

FEEDBACK ON CONSULTATION PAPER NO. 3 2014

REVISION TO THE MONEY LAUNDERING (JERSEY) ORDER 2008

In order to address recommendations made by the International Monetary Fund and comments made by MONEYVAL in relation to the application of customer due diligence measures.

CONSULTATION FEEDBACK

Please note that terms in italics are defined in the Glossary of Terms.

This paper reports on the responses received by the *Commission* on the *Consultation Paper*.

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GLOSSARY OF TERMS

Amending Order	means the Money Laundering (Amendment No. 7) (Jersey) Order 201-
AML/CFT	means anti-money laundering and countering the financing of terrorism
AML/CFT Handbook	means the Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorist for Financial Services Business Regulated under the Regulatory Laws
CDD	means customer due diligence
CDD measures	means <i>identification measures</i> and on-going monitoring. A full definition is provided in Article 3 of the <i>Money Laundering Order</i>
Commission	means the Jersey Financial Services Commission
Consultation Paper	means Consultation Paper No. 3 2014: Revision to the Money Laundering (Jersey) Order 2008
FATF	means the Financial Action Task Force
Handbook for the Accountancy Sector	means the Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism for the Accountancy Sector
Handbook for the Legal Sector	means the Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism for the Legal Sector.
identification measures	means, inter alia, measures to find out the identity of a customer (and its owners and controllers, and any parties on whose behalf it acts); to verify that information by reference to reliable and independent sources; and to collect wider relationship information. A full definition is provided in Article 3 of the <i>Money Laundering Order</i>
Jersey Finance	means Jersey Finance Limited
JFCU	means the Joint Financial Crimes Unit
ML/TF	means Money Laundering/Financing of Terrorism
Money Laundering Order	means the Money Laundering (Jersey) Order 2008
MONEYVAL	means the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, a monitoring body of the Council of Europe
relevant person	means a person carrying on a financial services business (as described in Schedule 2 of the Proceeds of Crime (Jersey) Law 1999) and which is carrying on that business in or from within Jersey, or, if a Jersey legal person, carrying on that business in any part of the world

SAR	means a Suspicious Activity Report
Three Handbooks	means the AML/CFT Handbook, the <i>Handbook for the Accountancy Sector</i> and the <i>Handbook for the Legal Sector</i>

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1 EXECUTIVE SUMMARY

1.1 Overview

- 1.1.1 In June 2014, the *Commission* issued Consultation Paper No. 3 2014: Revision to the Money Laundering (Jersey) Order 2008 (the *Consultation Paper*), to seek views on a number of proposed changes to the *Money Laundering Order* and the *Three Handbooks*.
- 1.1.2 The *Consultation Paper* consisted of 35 pages and included a draft of the *Amending Order*.
- 1.1.3 The consultation period closed on 18 July 2014. The majority of responses received by the *Commission* were submitted via an online survey, although a small number were received directly by the *Commission* and one response was made through *Jersey Finance*. In total, the *Commission* received 43 responses.

1.2 What is proposed and why?

- 1.2.1 The *Consultation Paper* proposed to amend the *Money Laundering Order* and the *Three Handbooks* in a way that is consistent with:
 - 1.2.1.1 international standards;
 - 1.2.1.2 signalled expectations of *MONEYVAL*; and
 - 1.2.1.3 the money laundering and terrorist financing risk that is present in Jersey.
- 1.2.2 For reasons given later in this Feedback Paper, the *Commission* will recommend that the Chief Minister makes the *Amending Order* as originally proposed, subject to some minor adjustments.

1.3 Feedback received

- 1.3.1 The *Commission* is grateful to respondents for taking the time to consider and comment on the proposals.
- 1.3.2 A full list of respondents is provided in Appendix A.
- 1.3.3 Sections 3, 4, 5 and 6 of this Feedback Paper present a summary of the comments received with the *Commission's* response, as appropriate, to each.

1.4 Next steps

- 1.4.1 Following publication of this Feedback Paper, the *Amending Order* will be presented to the Chief Minister along with a recommendation that he makes the *Amending Order*.
- 1.4.2 Appendix B sets out the enhanced measures that might be applied in order to address risk. It should be noted that there will be an opportunity to make submissions on these proposed measures in Consultation Paper AML 2, 2014 on Revisions to Commission AML/CFT Handbooks.

2 STRUCTURE OF THIS FEEDBACK PAPER

2.1 Structure of this Feedback Paper

- 2.1.1 Sections 3, 4, 5 and 6 contain the questions posed in the *Consultation Paper* in relation to the proposed amendments to the *Money Laundering Order* and the *Three Handbooks*.
- 2.1.2 While not every comment received is individually listed, these sections contain summaries of the most commonly made and pertinent comments in relation to each question posed and, as appropriate, the *Commission's* response to those comments.

3 SUMMARY OF RESPONSES - SIMPLIFIED IDENTIFICATION MEASURES - EXCLUSIONS

3.1 Overview

3.1.1 Section 4 of the *Consultation Paper* proposed changes to the *Money Laundering Order*: Article 17 (simplified identification measures in circumstances where the customer is a relevant person); and Article 18 (simplified customer due diligence measures).

3.2 Paragraph 4.5.1 of the Consultation Paper

Do you consider that the proposals are effective and proportionate?

Yes/No

If no, is this because:

- a) The proposals will have a disproportionate impact on compliance costs on you/your business (e.g. due to your customer base).
- b) The proposals will have a disproportionate impact on compliance costs on the financial services industry in Jersey.
- c) You do not consider that countries or territories that are the subject of a FATF public statement or are covered by its on-going process should be considered to be not compliant with FATF Recommendations.
- d) The proposals will place Jersey businesses at a disadvantage to competitors in other jurisdictions.
- e) Other, please explain: _____

3.2.1 A large majority of respondents who answered this question considered the proposals to be effective and proportionate.

3.2.2 Of the six respondents that did not, one respondent considered that the proposals would have a disproportionate impact on the compliance costs of its business and another considered that the proposals would have a disproportionate impact on the compliance costs of the financial services industry in Jersey.

3.2.3 One respondent requested that the *Commission* provide a list of countries that it is proposed should be considered not to be compliant with the *FATF* Recommendations.

- 3.2.4 Another observed that the proposals (which are linked to residency) appeared to be “lighter” than current requirements that apply where a customer or prescribed person has a relevant connection with a country or territory in respect of which the *FATF* has called for the application of enhanced *CDD measures*.
- 3.2.5 Two respondents suggested that the proposals required further clarification, but did not explain why.
- 3.2.6 A final respondent requested that specific consideration be given to bureaux de change activities in any accompanying guidance.

Commission response

- 3.2.7 In relation to the points set out in paragraph 3.2.2, the *Commission* accepts that there may be increased compliance costs for a *relevant person* that:
- (a) has previously taken on a customer who is resident in one of the countries listed in Appendix D2 (sources 1 and 2) of the *Three Handbooks* as not complying with *FATF* Recommendations; and
- (b) has hitherto applied simplified *identification measures* pursuant to Article 17 or 18 of the *Money Laundering Order* in relation to that customer.
- 3.2.8 However, given that the proposals do not require enhanced *CDD measures* to be applied to such customers, but rather remove the ability to apply simplified *identification measures*, the *Commission* remains of the view that any increased compliance costs will be proportionate in light of the risk profile of the customer in question.
- 3.2.9 As set out in the Cost Benefit Analysis in the *Consultation Paper*, informal indications from industry bodies in relation to the proposals were that such cases are relatively uncommon, and residence in such countries is already included as a factor when assessing the ML/TF risk of a customer. The receipt of only one submission to the contrary, means the *Commission* remains of the view that the proposals will not have a disproportionate impact on compliance costs of the financial services industry in Jersey.
- 3.2.10 In relation to the point set out in paragraph 3.2.3, it is the case that the *Commission* already publishes a list of countries and territories that are the subject of a *FATF* public statement or are covered by its ongoing process at Appendix D2 (sources 1 and 2) of the *Three Handbooks*.
- 3.2.11 In relation to the point set out in paragraph 3.2.4, the *Commission* does not accept that the proposals are “lighter” than the current position set out in Articles 17(14) and 18(9) of the *Money Laundering Order*. The current prohibition from applying simplified *identification measures* is limited to the case of a customer (or some other prescribed party) having a relevant connection with a country or territory that is subject to a *FATF* call to apply enhanced *CDD measures* and this will remain. This covers a very small set of countries, listed at Appendix D1 of the *Three Handbooks*. Instead, the

proposals extend this prohibition further to a customer who is resident in a separate (and larger) category of countries, listed at Appendix D2 (sources 1 and 2) of the *Three Handbooks*.

- 3.2.12 In relation to the point set out in paragraph 3.2.6, the *Commission* will discuss this directly with the respondent, since it is not readily apparent how Articles 17 and 18 of the *Money Laundering Order* might be applied by a person carrying on money service business.

4 SUMMARY OF RESPONSES - SIMPLIFIED IDENTIFICATION MEASURES – IDENTIFICATION OF THIRD PARTIES

4.1 Overview

4.1.1 Section 5 of the *Consultation Paper* proposed changes to Article 17 (simplified identification measures in circumstances where the customer is a relevant person) of the *Money Laundering Order*.

4.2 Paragraph 5.5.1 of the Consultation Paper

Do you consider that the proposals are effective and proportionate?

Yes/ No

If no, is this because:

- a) The proposals will have a disproportionate impact on you/your business, (e.g. due to the proportion of low fee-earning services you provide that would attract this additional compliance cost).
- b) The proposals will have a disproportionate impact on compliance costs on the financial services industry in Jersey.
- c) The proposals will place Jersey businesses at a disadvantage to competitors in other jurisdictions.
- d) The collection of basic identity information will not be sufficient to enable a relevant person to make a determination of risk in relation to third parties.
- e) The proposed 25 % threshold is too high.
- f) The proposed 25 % threshold is too low.
- g) Your customers will be reluctant to supply basic information on third parties.
- h) Information may soon become out of date and not relevant.
- i) Other, please explain: _____

4.2.1 The majority of respondents who answered this question considered the proposals to be effective and proportionate.

4.2.2 Of the nine respondents that did not, there was no consensus on the reasons given. Three respondents considered that the proposals would place Jersey businesses at a disadvantage to competitors in other jurisdictions. Another three considered that information collected might soon become out of date and not relevant (and therefore the measure was not effective).

4.2.3 Additional comments provided by respondents were varied, with no clear themes emerging. Comments included:

- 4.2.3.1 A request for clarification as to whether the proposal was for all third parties with a holding of 25% or more for which a customer acts to be found out, or those individuals with an ultimate beneficial interest of 25% or more in each of the third parties.
- 4.2.3.2 A suggestion that use of a threshold would not be truly risk-based and that the identity of higher risk third parties might not be found out.
- 4.2.3.3 A suggestion that the basic identity information to be collected would not enable adequate determination of risk in relation to third parties.
- 4.2.3.4 A question as to whether obtaining date of incorporation for a body corporate (or equivalent) would be useful.
- 4.2.3.5 A question as to whether the proposed requirements would be applied retrospectively.
- 4.2.3.6 A question as to how the proposals would apply in the case of a customer or third party who is a nominee.
- 4.2.3.7 A question about how a *relevant person* would be expected to keep this basic information up-to-date.
- 4.2.3.8 A suggestion that it would be difficult to obtain even basic information from customers in certain jurisdictions, including Jersey.
- 4.2.3.9 A query as to how the proposal would effect a relationship with a customer who intends to act on behalf of third parties in the future, but is not doing so at the time the relationship is formed, for instance the establishment of a trading facility.

Commission response

- 4.2.4 In relation to the point about competitiveness set out in paragraph 4.2.2, no detail or argument to support this position was supplied by respondents. Consequently, it is not understood why the one-off provision of some basic information about a limited number of third parties on whose behalf a customer acts will make Jersey less competitive. However, it remains the *Commission's* view that Jersey's competitive position would not be helped if the jurisdiction continues to be assessed as "partially compliant" with former *FATF* Recommendation 5 in *MONEYVAL's* forthcoming assessment of Jersey's compliance with the 40+9 Recommendations, which is more likely if the changes proposed to Article 17 of the *Money Laundering Order* are not made and may mean that Jersey is less likely to be considered "equivalent" under future European Directives.

- 4.2.5 In relation to the point set out in paragraph 4.2.2, the *Commission* accepts that basic information collected may soon become out of date. However, the *Commission* is of the view, based on discussions with industry, that an ongoing obligation to keep even basic information up-to-date would pose numerous practical difficulties and is not a feature of AML/CFT regimes in place in neighbouring European countries and territories. The *Commission* remains of the view that the proposals deal with the objective that has been set: to demonstrate that simplified *identification measures* may still involve finding out the identity of third parties on whose behalf a customer is acting (which is not currently the case under Article 17(3) of the *Money Laundering Order*, where there is never any requirement to find out information on third parties).
- 4.2.6 In relation to the point set out in paragraph 4.2.3.1, proposed amendments to the *Three Handbooks* will provide guidance on how to apply the threshold and confirm that the basic information will apply to the third parties only, not the beneficial owners of those third parties. See Consultation Paper AML 2, 2014.
- 4.2.7 In relation to the point set out in paragraph 4.2.3.2, the *Commission* considers that the use of a threshold (generally 25%) for determining which third parties' identity must be found out is practical and proportionate. While not as accurate as a sophisticated risk assessment, a threshold may be considered an approximation for risk in certain circumstances, and is less subjective than alternatives. In any event, the application of simplified *identification measures* to a customer under Article 17 of the *Money Laundering Order* is always dependent upon an assessment of customer risk, and this assessment will take account of a number of factors, including the nature of the third parties on whose behalf the customer acts. Part of the reasoning for the threshold being 25% is that a similar threshold is used in the context of finding out the ultimate beneficial owner of a customer that is a legal person and is a threshold recognised by international standard setters.
- 4.2.8 In relation to the point set out in paragraph 4.2.3.3, the *Commission* accepts that the basic information to be found out about third parties may be of limited value. However, the *Commission* is of the view, based on discussions with industry, that an obligation to collect more detailed information would pose numerous practical difficulties. The *Commission* remains of the view that the proposals will enhance the information to be collected for a business relationship (or one-off transaction), and will allow a consideration of risk in a manner that is proportionate to the identified deficiency in Jersey's AML/CFT regime.
- 4.2.9 In relation to the point set out in paragraph 4.2.3.4, the *Commission* will review the categories of information to be collected, taking into account comments received, when preparing amendments to the *Three Handbooks*, which will be the subject of separate consultation in due course. See Consultation Paper AML 2, 2014.

- 4.2.10 In relation to the point set out in paragraph 4.2.3.5, it is not intended that any of the additional requirements should be applied retrospectively. This means that no remediation project will be required. However, the proposed amendments to the *Three Handbooks* will provide further detail on how the existing obligation to keep documents, data and information current and up to date will interact with the new requirement to collect basic information. Briefly, the text in Consultation Paper AML 2, 2014, will state that:
- 4.2.10.1 Article 13(1)(c)(ii) of the *Money Laundering Order* requires a *relevant person* to apply *identification measures* where the *relevant person* has doubts about the veracity or adequacy of documents, data or information previously obtained.
- 4.2.10.2 Where, during the course of its regular review of documents, data and information held (pursuant to Article 3(3)(b) of the *Money Laundering Order*) a *relevant person* forms doubts about the veracity or adequacy of documents, data or information previously obtained (and relied upon to determine that the application of simplified *identification measures* was appropriate), the *relevant person* will need to apply *identification measures* to that customer.
- 4.2.10.3 To the extent that it continues to be appropriate to apply simplified *identification measures* to such a customer, this will include collecting basic information on significant third parties immediately before continuing to apply such measures.
- 4.2.10.4 However, where a *relevant person* reviews a business relationship (pursuant to Article 3(3)(b) of the *Money Laundering Order*) and continues to be satisfied about the veracity and adequacy of documents, data or information previously obtained (and relied upon to determine that the application of simplified *identification measures* was appropriate), there will be no requirement to collect basic identity information on significant third parties.
- 4.2.11 In relation to the point set out in paragraph 4.2.3.6, the proposals will apply in a situation where a customer is a nominee acting for a third party. In such a case it will be necessary to collect some basic information about any significant third party (as set out in the *Consultation Paper*).
- 4.2.12 In relation to the point set out in paragraph 4.2.3.7, the requirement to collect basic identity information will apply at the time the relationship is established or the one-off transaction is carried out and subsequently where the *relevant person* has doubts about the veracity or adequacy of documents, data or information previously obtained, in order to continue to apply simplified *identification measures*. Amendments to the *Three Handbooks* will provide detail on how the existing obligation to keep information current and up to date will interact with these requirements. See paragraph 4.2.10.

4.2.13 In relation to the point set out in paragraph 4.2.3.8, the *Commission* accepts that, in some circumstances, it may prove difficult to obtain even the basic information about the customer that is proposed. Time and effort may need to be expended in explaining to customers the new requirements, as well as the reasons for them.

4.2.14 In relation to the point set out in paragraph 4.2.3.8, the obligation to obtain basic information applies only to third parties that can be found out at the time the relationship is formed. If the customer is not acting on behalf of any third parties at this time, then the obligation to collect basic information cannot be applied.

5 SUMMARY OF RESPONSES - ENHANCED CDD MEASURES

5.1 Overview

5.1.1 Section 6 of the *Consultation Paper* proposed changes to Article 15 (enhanced customer due diligence) of the *Money Laundering Order*.

5.2 Paragraph 6.5.1 of the Consultation Paper

Do you consider that the proposals are effective and proportionate?

Yes/No

If no, is this because:

- a) The proposals will have a disproportionate impact on compliance costs on you/your business.
- b) The proposals will have a disproportionate impact on compliance costs on the financial services industry in Jersey.
- c) The proposals will place Jersey businesses at a disadvantage to competitors in other jurisdictions.
- d) One or more of the definitions proposed are too broad.
- e) One or more of the definitions proposed are too narrow.

5.2.1 The majority of respondents who answered this question did not consider the proposals to be effective and proportionate.

5.2.2 Of the reasons given, the most common concerns were:

5.2.2.1 The proposals would place Jersey businesses at a disadvantage to competitors in other jurisdictions.

5.2.2.2 One or more of the definitions proposed are too broad, in particular, the definition for private banking would extend beyond deposit-taking activities to fund services business. One respondent also suggested that the application of enhanced *CDD measures* to “non-residents” should focus on customers with a relationship in a jurisdiction other than their own resident jurisdiction, rather than on customers resident outside Jersey.

5.2.3 Several respondents also suggested that the proposals would have a disproportionate impact on the compliance costs of their business and/or the financial services industry in Jersey.

5.2.4 Additional comments provided by respondents were varied, with no clear themes emerging. The most common comments were:

- 5.2.4.1 An observation that almost all customers of *relevant persons* would be captured by the definitions, so a requirement to conduct enhanced *CDD measures* on such customers would be disproportionate and/or undermine a risk-based approach.
- 5.2.4.2 A question as to whether the new obligations would be applied retrospectively.
- 5.2.4.3 A question about a potential conflict between the ability to apply simplified *identification measures* under Articles 17 and 18 of the *Money Laundering Order* to a non-resident customer, and the requirement to apply enhanced *CDD measures* under Article 15 to a non-resident customer.
- 5.2.5 Other comments included:
 - 5.2.5.1 A suggestion that categorising nominee shareholders alongside bearer shares evidenced a fundamental misunderstanding of the use of nominees, which tend to be used to “ease” administration and keep costs down, rather than shield the identity of the ultimate beneficial owner.
 - 5.2.5.2 A suggestion that the use of a nominee shareholder should pose no greater ML/TF risk where a *relevant person* has found out and obtained evidence of identity of the ultimate beneficial owner (and as such, enhanced *CDD* should not be necessary).
 - 5.2.5.3 Questions about the definition of residency of a customer who is a legal person, specific measures that would be required to be applied and/or requests for guidance in specific circumstances; and suggestions that the impact of the proposals would only be apparent once the enhanced *CDD measures* to be applied to each of the categories of customer had been specified.
 - 5.2.5.4 A suggestion that the definition of “non-resident” should not include residents of the other Crown Dependencies or the United Kingdom.
 - 5.2.5.5 A suggestion to limit the application of enhanced *CDD measures* to customers where the ML/TF risk is considered to be higher.
 - 5.2.5.6 A suggestion that discretionary investment management services to customers with customised portfolios would be captured by the definition of private banking.

5.3 Paragraphs 6.5.2 and 6.5.3 of the Consultation Paper

Paragraph 6.5.2

Please include suggestions for additional measures (either identification measures or ongoing monitoring) that are commensurate with the risks attached to each of the identified categories of customer.

5.3.1 Several respondents also provided suggestions in relation to additional measures that could be applied in order to address the risks associated with each of the identified categories of customer. These have been taken into account when developing the proposed measures set out in Appendix B.

Paragraph 6.5.3

Additional comments:

5.3.2 One respondent provided comment to the effect that it anticipated having to apply enhanced *CDD measures* to all of its customers notwithstanding it having a “very low risk client base”.

Commission response

5.3.3 In relation to the point set out in paragraph 5.2.2.1, the *Commission* accepts that a number of jurisdictions, including those within the British Isles, do not require enhanced *CDD measures* to be applied in the way that is proposed, but does not agree that the effect of the proposals will be to place *relevant persons* at a competitive disadvantage. The *Commission* considers that:

5.3.3.1 many *relevant persons* will already be applying enhanced measures as part of “normal” *CDD measures* in order to address the particular risks that may be presented by non-resident customers, private banking relationships, customers who may hold assets through legal persons and arrangements, and customers who may have nominee shareholders of shares in bearer form (hereafter referred to as “specified customers”); and

5.3.3.2 “normal” *CDD measures*, such as finding out the identity of the ultimate beneficial owner of a customer may significantly limit the enhanced measures required, e.g. for customers who hold assets through legal persons.

Appendix B sets out the enhanced measures that might be applied in order to address the risk that is presented by specified customers.

5.3.4 It also remains the *Commission's* view that the effect of a “partially compliant” rating against former *FATF* Recommendation 5 in *MONEYVAL's* fourth round review of Jersey's compliance with the 40+9 Recommendations (more likely if the proposals are not adopted) is more likely to effect Jersey's competitive position as an international financial centre.

- 5.3.5 In relation to the point set out in paragraph 5.2.2.2, most respondents did not explain why they thought definitions to be too broad. To the extent that a fund service business activity has the characteristics of “private banking”, then it is intended that such activity would be subject to enhanced *CDD measures*. This should be contrasted with fund activities which would not have tailored or bespoke characteristics and thus would not be caught by the definition of “private banking”. Funds themselves would not be caught as they are not considered to be providing a service. In relation to the comment on “non-residents”, the *Commission* intends to update the law drafting instructions so that enhanced *CDD measures* apply when a customer is establishing a business relationship or carrying out a one-off transaction outside their country of residence.
- 5.3.6 In relation to the point set out in paragraph 5.2.3, no detail or argument to support this position was supplied by respondents. The *Commission’s* view remains that many *relevant persons* will already be applying enhanced measures as part of “normal” *CDD measures*. To the extent that they are not, the additional measures to be applied may not be significant (see paragraph 5.3.3) and may be determined on a risk-based approach, limiting incremental costs.
- 5.3.7 As set out in the Cost Benefit Analysis in the *Consultation Paper*, informal indications from industry bodies also suggested that customers affected were already often subject to additional measures and the introduction of a requirement to apply enhanced *CDD measures* would merely reflect current practice, so long as there remained sufficient flexibility in the measures required to be applied.
- 5.3.8 In relation to the point set out in paragraph 5.2.4.1, whilst the majority of customers would indeed be subject to the requirement to apply enhanced *CDD measures*, such measures would still be applied on a risk-basis, in line with the principles of a risk-based approach, and may not be significant (see paragraph 5.3.3). There is an important distinction between the measures to be applied where a customer is assessed as presenting a higher risk, and other circumstances in which enhanced *CDD measures* must be applied. In the same way that not all customers whose relationship is established on a non-face to face basis or customers who are politically exposed persons are considered to present a higher risk, the additional measures that would be required can be applied according to assessed risk. For this reason, the *Commission* remains of the view that a requirement to apply enhanced *CDD measures* is proportionate and fully in line with a risk-based approach.
- 5.3.9 In relation to the point set out in paragraph 5.2.4.2, requirements will not be applied retrospectively. This means no remediation project will be required. However, the proposed amendments to the *Three Handbooks* will provide further detail on how the existing obligation to keep documents, data and information up to date and relevant will interact with these new requirements. Briefly, the text in Consultation Paper AML 2, 2014, will state that:

- 5.3.9.1 Article 13(1)(c)(ii) of the *Money Laundering Order* requires a *relevant person* to apply *identification measures* where the *relevant person* has doubts about the veracity or adequacy of documents, data or information previously obtained.
- 5.3.9.2 Where, during the course of its regular review of customer and relationship information (pursuant to Article 3(3)(b) of the *Money Laundering Order*) a *relevant person* forms a doubt about the veracity or adequacy of documents, data or information previously obtained under *CDD measures*, the *relevant person* will need to apply the enhanced *identification measures* to that customer at that time.
- 5.3.10 In relation to the point set out in paragraph 5.2.4.3, the *Commission* intends to provide guidance on the interaction between the application of simplified *identification measures* under Articles 17 and 18 of the *Money Laundering Order* and additional requirements to conduct enhanced due diligence measures (e.g. because the customer is a non-resident) and to explain why the provisions are not contradictory. Briefly, the text in Consultation Paper AML 2, 2014, will state that:
- 5.3.10.1 Simplified *identification measures* may not be applied under Articles 17 and 18 of the *Money Laundering Order* in any case where a customer is assessed as presenting a higher risk.
- 5.3.10.2 Otherwise, it will still be possible to simplify *identification measures* (but not other *CDD measures*) in the way that is anticipated in Articles 17 and 18, in the case of a customer who is non-resident, is a private banking customer, is a customer who invests their personal wealth through legal persons or legal arrangements, or which is a legal person with nominee shareholders or which has issued bearer shares, so long as enhanced *CDD measures* are applied to address the particular risks inherent in such customer types. Appendix B sets out the enhanced measures that might be applied in order to address the risk that is presented by specified customers.
- 5.3.11 In relation to the points set out in paragraphs 5.2.5.1 and 5.2.5.2, the *Commission* accepts in principle the premise that customers who are legal persons with nominee shareholders may pose no greater ML/TF risk than those owned directly by individuals, in any case where (in accordance with the *Money Laundering Order*) a *relevant person* has found out the individual(s) who is (are) the ultimate beneficial owner(s) of the customer. It also understands that nominee shareholders will typically be used for reasons other than to mask beneficial ownership. As a result, the extent of enhanced *CDD measures* may be quite limited (in line with the principles of a risk-based approach). Appendix B sets out the enhanced measures that might be applied in order to address the risk that is presented by specified customers.

- 5.3.12 In relation to the point set out in paragraph 5.2.5.3 regarding the definition of residency of a customer who is a legal person, the *Commission* intends to update the law drafting instructions so that a company is also resident in a country if it carries on business in or from within that country.
- 5.3.13 In relation to the final point set out in paragraph 5.2.5.3, Appendix B sets out the enhanced measures that might be applied in order to address the risk that is presented by specified customers, which takes account of suggestions made by respondents.
- 5.3.14 In relation to the point set out in paragraph 5.2.5.4, whereas the close links between Jersey and the other Crown Dependencies and UK are recognised, the assumption is that financial services will tend to be sourced in a customer's country or territory of residence. Where this is not the case, then in line with Appendix B, an explanation should be sought. One explanation might be that a particular product or service is not available in a customer's home country or territory, or that the *relevant person* is itself actively targeting residents of another country or territory because of limited competition in that overseas market. Appendix B sets out the enhanced measures that might be applied in order to address the risk that is presented by specified customers, and sufficient flexibility will remain in the application of enhanced *CDD measures* to enable a distinction to be made between overseas jurisdictions presenting differing levels of risk.
- 5.3.15 In relation to the point set out in paragraph 5.2.5.5, this would not follow former *FATF Recommendation 5* and Article 15 of the *Money Laundering Order* already provides for enhanced *CDD measures* to be applied in the case of a customer who may be considered to present a higher ML/TF risk; those where a relationship is established on a non-face to face basis; and those who are politically exposed persons.
- 5.3.16 In relation to the point set out in paragraph 5.2.5.6, discretionary investment management services to customers with customised portfolios would **not** be captured by the definition of private banking, as such services are not considered to be individually tailored or bespoke but rather the provision of a standard discretionary investment management service. Similarly, the provision of advice would **not** be captured by the definition of private banking, as such services are not considered to be individually tailored or bespoke but rather the provision of a standard advisory service.

6 SUMMARY OF RESPONSES - MISCELLANEOUS AMENDMENTS

6.1 Overview

- 6.1.1 Section 7.2 of the *Consultation Paper* proposed a number of changes to the *Money Laundering Order* unrelated to earlier sections that will update references, correct typographical errors and improve clarity of presentation.
- 6.1.2 Section 7.3 of the *Consultation Paper* proposed a number of further changes to the *Money Laundering Order* that were not included in the draft amendment to the *Money Laundering Order* attached to the *Consultation Paper*, but that will be made when a suitable legislative opportunity presents itself; namely:
- 6.1.2.1 termination of a relationship whenever a *relevant person* is unable to apply *identification measures*, regardless of the timing of those *identification measures*; and
 - 6.1.2.2 an additional reporting requirement to the *JFCU*.

6.2 Paragraph 7.4.1 of the Consultation Paper

Do you consider that the proposals are effective and proportionate?

Yes/No

If no, please provide reasons:

- 6.2.1 The majority of respondents who answered this question considered the proposals to be effective and proportionate.
- 6.2.2 Seven respondents did not.
- 6.2.3 Three respondents queried how a *relevant person* that was not party to the original *SAR* could be expected to identify information that was relevant to that *SAR*. One respondent described the proposed requirement as “an open ended obligation to provide information on request”. Another thought that there was danger in opening up the group of people who would be aware that a *SAR* had been made.
- 6.2.4 Two respondents highlighted the difficulties inherent in requiring a relationship to be terminated where *identification measures* could not be completed, where this may conflict with other law, such as the *Trusts (Jersey) Law 1984*.
- 6.2.5 Other comments included:
- 6.2.5.1 Requests for more detail in relation to the proposals.

6.2.5.2 Questions in relation to specific scenarios and circumstances.

Commission response

- 6.2.6 In relation to the points set out in paragraph 6.2.3, it is anticipated that when the *JFCU* requests information from a *relevant person* who has not made a *SAR*, the notice provided would specify the relevant information in sufficient detail to enable such information to be identified. It is intended that such a notice would, based on intelligence previously received, be targeted, i.e. sent to *relevant persons* identified as holding information connected with the subject of previously obtained information (e.g. a *SAR*). The *Commission* does not consider that this would be an opened ended obligation.
- 6.2.7 In relation to the point set out in paragraph 6.2.4, Article 14 of the *Money Laundering Order* establishes only a requirement to terminate a business relationship and does not set a deadline for doing so. This provides some flexibility in responding to cases where there may be a conflict of law.
- 6.2.8 In relation to the point set out in paragraph 6.2.5.1, further details on the proposals will be made available at the time that a legislative amendment is proposed.
- 6.2.9 In relation to the point set out in paragraph 6.2.5.2, specific scenarios and circumstances that require further clarification will be addressed in legislation and/or accompanying guidance. These will include:
- 6.2.9.1 Explaining the scope of the obligations.
 - 6.2.9.2 Setting out reasonable timeframes for compliance with requests.
 - 6.2.9.3 Explaining potential interaction with “tipping off” provisions and conflict of law.

APPENDIX A

List of respondents to Consultation Paper No 3.

- Alter Domus (Jersey) Limited
- Apex Trust Company Limited (2 submissions)
- Appleby
- Appleby Trust (Jersey) Ltd
- Axio Capital Solutions Ltd
- Baccata Trustees Limited
- Barclays Bank PLC
- Bedell Group
- BNP Paribas Securities Services
- Bridport Investor Services
- Channel Islands Co-operative Society Ltd
- Collas Crill
- Crestbridge Ltd
- Hatstone Lawyers
- HSBC
- HSBC Bank Middle East Limited
- Investec Bank (CI) Limited, Jersey branch
- Ipes (Jersey) Limited
- JP Morgan
- Kleinwort Benson
- Meridian Asset Management (C.I.) Ltd
- Pershing (Channel Islands) Limited
- R&H Trust Co (Jersey) Limited
- Santander UK plc, Jersey Branch
- Seymour Trust Company Limited
- State Street (Jersey) Limited
- State Street Fund Services (Jersey) Ltd & State Street Custodial Services (Jersey) Limited
- Stonehage
- SWM Ltd
- SWM Synergy

and

- 12 individuals

APPENDIX B:

Enhanced measures that might be applied in order to address the risk that is presented by specified customers

Extracts from Section 7 of draft AML/CFT Handbook

NON-RESIDENT CUSTOMER - OVERVIEW

Customers who are not resident in a country or territory but who nevertheless seek to form a business relationship or conduct a one-off transaction with a relevant person in that country or territory will typically have legitimate reasons for doing so. Some customers will, however, pose a risk of money laundering or financing of terrorism and may be attempting to move illicit funds away from their country or territory of residence or attempting to further conceal funds sourced from that country or territory.

NON-RESIDENT CUSTOMER - GUIDANCE NOTES

A relevant person may demonstrate that it has applied enhanced CDD measures under Article 15(2A) of the Money Laundering Order, where it has applied additional measures that are commensurate with risk. Additional measures may include one or more of the following:

- Determining the reasons why the customer is looking to establish a business relationship or carry out a one-off transaction other than in their home country or territory;
- The use of external data sources to collect information on the customer and the particular country risk in order to build a customer business and risk profile similar to that available for a resident customer.

CUSTOMER PROVIDED WITH PRIVATE BANKING SERVICE - OVERVIEW

Private banking is generally understood to be the provision of banking and investment services to high net worth clients in a closely managed relationship. It often involves complex, bespoke arrangements and high value transactions across multiple jurisdictions. Such customers may therefore present a higher risk of money laundering or financing of terrorism.

CUSTOMER PROVIDED WITH PRIVATE BANKING SERVICE - GUIDANCE NOTES

A relevant person may demonstrate that it has applied enhanced CDD measures under Article 15(8) of the Money Laundering Order, where it has applied additional measures that are commensurate with risk. Additional measures may include:

- Taking reasonable measures to find out the source of funds and source of wealth.
- Reviewing the business relationship on at least an annual basis, including all documents, data and information obtained under identification measures in order to ensure that they are kept up to date and relevant.
- Where monitoring thresholds are used, setting lower thresholds for transactions connected with the business relationship.

CUSTOMER THAT IS A PERSONAL ASSET HOLDING VEHICLE - OVERVIEW

Personal asset holding vehicles are legal persons or legal arrangements established by individuals for the specific purpose of holding assets for investment. The use of such persons or arrangements may

make identification of ultimate beneficial owners more difficult since layering of ownership may conceal the true source or controller of the investment.

CUSTOMER THAT IS A PERSONAL ASSET HOLDING VEHICLE - GUIDANCE NOTES

A relevant person may demonstrate that it has applied enhanced CDD measures under Article 15(10) of the Money Laundering Order, where it has applied additional measures that are commensurate with risk. Additional measures may include:

- Understanding the structure of the vehicle, determining the purpose and rationale for making use of such a vehicle, and being satisfied that the customer's use of such an investment vehicle has a genuine and legitimate purpose.
- Taking reasonable measures to find out the source of funds and source of wealth.

CUSTOMER THAT IS A COMPANY WITH NOMINEE SHAREHOLDERS OR BEARER SHARES - OVERVIEW

Companies with nominee shareholders or bearer shares may present a higher risk because such arrangements make it possible to hide the identity of the beneficial owner(s) and/or changes in beneficial ownership by separating legal and beneficial ownership, or because there is no trail of ownership, which introduces a degree of anonymity.

Notwithstanding this, nominee shareholders are often used for good and legitimate reasons, e.g. to ease administration and reduce client costs by enabling a nominee to take necessary corporate actions, such as the passing of resolutions, in the day to day administration of a corporate structure.

Where one or more of the following circumstances apply, the customer should not be considered to be a customer that issues bearer for the purpose of Article 15(11) of the Money Laundering Order:

- The bearer shares are issued by a company in a country or territory that has fully enacted appropriate legislation to require bearer shares to be registered in a public registry; or
- The bearer shares are traded on an approved stock exchange; or
- All issued bearer shares are held in the custody of the relevant person, or trusted external party along with an undertaking from that trusted external party to inform the relevant person of any transfer or change in ownership.

CUSTOMER THAT IS A COMPANY WITH NOMINEE SHAREHOLDERS OR BEARER SHARES - GUIDANCE NOTES

A relevant person may demonstrate that it has applied enhanced CDD measures under Article 15(11) of the Money Laundering Order, where it has applied additional measures that are commensurate with risk.

In the case of customers who are companies with nominee shareholders, additional measures may include:

- Determining and being satisfied with the reasons why the customer is making use of nominees; and
- Using external data sources to collect information on the fitness and propriety of the nominee (such as its regulated status and reputation) and the particular country risk.

In the case of customers who are companies with bearer shares, additional measures may include:

- Determining and being satisfied with the reasons why the customer has issued bearer shares;
- Ensuring that any new or continued relationship or any one-off transaction is approved by the senior management of the relevant person; and
- Reviewing the business relationship on at least an annual basis, including all documents, data and information obtained under identification measures in order to ensure that they are kept up to date and relevant.