

# **Anti-Money Laundering**

## **Future supervisory approach consultation**

February 2010

OFT1157con

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## Scope of this consultation

<b>Topic of this consultation</b>	This consultation outlines options for the OFT's future approach to supervising businesses in accordance with its obligations under The Money Laundering Regulations 2007 (the Regulations).
<b>Scope of this consultation</b>	This consultation is focused on the OFT's role as a Supervisory Authority under the Regulations. It outlines options and proposals relating to the OFT's future approach to registration, monitoring and enforcement, penalties and fee structures.
<b>Geographical scope</b>	UK-wide
<b>Impact assessment</b>	The overall impact of the Regulations on the UK economy and businesses was the subject of two Regulatory Impact Assessments, published by HM Treasury in 2006 and 2007. Some of that impact will arise through OFT's performance of its duties under the legislation. We will be assessing the likely costs and benefits of detailed proposals for carrying out our role, to ensure we achieve the goal of an effective regime whilst minimising the burden on the supervised community. The results of this assessment will be published with the OFT's future supervisory approach.

## Basic information

<b>To</b>	This consultation is aimed primarily at <ul style="list-style-type: none"><li>• organisations representing estate agents and consumer credit lenders who are supervised by the OFT as well as individual members of the supervised populations</li><li>• representatives of local Authority Trading Standards Services and the Department for Enterprise, Trade and Investment in Northern Ireland who may share monitoring and enforcement powers</li><li>• other anti-money laundering supervisors</li><li>• government departments and agencies with an interest in anti money laundering such as HM Treasury, the Home Office and the Serious Organised Crime Agency.</li></ul>
<b>Duration</b>	The consultation will run from <b>9 February to 7 May 2010.</b>
<b>Enquiries</b>	If you have any queries regarding the content of this consultation, please contact: Peter Swan Anti-Money Laundering Office of Fair Trading Fleetbank House 2-6 Salisbury Square London EC4Y 8JX Tel: 020 7211 8226 Fax: 020 7211 8123 Email: <a href="mailto:peter.swan@oft.gsi.gov.uk">peter.swan@oft.gsi.gov.uk</a>

<p><b>How to respond</b></p>	<p>We would welcome your comments on options and proposals set out in this document.</p> <p>Please respond to as many questions as you are able and provide any comments in writing (by e-mail, or alternatively by letter as indicated above).</p> <p>When responding to this consultation, please state whether you are responding as an individual or on behalf of an organisation. If the latter, please make clear who the organisation represents and, where applicable, how the views of members were collated.</p> <p>We are publishing this consultation on the OFT website and sending it to a range of stakeholders to invite comments. All businesses that have applied for registration by 31 January will be notified that the consultation document is now available.</p>
<p><b>Additional ways to become involved</b></p>	<p>The OFT would like to meet with interested parties as part of the consultation process. To arrange a meeting please contact Peter Swan (details given above).</p>
<p><b>After the consultation</b></p>	<p>The OFT will analyse responses received and where necessary clarify issues raised by respondents. The OFT will publish a summary of responses received early Summer 2010. In addition the OFT's future supervisory approach will be formulated and published later in the year.</p>
<p><b>Compliance with the <i>Code of Practice on Consultation</i></b></p>	<p>This consultation complies with the Better Regulation Executive's Code of Practice on Consultation. A list of the key criteria, along with a link to the full document, can be found at Annexe D.</p>

## Background

<b>Getting to this stage</b>	<p>Since taking on its role as a Supervisory Authority under the Money Laundering Regulations 2007 the OFT has focused on</p> <ul style="list-style-type: none"><li>• publishing guidance for its supervised populations</li><li>• developing and implementing its registration scheme to obtain the necessary information on those supervised by the OFT as well as funding for 2009-10.</li></ul>
<b>Previous engagement</b>	<p>This is the OFT's first formal consultation relating to its role as a Supervisory Authority under the Money Laundering Regulations 2007.</p> <p>The OFT has carried out some limited and targeted consultation on aspects of guidance for supervised firms on their obligations and on elements of registration. The latter included some testing of the registration application form.</p>

## **Feedback about this consultation**

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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A copy of the key criteria from the Better Regulation Executive's *Code of Practice on Consultation* can be found in Annexe D.

## **Data use statement for responses**

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. We may choose to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that Information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and, to the extent relevant, if at all, our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

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# 1 INTRODUCTION

- 1.1 The purpose of this consultation is to invite views on the most appropriate future supervisory approach and fee structure to be adopted by the Office of Fair Trading (OFT) in its role as a Supervisory Authority under the Money Laundering Regulations 2007 (the Regulations).
- 1.2 Since 15 December 2007 the OFT has had a statutory duty under the Regulations to effectively supervise compliance with measures imposed by the Regulations by:
- estate agents – those businesses engaged in estate agency work as defined by section 1 of the Estate Agents Act 1979
  - consumer credit financial institutions (CCFIs) – those businesses engaged in consumer credit lending requiring a standard licence which are **not** authorised by the Financial Services Authority (FSA) or supervised by HM Revenue and Customs (HMRC) as a money service business.
- 1.3 The OFT is required to supervise effectively and to take the necessary measures to secure the compliance of supervised firms with the requirements of the Regulations.<sup>1</sup> The OFT's role does not involve the investigation of alleged money laundering or terrorist financing. The OFT has to date focused on the provision of guidance for supervised businesses and the introduction of compulsory registration in July 2009.
- 1.4 This consultation does not re-open the issue of whether certain businesses should be supervised by the OFT, or anyone else. Nor will it re-open the question of whether the OFT should require businesses it supervises to register. Registration provides the necessary funding and information for the OFT's supervisory role. This consultation does address

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<sup>1</sup> Regulation 24(1)

the process of registration in the future and how the OFT should identify and deal with those who do not register.

1.5 The next stage of ensuring that the OFT is an effective Supervisory Authority is to:

- build the OFT's longer term approach to monitoring compliance and enforcement, and
- decide on the most appropriate structure for funding the OFT activity given that the OFT's anti-money laundering role has to be self funding.

1.6 To date monitoring and enforcement activity has been minimal reflecting the fact that the OFT has received little adverse information on firms it supervises. The OFT Board agreed in December 2007 to an interim monitoring and enforcement approach, the key components of which are:

- there should be no routine inspections of supervised businesses
- the OFT will engage in reactive enforcement – react to adverse intelligence received from third parties, for example the Serious Organised Crime Agency (SOCA) and police, and
- in cases where non-compliance with the Regulations is drawn to the OFT's attention it would approach the business requiring it to take corrective action.

1.7 This approach has been used to address allegations of non-compliance received by the OFT so far but it is not a viable long term approach. Whilst adequate in the early stages of enforcement and implementation of the Regulations it is insufficient to secure compliance by the OFT with its statutory duties under the Regulations in the long term. The OFT remains committed to raising compliance levels through encouragement, guidance and reacting to adverse intelligence but must also ensure that it can

identify non compliance and take effective action against those who ignore advice and guidance and flout the law.

- 1.8 The OFT needs to shape a more appropriate model for monitoring and enforcement activity for the longer term. The launch of this consultation is the first stage in shaping that model. As well as asking those we consult to comment on the proposals and options outlined in this document we would like to meet with interested parties, so that we can identify the impact of our proposals in terms of behaviours and costs.
- 1.9 The Regulations give the OFT significant powers to take action where there is non-compliance. The OFT can impose civil financial penalties or prosecute. We know that some industry participants believe that use of these powers will be essential in ensuring that supervised firms recognise that they must comply with the Regulations. A key issue to be addressed is the extent to which civil financial penalties are used, the scope for flat rate penalties and how the OFT will use its discretion to impose penalties which we consider appropriate. The Regulations specify that 'appropriate' means 'effective, proportionate and dissuasive'.<sup>2</sup>
- 1.10 Another key issue we invite comment upon is that of a future fee structure. The anti-money laundering supervisory regime has to be self funding. The OFT cannot use central funding provided by Government to fund its activities under these Regulations. The Regulations give the OFT power to charge those it supervises fees which reflect the OFT's reasonable costs and provide that a charge may be levied in respect of each of the premises used by a business.<sup>3</sup> The OFT's fees for 2009-10, payable at registration, were premise based (calculated on the number of premises a business operated from). HMRC also charges premise based fees. In this consultation we invite views on alternatives to premise based fees such as fees based upon turnover.

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<sup>2</sup> Regulation 42(1)

<sup>3</sup> Regulation 35

- 1.11 Businesses are required to register by 31 January 2010. We expect that a proportion of supervised firms will not apply for registration in the statutory six-month period. This is consistent with the experience of some other supervisors. Those supervised businesses who have not registered will be given a short opportunity to do so but continued failure to register will lead to enforcement action by the OFT.
- 1.12 At the time of preparing this consultation the OFT does not have complete information on its supervised population and is not in a position to assess future fee levels. Work on future fee levels will be carried out in parallel with the consultation so that registration data and the consultation responses can be analysed and inform the process of setting fees for 2010-11.

## 2 BACKGROUND

### What supervised businesses have to do

2.1 The aim of the Regulations is to ensure that adequate controls are in place in relevant businesses to prevent them being used for money laundering or terrorist financing. CCFIs have had to comply with previous regulations since 1994 and estate agents since 2003. Neither group had a statutory supervisor until 15 December 2007 when the OFT took on this role.

2.2 The Regulations<sup>4</sup> require relevant businesses to:

- put in place procedures to verify the identify of customers on entering into a business relationship or transaction and to carry out ongoing monitoring during the business relationship
- keep records obtained in establishing customers' identity and of business relationships for five years
- train staff in the relevant procedures and law
- appoint a nominated officer whose role includes reporting to the SOCA suspicions of money laundering activity
- put in place and maintain policies and procedures covering the above requirements.

2.3 Now that the OFT has decided that supervised businesses should register with it, they must do so by 31 January 2010. They commit an offence under the Regulations if they do not do so but continue to carry on a supervised business. They also have to pay fees charged by the OFT and

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<sup>4</sup> Regulations 5-21

to advise the OFT of material changes to the information supplied at registration.<sup>5</sup>

## **What the OFT is required to do and its legal powers**

- 2.4 The Regulations require the OFT to supervise businesses that fall under its remit effectively and to take necessary measures for the purposes of securing compliance with the Regulations. It is for the OFT to decide upon how it meets its statutory obligations.
- 2.5 The Regulations give the OFT the power to require registration and to publish, or make available to public inspection, all or part of its register.<sup>6</sup>
- 2.6 The Regulations set out provisions that apply to the registration process.<sup>7</sup> These require that the OFT must, within 45 days of receipt of the application or the date any further information it requests is received, give the applicant notice of:
- its decision to register the applicant, or
  - that it is minded not to register, the reasons and the right to make representations to the OFT within the specified period (not less than 28 days).
- 2.7 The OFT must then decide within a reasonable period and give the applicant notice of its decision, the reasons for refusing to register and right to appeal.
- 2.8 The OFT can refuse to register an applicant if it appears to the OFT that information provided is false or misleading in a material particular or if the

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<sup>5</sup> Regulation 33

<sup>6</sup> Regulation 32(7)

<sup>7</sup> Regulation 34

applicant has failed to pay the correct fee or failed to supply information requested.

2.9 The OFT may cancel a person's registration if at any time after registration, it appears to the OFT that it would have had grounds to refuse the registration. Again the OFT has to inform the person by notice, that it is minded to cancel the registration, the reasons and the right to make representations. The OFT must then make a decision within a reasonable time, give notice of that decision and if it decides to cancel, give reasons, the date the cancellation takes effect and provide notice of the right to appeal. There is provision for cancellation to have immediate effect where the OFT considers this is in the public interest.

2.10 The OFT can also:

- require information from, and attendance of relevant and connected persons, by notice. In the event that the person fails to comply the OFT can obtain a court order requiring the person to do so. The information must be reasonably required by the OFT in connection with its functions under the Regulations and the reasons must be given in the notice requiring it<sup>8</sup>
- enter and search premises under warrant<sup>9</sup>
- enter and inspect premises without a warrant in certain specified circumstances.<sup>10</sup>

2.11 The Regulations provide that the OFT's monitoring and enforcement role can be shared with local authority Trading Standards Services (TSS) and with the Department of Enterprise, Trade and Investment in Northern

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<sup>8</sup> Regulation 37

<sup>9</sup> Regulation 39

<sup>10</sup> Regulation 38

Ireland (DETINI) under agreements. No such arrangements have yet been made. Only the OFT is able to make decisions in relation to registration.<sup>11</sup>

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<sup>11</sup> Regulation 41

### **3 REGISTRATION**

- 3.1 The Regulations require some supervisory authorities to keep a register of their relevant businesses and gives others such as the FSA and the OFT discretion to require registration by businesses they supervise.
- 3.2 The OFT exercised its discretion to maintain a register of businesses it will supervise. The decision to require registration was taken on the basis that it was the only way to ensure that the OFT has the necessary information on its supervised population and the necessary funding to ensure that it was an effective supervisor.
- 3.3 The registration system was launched on 31 July 2009 and relevant firms had until 31 January 2010 to be registered. After that date all firms must be registered before they undertake the supervised activity. The requirement to register applies to all firms supervised by the OFT.
- 3.4 This consultation does not revisit the decision to require supervised firms to register but seeks input regarding:
- how to identify firms which have not registered – for example, by use of an online Public Register of those registered
  - what action to take against those who do not register, and
  - whether online payment and registration systems are desirable.

#### **Identifying firms that have not registered**

- 3.5 The OFT is seeking feedback from stakeholders on how best it can identify businesses who have not registered including new entrants to the market. Those who do not register impose greater financial burdens on those who do register as the OFT's income is reduced and expenditure increased.

- 3.6 The OFT believes that a key tool to help identify those who have not registered is to publish its Register<sup>12</sup> so that industry, members of the public, TSS and others can help the OFT identify businesses which should have registered but have not.
- 3.7 Without a Public Register it is likely that the OFT's costs in identifying non registered firms would be greater. It would also be more difficult for others to assist the OFT in identifying those registered and supervised by the OFT as well as those who have not registered. An online Public Register is preferable to the periodic publication of a hard copy of registration data. That would be resource intensive, be less accessible or current and increase the OFT's costs. A Public Register would also ease the costs of sharing information with other regulators.
- 3.8 It is proposed that the Public Register would be accessed through the OFT's website and would contain basic information that allows the business to be correctly identified and verified as registered, for example, trading name and address. It would not contain commercially sensitive information such as business turnover or number of staff. In addition to a Public Register, available on the OFT's website, the OFT proposes to run a compliance hotline contactable by both telephone and e-mail. Businesses, other supervisors and regulators, will be encouraged to contact the compliance hotline to report allegations of non compliance with the Regulations.

## Questions

**Q1. What ways, in addition to an online Public Register and a compliance hotline, do you think the OFT should identify businesses who have not registered?**

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<sup>12</sup> As permitted by Regulation 32(7).

- Q2. What additional information do you think should be published by the OFT on its online public register?**
- Q3. Do you support the proposal for an AML compliance hotline so that businesses, other supervisors and regulators, consumers, TSS and others can report non-compliance, including failure to register, to the OFT?**

## **Tackling businesses that do not register**

- 3.9 There is a legal obligation on firms supervised by the OFT to register by 31 January 2010. Where firms fail to do so but continue to carry on a supervised business, the OFT has the power to impose civil financial penalties or to prosecute. Although the OFT's longer term monitoring and enforcement approach is being shaped through this consultation there are some aspects which require to be introduced before the consultation ends. They relate to businesses who fail to apply for registration by 31 January 2010.
- 3.10 The OFT wants to encourage supervised businesses that are trading whilst unregistered to become compliant. This can be done by alerting them to the need to register, allowing them time to register and penalising those who continue to trade whilst unregistered.
- 3.11 Consideration had been given to a purely administrative approach to imposing penalties involving a period of grace followed by the imposition of a penalty by the OFT's AML Compliance team. However, the scope to operate such a system is limited by the fact that the Regulations require that those who face the imposition of a penalty must be given the opportunity to make representations to the OFT and if not successful a right to appeal to the First-Tier Tribunal (Consumer Credit Appeal).<sup>13</sup> Accordingly, the following approach is proposed for businesses which are found to be carrying on a supervised business but unregistered after 31

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<sup>13</sup> Regulation 34

January 2010:

- A warning letter will be sent by the OFT setting out the requirement for the business to register if they intend to continue carrying on that business.
- The business will be given a grace period of 21 days from issue of the warning letter within which to apply for registration or face use of the OFT's formal powers.
- In the majority of cases failure to respond would result in a formal letter advising that the OFT intends to impose a civil financial penalty and specifying the amount. In accordance with the Regulations the business would have 28 days in which to make representations in relation to the imposition of a financial penalty and the amount.
- There may be cases where the OFT believes that prosecution would be appropriate. An example would be where the business ignores the OFT's approaches, continues trading and fails to register.
- This process will be kept under review so that the OFT can deal most effectively with those who deliberately avoid registration.

#### **Questions**

- Q4. Do you agree with the OFT giving business a grace period before making use of its formal powers?**
- Q5. Is the grace period reasonable? If not, what do you think it should be?**
- Q6. Is the procedure above suitable for use beyond the first few months after the end of the six month registration period?**
- Q7. What amendments, if any, do you believe should be made to this procedure for longer term use?**

## **Moving to online transactions with the OFT**

- 3.12 The OFT had intended that the entire registration and payment process would be online so that processing costs for the OFT and many businesses were reduced. Plans had to change, reflecting financial and time pressures, and registration was introduced with very limited online transaction capability. The OFT's AML registration process is paper based, with applicants required to fill out hard copy forms, which can be requested or download them from the website and post them with cheques to the OFT. For the longer term the OFT wants to assess the advantages and disadvantages, as well as the costs, of a totally online system capable of handling new registrations, notifications by registered businesses of changes to material information given to the OFT and payment of fees due to the OFT.
- 3.13 An online system would reduce the OFT's staff costs for the future in terms of processing data and fees. It should also ensure a swifter and more user friendly system for many of the supervised population. Some of the OFT's supervised population have preferred to have hard copy forms but it is not yet clear exactly what proportion would continue to prefer hard copy forms. Feedback on this issue would be welcome.
- 3.14 Moving to an online system would mean additional costs would be incurred in setting it up. Given that the OFT's reasonable costs are passed on to those supervised this would mean that many businesses would be paying twice for the set up of OFT systems to support the registration and fee charging elements of the OFT's role. The OFT believes that it should seek to identify ways in which the aim of increased online transactions with the OFT can be realised with minimal additional costs for supervised businesses.

## **Questions**

- Q8. Should the OFT seek to develop online transactional capability? and if so in what timescale?**
- Q9. What should be the higher priority – the ability to pay online or to register or update registration information?**
- Q10. Are there sectors of the supervised population for which online transactions would be particularly beneficial or inconvenient?**

## 4 MONITORING AND ENFORCEMENT

### Emphasis on working with business to raise compliance levels

- 4.1 The OFT will continue to seek to achieve compliance through the provision of advice and guidance to business. We will seek to work with industry bodies and representatives of small businesses wherever possible in order to identify how best to provide relevant and targeted advice and guidance to supplement the core guidance first published in 2007.

#### Questions

- Q11. What do you see as priority areas for targeted advice and guidance activity?**
- Q12. How would you/your members like to receive advice and guidance?**
- Q13. What methods for the provision of advice and guidance have you found most useful?**

### Risk based approach

- 4.2 Supervisory authorities such as the OFT are expected to operate their supervisory regimes in accordance with a risk based approach as agreed by the Anti-Money Laundering Supervisors Forum (the AMLSF).<sup>14</sup> The aim is to ensure a consistent framework and approach to supervision in the UK.
- 4.3 The adoption of a risk based approach to monitoring and enforcement is not new to the OFT. The OFT's high level approach has been set out in

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<sup>14</sup> The Forum was set up by Her Majesty's Treasury (HMT) and consists of representatives of all Supervisors under the Regulations. See the HMT website at [www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk)

its AML Enforcement Principles which were published in May 2009 (see Annexe B). These principles reflect ones the OFT has used in its consumer protection work with the necessary adjustments to reflect the differences in the area of money laundering. In essence they mean that the OFT will use its significant powers only where appropriate and where risks are highest.

- 4.3 A risk based approach allows us to target our resources to those areas that are perceived to present a higher risk of money laundering. We will identify priority areas for action through a risk assessment of our supervised sectors, thereby seeking to minimize burdens on businesses generally. We will keep under review our risk based approach to ensure that it takes into account, amongst other things, changes to markets, working practices and legislation.
- 4.4 The OFT is in the process of developing a detailed risk model for its AML Supervisory role. Information on the risks posed by, or to, the OFT supervised population is, as yet, minimal. Registration will provide information on the OFT's supervised population but further information is needed to identify the points at which businesses are at risk in their day to day business. The OFT is grateful to those industry organisations who are seeking to identify risk factors and feed into the development of the OFT risk model.
- 4.5 The AMLSF has identified factors relevant to risk assessment including:
- Risk associated with the activity undertaken by the business and the environment it works in, including:
    - likelihood that the products or services on offer by a supervised business can be used for laundering money
    - likelihood that customers' funds may have criminal origins
    - nature of transactions
    - geographical risk (does the firm, its clients or sub-contractors trade in locations that might pose greater risks).

- Risks based on a combination of objective factors and experience including:
  - a supervisor's wider work with a firm and other supervisory authorities and law enforcement agencies' experience of the firm
  - a firm's compliance history
  - complaints about firms or about the quality of the firm's internal controls, and intelligence from other sources – for example, from consumers.
  
- Potential harm that could be caused should money laundering be taking place in the business or industry sector including:
  - the size of the business – for example, turnover, number and type of customers, number of premises, value of transactions
  - links with other businesses.

### **Questions**

- Q14. What do you believe should be the key components of the OFT risk models for estate agents and CCFIs?**
- Q15. Are the AMLSF factors listed all appropriate to CCFIs and /or estate agents? If not, please say why.**
- Q16. Are there additional factors not listed that you believe are appropriate?**
- Q17. Are there particular sectors or types of supervised businesses, or business practices, which you believe pose higher risks?**
- Q18. What sectors or types of supervised business do you believe pose minimal risks of being used for money laundering and why?**

## The OFT's approach to monitoring and enforcement

4.6 The OFT has pursued a reactive approach to monitoring and enforcement which is consistent with the expectations of HM Treasury. That means that we react to adverse intelligence rather than seek it out. The OFT has received little adverse information on firms it supervises. Resource for monitoring and enforcement work has been limited but has recently grown from two to six compliance staff. This anticipates increased activity as the registration period closes. A key task going forward will be to identify those who have not registered but continue to trade, ensure supervised firms do register and that they are complying with all the provisions of the Regulations.

4.7 Comments are invited on the following compliance monitoring models.

- **No change** – The OFT would continue to focus on the provision of advice and guidance and raising awareness through mailings to the supervised population and attendance at seminars and conferences. Monitoring and enforcement work would be restricted to reacting to adverse intelligence received. This is the OFT's interim approach which started in December 2007. At that time the OFT did not view it as viable as a long term approach to monitoring and enforcement. This does not involve any routine inspections to check on compliance. Nor has it involved any targeted inspections. Where non-compliance with the Regulations is drawn to our attention the OFT has approached the business and advised them to rectify it.
- **Minimal sampling** – This model would include the provision of advice and guidance and reaction to adverse intelligence as above. Routine inspections would not be carried out but the OFT would carry out a small element of random and targeted sampling. This might involve sampling 100 - 200 businesses each year across the supervised population, or 100 CCFIs and 100 estate agents. The results of the random sampling would inform the scope of more targeted sampling as well as help shape the OFT's work on a risk assessment model and the need for further guidance for business.

- **Enhanced sampling** – This model would be the same as minimal sampling except that it would involve a higher level of random and targeted sampling as a matter of routine. At this point we have not considered what this level might be.

### **Questions**

- Q19. Which model do you believe that the OFT should adopt and why?**
- Q20. Is the minimal rate of sampling suggested sufficiently high? If you believe that higher rates are appropriate, what level do you recommend?**
- Q21. Are there elements missing which you believe would be appropriate and cost effective?**
- Q22. Which sectors or types of business do you believe should be targeted?**

### **Sharing of the OFT's monitoring and enforcement powers**

- 4.8 The Regulations enable the OFT to share some of its monitoring and enforcement role with TSS and the DETINI. This reflects the fact that the OFT and the TSS and the DETINI have a long history of working together in regulating markets involving the supervised population. The involvement of the TSS and the DETINI would provide the OFT with a more local presence. The sharing of powers requires agreements between the OFT and the relevant organisations. No such agreements have been entered into because the OFT focus to date has been on guidance and registration. Now that we are shaping the future approach to monitoring and enforcement it is time to consider how shared roles might work.
- 4.9 The Regulations do not give the TSS and the DETINI the power to impose financial penalties but they could share the powers relating to prosecution and obtaining information, by letter and inspection, under or without a warrant. The detail of how shared powers would work is left for agreements and not set out in statute.

4.10 The Regulations have the effect of making any action or omission of the TSS an action or omission of the OFT. Officers of a trading standards authority would be treated as being an officer of the OFT. This is very different to the position under consumer protection legislation where the OFT and TSS work in partnership. Given the relationship provided by the Regulations the TSS would, like the OFT, have to work in accordance with the OFT's AML Enforcement Principles and with the OFT's future enforcement policy generally and particularly in relation to how we intend to use the powers to obtain information, and prosecute.

### **Questions**

**Q23. Should the TSS and the DETINI be involved in the monitoring and enforcement of AML Regulations?**

**Q24. What advantages do you see in the sharing of powers?**

**Q25. What concerns do you have with the sharing of powers?**

## 5 PENALTIES

5.1 Where a business is found to have breached the Regulations, the OFT has the power to impose financial penalties as well as the power to prosecute.<sup>15</sup> Breaches of the Regulations for which a penalty may be imposed include failure to:

- carry out customer due diligence measures such as verification of identity of customer
- keep required records
- train staff
- have policies and procedures
- advise of material changes to, or correct significantly inaccurate information, provided at registration
- be registered whilst carrying on a supervised business after 31 January 2010.

5.2 The Regulations<sup>16</sup> require that where it is proposed to impose a penalty, the OFT must give the person notice of:

- its proposal to impose a penalty and the proposed amount
- the reasons for imposing the penalty, and
- the right to make representations to it within a specified period (not less than 28 days).

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<sup>15</sup> Regulations 42 and 45

<sup>16</sup> Regulation 42(6) and (7)

- 5.3 The OFT must then decide, within a reasonable period, whether to impose a penalty and must give the person notice of:
- its decision not to impose a penalty or
  - its decision to impose a penalty and the amount
  - the reasons for its decision, and
  - the right to appeal to the First Tier Tribunal (Consumer Credit Appeal).
- 5.4 The OFT may impose a penalty of such an amount as it considers appropriate which is defined in the Regulations as effective, proportionate and dissuasive.
- 5.5 The OFT must not impose a penalty on a person where there are reasonable grounds for it to be satisfied that the person took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with.<sup>17</sup>
- 5.6 The OFT will consider the nature and seriousness of any suspected breach of the Regulations before deciding on the appropriate action to take. Formal enforcement action, such as imposing a financial penalty, or prosecution, is likely where a business has repeatedly breached the Regulations or failed to respond to advice on compliance.
- 5.7 Where the OFT believes that enforcement action is necessary, the objective will be to ensure that interventions are effective and efficient and provide the necessary level of deterrence to those who would deliberately flout their legal obligations.
- 5.8 In applying penalties the OFT will be seeking to:

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<sup>17</sup> Regulation 42(2)

- change the behaviour of the offender
- eliminate any financial gain or benefit from non-compliance
- be responsive and consider what is appropriate for the particular offender and regulatory issue
- be proportionate to the nature of the offence and the harm caused
- deter future non-compliance both individually and generally thereby increasing the detection and prevention of money laundering and terrorist financing.

5.9 Penalty options include:

- flat rate penalties for particular offences
- a case by case approach to imposing penalties
- a mix of flat rate and case by case approach.

5.10 The OFT preference is a case by case approach as individual circumstances of breaches may vary considerably. A rigid formulaic approach is unlikely to reflect the circumstances of different cases – such as the extent to which breaches of the Regulations are accidental, through ignorance or misinformation, negligent or deliberate. Given that penalties have to be dissuasive as well as proportionate a key issue to be explored is that of how best to incentivise businesses to comply. A case by case approach enables the OFT to match the principles outlined at paragraph 5.8 above. It also reflects the fact that the anti-money laundering role is new for the OFT and we do not yet have a feel for the issues which may arise and impact upon penalty levels. This does leave discretion with the OFT and the aim would be, where appropriate, to use principles established within the OFT's wider roles in imposing penalties.

5.11 The OFT does not wish to limit the scope of its discretion at this early stage. Flat rate penalties might be more appropriate for certain offences – for example, in relation to failure to register. A flat rate penalty could be related to the costs incurred in dealing with a company who fails to register. However a major drawback of a flat rate penalty is that it does not differentiate in terms of size of a business nor the circumstances surrounding non-registration. If the OFT were to impose a flat rate penalty of, for example, £5,000 that amount might not act as a deterrent for some businesses. Making decisions on case by case basis enables the OFT to reach a decision on an appropriate penalty based on the full circumstances of a case.

### **Questions**

**Q26. Do you agree with the OFT's proposed approach to imposing penalties? If not, why not?**

**Q27. In what situations would a flat penalty be more appropriate than a case by case approach?**

**Q28. On what basis should penalties be calculated? To what extent should they reflect the size of a business – for example, as a percentage of turnover?**

**Q29. Should there be a set range of penalties for particular breaches and increases for repetitions?**

## 6 FEES

6.1 The AML supervisory regime has to be self funding and therefore supervised businesses are expected to pay the costs of their supervision. To enable this, the Regulations<sup>18</sup> provide that a supervisory authority may impose charges:

- on applicants for registration
- on relevant persons supervised by that authority
- in respect of each of the premises at which a person carries on (or proposes to carry on) business.

6.2 Under the Regulations charges must not exceed such amount as the supervisory authority considers will enable it to meet any expenses reasonably incurred by it in carrying out its functions under the Regulations or for any incidental purpose. The Regulations provide that OFT expenses include those incurred by the TSS or the DETINI under arrangements. As stated earlier (paragraph 4.8 above) the OFT has not yet shared relevant powers under the Regulations with the TSS or the DETINI.

6.3 The OFT also has to abide by HM Treasury guidance on Managing Public Money. This requires that there should be no discrimination in the setting of fees and that cross subsidies should be avoided. Fees should be set at a level that reflects the cost of carrying out the service provided and that any differentiation of charges should only be implemented if that differentiation reflects the costs of providing the service.

6.4 The OFT imposed charges for the first time at registration. Fees charged were for 2009-10 and related largely to the costs of set up of registration with a minimal amount covering compliance activity. The OFT has not

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<sup>18</sup> Regulation 35

sought to recover any set up or staffing costs incurred before November 2008. The fee payable on registration was set at £115 per premise capped at twenty premises.

- 6.5 Going forward the OFT has to decide upon the level of charges to impose in the longer term to fund its AML role. At this stage we are not inviting comments on possible fee levels because we have yet to analyse the registration data, determine the population who will bear the costs and what supervisory approach to adopt. These factors will affect future costs and will only be determined following the consultation.

### **Fee structures**

- 6.6 The issue we want to consult upon now is that of fee structures. Available options are:

- flat fees regardless of size or type of company
- continue with premise based fees and a cap
- continue with premise based fees but with no cap. All businesses would pay a fee based on total number of supervised premises
- fees based on turnover for all businesses instead of premises
- fees based on turnover for on line businesses only continuing with premise based fees for others, or
- some element of 'polluter pays' – those who cause the most enforcement work should pay more to the OFT in fees.

- 6.7 The OFT's preference is for premise based fees as they reflect the size of businesses and the number of premises which are within the supervisory net. Turnover based fees were not an option for registration as the OFT did not have that information. However, once registration is complete the OFT will have turnover information and could use that as a basis for fee

setting; fees could be in bands reflecting the range of turnover. Premise based fees appear simpler to administer but they do have the drawback of providing a fee level for large on line suppliers which may bear no relation to their business activity and potential for supervisory activity.

- 6.8 HMRC, another AML supervisor, also uses premise based fees but does not set a cap. The OFT introduced a cap because it felt that a purely premise based fee would discriminate against the largest businesses.
- 6.9 A flat rate for fees, regardless of the size of a business would result in discrimination and an undue financial burden being borne by smaller businesses.
- 6.10 Operating a 'polluter pays' approach has attractions in that those who cost the most to supervise pay the most. However, implementation of such an approach at this early stage in the development of the OFT's supervisory regime is not proposed as it is unlikely to contribute meaningfully to resources in the early days. It depends upon better information on the supervised population and their compliance with the Regulations as well as the risks they pose. The OFT believes that this is something to be considered for a more mature regime where known factors outweigh the unknowns. There will be an element of 'polluter pays' when the OFT imposes financial penalties on those who breach the Regulations as these monies will be used to fund the regime.<sup>19</sup> Using a 'polluter pays' mechanism may impact on penalty levels as it is arguable that there is a double financial impediment which should be taken into account in the imposition of penalties.
- 6.11 The costs of administering the levy of a fee needs to be covered by the income received from fees. The aim will be to keep costs and fees as low as possible. Initially, because of the uncertainty involved in a new regime, fees will be assessed and levied annually. The OFT would welcome views

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<sup>19</sup> Regulations 35(4) and 42(8)

on a longer term move to a longer charging period such as three – five years.

## **Questions**

**Q30. Do you agree with the OFT's proposal to continue with premise based fees? Should they be capped, and if so, at what level?**

**Q31. If you do not agree with this proposal which approach do you favour and why?**

**Q32. Which of the following fee structures should be adopted for online businesses who have no, or few, premises?**

- flat fees regardless of size or type of company
- turnover based fees.

**Q33. Are there other possible fee structures?**

**Q34. Do you favour an approach such as 'polluter pays' – those who cause the most work should pay more to the OFT in fees. What are the advantages/ disadvantages of such an approach?**

**Q35. Should the OFT follow the same approach for estate agents and CCFIs? If so, what structures best suit what sectors or types of business?**

**Q36. Should OFT move towards a longer charging period such as three – five years?**

# ANNEXES

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## **A SUMMARY OF QUESTIONS**

### **Chapter 3 – registration**

- Q1. What ways, in addition to an online Public Register and a compliance hotline, do you think the OFT should identify businesses who have not registered?
- Q2. What additional information do you think should be published by the OFT on its online public register?
- Q3. Do you support the proposal for an AML compliance hotline so that businesses, other supervisors and regulators, consumers, TSS and others can report non-compliance, including failure to register, to the OFT?
- Q4. Do you agree with the OFT giving business a grace period before making use of its formal powers?
- Q5. Is the grace period reasonable? If not, what do you think it should be?
- Q6. Is the procedure above suitable for use beyond the first few months after the end of the six-month registration period?
- Q7. What amendments, if any, do you believe should be made to this procedure for longer term use?
- Q8. Should the OFT seek to develop online transactional capability? and if so in what timescale?
- Q9. What should be the higher priority – the ability to pay online or to register or update registration information?
- Q10. Are there sectors of the supervised population for which online transactions would be particularly beneficial or inconvenient?

## **Chapter 4 – monitoring and enforcement**

- Q11. What do you see as priority areas for targeted advice and guidance activity?
- Q12. How would you/your members like to receive advice and guidance?
- Q13. What methods for the provision of advice and guidance have you found most useful?
- Q14. What do you believe should be the key components of the OFT risk models for estate agents and CCFIs?
- Q15. Are the AMLSF factors listed all appropriate to CCFIs and /or estate agents? If not, please say why.
- Q16. Are there additional factors not listed that you believe are appropriate?
- Q17. Are there particular sectors or types of supervised businesses, or business practices, which you believe pose higher risks?
- Q18. What sectors or types of supervised business do you believe pose minimal risks of being used for money laundering and why?
- Q19. Which model do you believe that the OFT should adopt and why?
- Q20. Is the minimal rate of sampling suggested sufficiently high? If you believe that higher rates are appropriate, what level do you recommend?
- Q21. Are there elements missing which you believe would be appropriate and cost effective?
- Q22. Which sectors or types of business do you believe should be targeted?
- Q23. Should the TSS and the DETINI be involved in the monitoring and enforcement of AML Regulations?

Q24. What advantages do you see in the sharing of powers?

Q25. What concerns do you have with the sharing of powers?

## **Chapter 5 – penalties**

Q26. Do you agree with the OFT's proposed approach to imposing penalties? If not, why not?

Q27. In what situations would a flat penalty be more appropriate than a case by case approach?

Q28. On what basis should penalties be calculated? To what extent should they reflect the size of a business – for example, as a percentage of turnover?

Q29. Should there be a set range of penalties for particular breaches and increases for repetitions?

## **Chapter 6 – fees**

Q30. Do you agree with the OFT's proposal to continue with premise based fees? Should they be capped, and if so, at what level?

Q31. If you do not agree with this proposal which approach do you favour and why?

Q32. Which of the following fee structures should be adopted for online businesses who have no, or few, premises?

- flat fees regardless of size or type of company
- turnover based fees.

Q33. Are there other possible fee structures?

Q34. Do you favour an approach such as 'polluter pays' – those who cause the most work should pay more to the OFT in fees. What are the advantages/disadvantages of such an approach?

- Q35. Should the OFT follow the same approach for estate agents and CCFIs? If so, what structures best suit what sectors or types of business?
- Q36. Should OFT move towards a longer charging period such as three – five years?

## **B AML ENFORCEMENT PRINCIPLES**

### **Proportionate**

- B.1 To ensure that our enforcement action is proportionate, we will take account of the level of risk and the circumstances of each case, focusing on the following factors:
- the direct and indirect risks of taking action bearing in mind the seriousness of any breach of the law and any impact on the effectiveness of the anti-money laundering and terrorist financing regime
  - the available enforcement options
  - the extent of administrative burdens likely to be imposed in the use of the various enforcement options
  - information including knowledge of the business's past behaviour including the type of action which the business is most likely to respond to
  - ensuring the cost is proportionate to achieving the desired results.
- B.2 We will generally seek to use compliance options in the first instance unless factors indicate that more formal enforcement action is required as a first step.
- B.3 We will actively seek to promote consistency in enforcement between OFT and other AML supervisors, and will work closely with them to this end. This will include working and sharing information with AMLSF as well as liaison with individual supervisors such as the FSA and HMRC.
- B.4 We will work with other supervisors to give guidance to businesses as to who is their supervisor. In the event of overlapping responsibilities we will seek to reach an agreement in accordance with the Regulations as to who will act as supervisor for that business. In the absence of any such agreement, we will cooperate with the other supervisors to ensure

consistency of approach and to avoid the business receiving multiple approaches on linked issues. We will inform any such business of agreements that have been reached in this respect under the Regulations.

- B.5 Our enforcement approach will be risk based, this will enable us to focus our supervisory activities and target those businesses that are considered high risk. In carrying out our functions, we will act fairly and consistently. This does not mean that we will **always** enforce the law in the same way on apparently comparable cases – we will tailor the action to the individual circumstances. We will assess each case on its own merits, taking account of risk and of the need for proportionality, deterrence and achieving high levels of compliance.
- B.6 We are committed to working with the SOCA, police forces and other supervisors. We will be working with TSS, to develop and agree a coordinated enforcement approach for the future. We will ensure that such arrangements establish complementary priorities, a framework for efficient and effective enforcement, avoid multiple approaches to businesses and that the principles of better regulation are embodied in them.

### **Transparent and accountable**

- B.7 Except when circumstances make it inappropriate, we will give businesses an opportunity to comply with the Regulations. We will not in normal circumstances escalate our enforcement decisions unless dialogue is failing or the business has a history of non-compliance.
- B.8 When we take action we will tell businesses the reasons why. We will state clearly:
- the area in which the business is failing to comply with the Regulations and the specific provisions being breached
  - what the next steps will be including timescales

- an invitation to discuss the matter
  - the possible consequences (civil and/or criminal) of failure to respond.
- B.9 Following the outcome of any enforcement action we will make known the rights of appeal available.
- B.10 We will cooperate fully with FATF and with HMT in reviews of our effectiveness as supervisors and the outcomes of our actions.
- B.11 We will, wherever possible and appropriate, publicise all outcomes of court proceedings and other formal action taking due account of the need to:
- deter others from engaging in similar kinds of conduct
  - facilitate detection of further breaches
  - educate other businesses in the market.
- B.12 We will be developing a system for reviewing outcomes and the impact of our compliance work.
- B.13 We are committed to providing a high quality, accessible and responsive service to individuals and businesses.
- B.14 Our policy and practice is to be professional, courteous and helpful in all our contacts and enquiries.
- B.15 The OFT procedure for dealing with complaints is set out on the OFT website – [www.of.gov.uk/about/governance/complaint](http://www.of.gov.uk/about/governance/complaint).
- B.16 We are, however, subject to disclosure constraints in law and will protect commercial and personal data accordingly.

### **Sanctions and penalties**

- B.17 In the event of a breach of the Regulations, the Regulations provide for:

- the imposition of civil penalties of such amounts as are considered appropriate by the supervisory authority
- in the event of a criminal conviction
  - on summary conviction, a fine not exceeding the statutory maximum
  - on conviction on indictment, imprisonment for a term not exceeding two years, to an unlimited fine or to both.

B.18 By applying sanctions and penalties the OFT will be seeking to:

- change the behaviour of the offender
- eliminate any financial gain or benefit from non-compliance
- be responsive and consider what is appropriate for the particular offender and regulatory issue
- be proportionate to the nature of the offence and the harm caused
- aim to deter future non-compliance.

B.19 The OFT cannot impose a civil penalty on a business where there are reasonable grounds for us to be satisfied that the business took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with. Also, there is no criminal offence committed in these circumstances.

B.20 In deciding whether a person has failed to comply with a requirement of the Regulations, the OFT or a court must also consider whether the business followed any relevant guidance which was at the time—

- issued by the OFT or any other appropriate body such as a trade association, or

- approved by HMT, and which was published in a manner approved by HMT as suitable in their opinion to bring the guidance to the attention of persons likely to be affected by it.

B.21 Further guidance on penalties and sanctions will be published by the OFT in due course.

## **C LIST OF CONSULTEES**

**The following organisations and individuals have been consulted. We would welcome suggestions of others who may wish to be involved in this consultation process.**

Association of Accounting Technicians

Association of Chartered Certified Accountants

Association of International Accountants

Association of Property Finders & Buyers Agents

Association of Relocation Professionals

Association of Taxation Technicians

Better Regulation Commission

Better Regulation Executive

British Chamber of Commerce

British Cheque Cashers Association

British Vehicle Rental and Leasing Association

Central England Trading Standards Authority

Chamber Wales

Chartered Institute of Management Accountants

Chartered Institute of Public Finance and Accountancy

Chartered Institute of Taxation

Confederation of British Industry

Consumer Credit Association UK  
Consumer Credit Trade Association  
Consumer Finance Association  
Council for Licensed Conveyancers  
Credit Services Association  
Department for Business, Innovation and Skills  
Department of Enterprise, Trade and Investment  
Direct Marketing Association  
East of England Trading Standards Authority  
Faculty of Advocates  
Faculty Office of the Archbishop of Canterbury  
Federation of Small Businesses  
Federation of Small Businesses (Scotland)  
Finance & Leasing Association  
Financial Services Authority  
General Council of the Bar  
General Council of the Bar of Northern Ireland  
Hackney Trading Standards  
Her Majesty's Revenue and Customs  
Her Majesty's Treasury

HM Revenue and Customs

Home Office

Information Commissioners Office

Insolvency Practitioners Association

Institute of Certified Bookkeepers

Institute of Chartered Accountants in England and Wales

Institute of Chartered Accountants in Ireland

Institute of Chartered Accountants of Scotland

Institute of Financial Accountants

International Association of Book-Keepers

Law Society

Law Society of Northern Ireland

Law Society of Scotland

Local Authority Coordinating body for Regulatory Services

Local Better Regulation Office

London Trading Standards Authority

Mail Order Traders Association

National Association of Estate Agents

National Federation of Property Professionals

National Pawnbrokers Association

North East Trading Standards Authority

Northern Ireland Chamber of Commerce

Northern Ireland Executive

Ombudsman for Estate Agents

Regional Asset Recovery Teams

Royal Institution of Chartered Surveyors

Scottish Chamber of Commerce

Scottish Executive

Serious Organised Crime Agency

Society of Chief Officers of Trading Standards in Scotland

South West England Regional Co-ordination of Trading Standards

The Gambling Commission

Trading Standards – East Midlands Illegal money lending team

Trading Standards – Glasgow Illegal money lending team

Trading Standards – Midlands Illegal money lending team

Trading Standards – North East Illegal money lending team

Trading Standards – South West London North East Illegal money lending team

Trading Standards – Wales Illegal money lending team

Trading Standards Institute

Trading Standards North West

Trading Standards of East Midlands

Trading Standards South East

Wales Heads of Trading Standards

Welsh Assembly Government

Yorkshire and the Humber Trading Standards Group

## D CONSULTATION CRITERIA

**Public bodies are required to perform consultations in accordance with the following criteria wherever possible:**

- D.1 **When to consult** – formal consultation should take place at a stage when there is scope to influence the policy outcome.
- D.2 **Duration of consultation exercises** – consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- D.3 **Clarity of scope and impact** – consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- D.4 **Accessibility of consultation exercises** – consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- D.5 **The burden of consultation** – keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- D.6 **Responsiveness of consultation exercises** – consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- D.7 **Capacity to consult** – officials running consultations should seek guidance in how to run effective consultation exercises and share what they have learned from the experience.
- D.8 The full *Code of Practice on Consultation* can be found on the website of the Department for Business, Enterprise and Regulatory Reform: [www.berr.gov.uk/files/file47158.pdf](http://www.berr.gov.uk/files/file47158.pdf).