



Insolvency Oracle

Consultation on the Transposition of 5MLD  
Sanctions and Illicit Finance Team (2/27)  
HM Treasury  
1 Horse Guards Road  
London  
SW1A 2HQ

10 June 2019

Dear Sirs

**Response to the Consultation:  
Transposition of the Fifth Money Laundering Directive**

I welcome the opportunity to respond to this consultation.

**About Me**

This response reflects my own views as a self-employed consultant, who assists insolvency practitioners to comply with insolvency and related legislation, including the MLRs, and regulatory standards.

My clients are typically insolvency practices headed up by one or two insolvency practitioners with a staff complement of between one and 30 employees, although I have also been engaged by practices larger than this. In some cases, the insolvency practice is a standalone business, but some insolvency practices work in, or alongside, traditional accountancy practices. Therefore, from an MLRs perspective, the insolvency practitioners with whom I work are often the ones primarily responsible in their practice for compliance with the MLRs, but in some cases they collaborate to some extent with their accountancy practice partners.

**Summary**

In common with several past consultations on the MLRs, the unusual position of insolvency practitioners does not appear to have been well considered.

Insolvency practitioners are probably unique in having to treat the insolvent entity/debtor over which they are appointed as the "client" for anti-money laundering purposes when no true client relationship exists. This can cause difficulties for insolvency practitioners in completing CDD prior to their appointment, as they do not always have any direct contact with the "client" before appointment, particularly where one or more creditors are seeking their appointment. For the insolvency regime to continue to work effectively, it is essential that creditors are not hindered from exercising their

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statutory rights to appoint an insolvency office holder where the practitioner is finding it difficult to complete CDD prior to appointment. It seems to me that some of the proposed changes will threaten the smooth-running of insolvency appointment processes and thus could damage creditors' interests and even perhaps enable ML/TF to continue without the useful interruption of an insolvency appointment.

I have limited responses to questions within my field of expertise.

***Question 47: To what extent would removing 'reasonable measures' from regulation 28(3)(b) and (4)(c) be a substantial change? If so, would it create any risks or have significant unintended consequences?***

Insolvency practitioners are often appointed as insolvency office holders with little – and sometimes no – prior contact with the insolvent entity. This is particularly the case where one or more creditors wish to appoint an insolvent practitioner to protect and represent their interests, for example if a secured creditor wishes to appoint an Administrator or where unsecured creditors want to replace the company members' choice of Liquidator in a creditors' voluntary liquidation with their own. In other cases, creditors often take steps to seek their own choice of insolvency office holder in bankruptcies and compulsory windings-up and in these occasions also the insolvency office holder is highly unlikely to have any prior direct contact with the bankrupt or the insolvent entity.

Although on appointment the insolvency practitioner has no true "client" relationship with the insolvent entity, it has long been understood that the Supervisory Bodies consider the insolvent entity to be the "client" and for the insolvency practitioner to enter into a "business relationship" with that client, when they are appointed as insolvency office holder, for the purposes of applying the anti-money laundering regulations.

At present, insolvency practitioners take "reasonable measures" to obtain the information required by regulations 28(3)(b) and (4)(c), which in the case of a "hostile" appointment such as that described above will involve asking the appointing creditor(s) for information and examining information in the public domain such as that held at Companies House. In these cases, the law to which the body corporate is subject, its constitution (if held at Companies House), the directors' names (as per Companies House) and the company's ownership and control structure (at least as it appears to the outside world) can usually be determined relatively easily.

However, if that information is not available on Companies House, for example if the insolvent entity is an unregistered partnership, it may not be possible for the insolvency practitioner to gather this information prior to entering into the business relationship and indeed some information may not even be easily accessible after the insolvency practitioner's appointment.

If the insolvency practitioner is strictly required to obtain this information, rather than take "reasonable measures" to obtain it, this could delay or even jeopardise an insolvency practitioner's ability to consent to act as insolvency office holder. This may mean that creditors are unable to exercise their statutory rights to appoint an insolvency office holder to protect their interests. Clearly this would undermine the effectiveness of the insolvency regime.

***Question 48: Do you have any views on extending CDD requirements to verify the identity of senior managing officials when the customer is a body corporate and the beneficial owner cannot be identified? What would be the impact of this additional requirement?***

I believe that most insolvency practitioners would look to verify the identity of a body corporate's senior managing official as part of their CDD on the "client" in any event, so in most cases this change would have no material impact.

However, as explained above, there will be occasions, particularly when a creditor seeks to appoint an insolvency practitioner as Administrator or Liquidator, when the insolvency practitioner has no prior contact with the "client" and therefore may be unable to verify the identity of the senior managing official. For this reason, such verification should be subject to the "reasonable measures" test, as this would be the only way insolvency practitioners could meet the requirement in some cases. As explained above, if insolvency practitioners were not allowed to take reasonable measures to verify the identity, it would hinder creditors' statutory rights to appoint an insolvency office holder to protect their interests in some cases and it would undermine the effectiveness of the insolvency regime.

***Question 49: Do related ML/TF risks justify introducing an explicit CDD requirement for relevant persons to understand the ownership and control structure of customers? To what extent do you already gather this information as part of CDD obligations?***

As explained above, in most cases, insolvency practitioners would gather this information as part of their CDD obligations, but there will be instances when it is not possible to do so, usually due to the lack of contact of the insolvency practitioner with the "client" where creditors are seeking their appointment.

If insolvency practitioners were required in all cases to understand the ownership and control structure of customers prior to being appointed, this could delay (or even block) their appointment, which could allow ML/TF to continue. It is arguable that anything that delays an insolvency practitioner's appointment increases the risk of ML/TF, because it allows entities to continue to be used by their existing controllers, rather than have a regulated insolvency practitioner take control.

Consequently, I believe that it would be more useful and practical to require insolvency practitioners to take reasonable measures to gain such an understanding.

***Question 50: Do respondents agree we should clarify that the requirements of regulation 31 extend to when the additional CDD measures in regulation 29 and the EDD measures in regulations 33-35 cannot be applied?***

Such clarification would be useful. However, I would also ask that the exceptions listed in regulation 31(5) be revisited, as these are currently unhelpful to insolvency practitioners.

Regulation 31(5) allows an insolvency practitioner to continue to work "where an insolvency practitioner has been appointed by the court as administrator or liquidator of a company" (subject to other statutory conditions). As explained in my answer to question 47 above, insolvency practitioners are appointed in other "hostile" situations, where creditors have taken their own steps to appoint an insolvency practitioner as Administrator, Liquidator or Trustee in Bankruptcy. Such appointments are rarely made by the court (even though in some of those cases, the company or individual is placed into liquidation or bankruptcy by the court). Thus, to enable insolvency practitioners to continue to administer insolvent estates to achieve the objectives of the Insolvency Act in all appropriate cases, regulation 31(5) should be extended to appointments made by creditor(s).

***Question 53: Do respondents agree with the envisaged approach for obliged entities checking registers, as set out in this chapter (for companies) and chapter 9 (for trusts)?***

I do not believe that this would create any unnecessary burdens for insolvency practitioners planning to be appointed over companies.

***Question 61: Do you have any views on the proposal to require obliged entities to directly inform Companies House of any discrepancies between the beneficial ownership information they hold, and information held on the public register at Companies House?***

It is not clear to me what benefits would be derived from such reports to Companies House in the case of companies in terminal insolvency proceedings, e.g. liquidations. It would seem to be an unnecessary burden to require insolvency practitioners to submit such reports (and for Companies House to deal with them thereafter), when their appointment has meant that they are in control of the company's affairs and, for insolvent liquidations, that the shareholders are highly unlikely to benefit further from the company's business or assets.

I also question the threshold for determining a "discrepancy". Insolvency practitioners often encounter insolvent entities where it seems that a shadow director has been exercising control. Such information would form part of their investigations and reporting, where relevant, to the Insolvency Service under the Company Directors Disqualification Act 1986. However, it could prove difficult to form a view that this meant that there was a discrepancy in the beneficial ownership information at Companies House that required reporting.

This could also expose the insolvency practitioner to allegations, complaints and/or legal actions in the event that anyone were to disagree with the practitioner's conclusion and therefore could give rise to costs which would not have been incurred had there been no such requirement to report "discrepancies". In light of the limited benefits to be generated in seeking to correct the register for companies in terminal insolvency proceedings, this would seem to be a disproportionate measure.

***Question 63: How should discrepancies in beneficial ownership information be handled and resolved, and would a public warning on the register be appropriate? Could this create tipping off issues?***

As explained in my answer to question 61, I question the value in handling and resolving such discrepancies in terminal insolvency proceedings.

I can envisage scenarios where a public warning on the register and/or Companies House contacting the company in an attempt to resolve the apparent discrepancy (as set out in paragraph 8.11) would create tipping off issues.

***Question 99: Does your sector have networks of principals, agents and sub-agents?***

This depends on how "agents" are defined. Under the Insolvency Act 1986, only an individual can take appointments as an insolvency practitioner (notwithstanding the definition in the Regulations). Insolvency practitioners inevitably will instruct agents to assist them in their administration of insolvent estates, e.g. to assist in selling assets, recovering book debts or processing employees'



claims. The consultation document gives me the impression that such agents are not the government's concern, so I would expect that any changes to the Regulations would be carefully worded to ensure that such agents are not captured.

***Question 100: Do complex network structures result in those who deliver the business to customers not being subject to the training requirements under the MLRs?***

I would not call the networks explained in my answer to question 99 as "complex" – an insolvency practitioner would know who they are instructing as agents to assist them; the use of "sub-agents" would be rare.

Some such agents' work for the insolvency practitioner would require them to have training under the MLRs, e.g. the agents themselves may be high value dealers. However, not all such agents' work would lead them to be obliged entities in their own right and therefore they would not be subject to the training requirements under the MLRs. However, I would not expect those agents' work to require them to have such training, e.g. where the agents are helping to process employee claims, and it would seem an unnecessary extension of the Regulations to require such agents to have training.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michelle Butler', with a stylized flourish extending from the bottom right.

**Michelle Butler MIPA MABRP**