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GUIDANCE NOTE NO 01 OF 2018

**GUIDANCE NOTE ON CUSTOMER DUE DILLIGENCE
PERTAINING TO INTERMEDIARIES AND RELATED PARTIES:
SUB-ACCOUNTS & POOL ACCOUNTS**

First issued: 22 March 2018

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A. DEFINITIONS

“Professional Trust Account” refers to a bank account used by third parties who, by virtue of their profession, open or make use of Professional Trust Accounts at banks in order to control / manage funds on behalf of their client(s) who may be individuals or groups. Lawyers and Asset Managers are examples of professionals who may need the use of professional trust accounts.

“Beneficial owner” means -

- (a) a natural person who owns or effectively controls a client, including the natural person on whose behalf a transaction is conducted; or
- (b) a natural person who exercises effective control over a legal person or trust.

The FIA 2012, in its definitions section further explains certain factors that have a bearing on beneficial ownership and exercising effective control.

“Client and Customer” have their customary meaning and are used interchangeably;

“Customer due diligence (CDD)” means a process which involves establishing the identity of a client, the identity of the client’s beneficial owners in respect of legal persons and monitoring all transactions of the client against the client’s profile;

“Enhanced customer due diligence (EDD)” means doing more than the conventional customer due diligence measures mentioned above and includes, amongst others, taking measures as prescribed by the Centre to identify, as far as reasonably possible, the source of wealth, funds and any other assets of the client or beneficial owners whose activities may pose a risk of ML, TF or PF;

“Establish identity” means a two tier process consisting of ascertainment or collecting of certain identification information, and verification of some of the information against reliable documentation or information;

“Intermediary” means a person or entity who by virtue of their profession act on behalf of third parties in a professional capacity, often in a position of trust. They are often required by legislation to operate a separate account in the form of a trust account to separate their client’s funds from their funds.

“Legal ownership” of an asset means that the legal person or individual (“Person”) claiming legal ownership is regarded to be the legal owner under the (civil) laws of the country in which the Person and/or the asset is located. Under the civil laws of most countries, legal ownership will be assumed for a Person who has “possession” of the asset. “Possession” of the asset means either physical possession or official registration of the asset in the name of a Person. Initially, a legal owner also has full economic ownership of the asset;

“ML/TF/PF” refers to Money Laundering, Terrorist and Proliferation Financing;

“Monitoring” Regulation 1 of the FIA Regulations: “monitoring” for purposes of Section 23, 24 and 25 of the Act includes - (a) the monitoring of transactions and activities carried out by the client to ensure that such transactions and activities are consistent with the knowledge that the accountable institution has of the client, the commercial or personal activities and risk profile of the client; (b) the enhanced monitoring of transactions and activities of identified high risk clients in order to timeously identify suspicious transactions and activities; and (c) the screening of the name of a client or potential client, and the names involved in transactions, against the sanctions lists issued by the United Nations Security Council under Chapter VII of the United Nations Charter; for purposes of combating money laundering, the financing of terrorism and the funding of proliferation activities.

1. Introduction

The Financial Intelligence Centre (FIC) has observed the need to avail guidance on CDD expectations pertaining to Intermediaries operating bank accounts on behalf of their clients.

This Guidance Note is availed to help relevant Accountable Institutions implement measures that will assist in complying with relevant sections of the Act on customer identification.

This Guidance Note is applicable to all Accountable Institutions that are Professional Intermediaries and those which offer banking services. It is issued by the FIC in terms of section 9(h) of the Financial Intelligence Act, 2012 (Act No 13 of 2012) (The FIA).

2. Background

The banking sector needs clarity on the extent to which they should subject Professional Intermediaries, their associates and clients to CDD measures, when such Professional Intermediaries open and manage accounts for their clients.

In practice two scenarios exist:

The first scenario is that Professional Intermediaries often open pool accounts for funds from various clients whose funds form part of the pool. These clients cannot be readily identified by banking institutions. Secondly, Professional Intermediaries also open sub-accounts in the names of various clients and such sub-accounts can be readily identified by banking institutions¹.

In most cases, the Professional Intermediaries are the persons managing such bank accounts in the interest of the professional relationships with their clients. The persons

¹ "Professional trust account" can take the form of: A Pooled Account; Multiple Pooled Accounts; A Single Account for a single client; and Multiple single accounts for multiple clients.

responsible for introducing funds or providing instructions for moving such funds through such bank accounts are the Professional Intermediaries' clients (underlying clients), who may not always have direct interaction with banking institutions. This creates a challenge for banking institutions to identify underlying clients. If not prudently regulated and managed, this could amount to:

- a. **over-regulation** which may lead to excessive control implementation and thus undermine business and commercial practices; or
- b. **inadequate or under-regulation** which may lead to control inadequacies and thus create vulnerabilities which may be used to advance ML/TF/PF.

The objective of this Guidance is thus to encourage practices which enhances relevant prudent practices.

3. Commencement

This Guidance Note shall come into effect on **22 March 2018**.

4. Professional Intermediaries

The Basel Committee on Banking Supervision, after consideration of FATF² expectations in this regard issued Guidance to assist in mitigating risks emanating from such relationships. The FIC agrees with, and recommends the following guidance, as advocated for, by the Basel Committee on Banking Supervision³:

A. ***Single customers, sub-accounts, co-mingling:***

- i. *When a professional intermediary opens a customer account on behalf of a **single customer**, that customer must be identified by the bank;*
- ii. *Professional Intermediaries **open a pooled account on behalf of a number of customers, where funds held by the intermediary are not***

² Refers to the Financial Action Task Force

³ Guidelines Sound management of risks related to money laundering and financing of terrorism, issued in February 2016

co-mingled⁴ but **sub-accounts are established (at banking level)**, that can be attributed to each beneficial owner. All such beneficial owners (underlying clients) of the accounts held by the Professional Intermediary should be identified by the bank;

- iii. **Co-mingling/pooled accounts:** there may be circumstances where the bank may not need to look beyond the Professional Intermediary, i.e when the professional intermediary manages an account or set of accounts in which funds from different clients of the intermediary are pooled or comingled. The underlying principle is that the bank is not in a position to readily identify such underlying clients or subject them to CDD. The Basel Committee equally provides that this should be in cases when such professional intermediary is subject to due diligence standards in respect of its customer base that are equivalent to those applying to the bank itself, such as could be the case for broker-dealers, law firms, asset managers etc.

B. Where an account is opened by a Professional Intermediary⁵ for a company, fund, unit trust or partnership etc, the following should be considered as key Principals⁶ and the bank should take steps to identify:

- ✓ the fund/unit trust itself;
- ✓ its directors or any controlling board where it is a company;
- ✓ its trustee where it is a unit trust;
- ✓ its managing (general) partner where it is a limited partnership;
- ✓ account signatories; and
- ✓ any other person who has control over the relationship e.g. fund administrator or manager.

⁴ Co-mingling refers to mingling funds from different clients into one account or several accounts (pool account) and the banks do not necessarily “know” these clients paying money into such accounts.

⁵ Which is also subject to the same due diligence standards in respect of its client base as the bank

⁶ Principals to be identified should be considered to be those persons exercising control or significant influence over the organisation's assets. This will often include board members plus executives and account signatories.

Where other investment vehicles are involved, the same steps should be taken as in paragraph B where it is appropriate to do so. In addition, in cases when no equivalent due diligence standards apply to the investment vehicle, all reasonable steps should be taken to verify the identity of the beneficial owners of the funds and of those who have control of the funds.

- C. Professional Intermediaries should be treated as individual customers of the bank and the standing of the intermediary should be separately verified by obtaining the appropriate information including their beneficial ownership, as prescribed in the FIA and accompanying Regulations, Circulars, Directives and any other relevant guidance.

5. Exemption Order – 2009

If a Professional Intermediary (e.g asset manager, lawyer and estate agent) is holding a professional trust account with a bank, the bank is exempted from identifying the underlying client in terms of item 2.6 of the Exemption Order published by Government Notice 75 of 2009⁷. Item 2.6 is reproduced below for ease of reference:

“2.6 For the purpose of regulation 3 of the Regulations, if a person or entity, which is an Accountable Institution, opens or operates a professional trust account at another Accountable Institution, the latter accountable institution is exempt from complying with the provisions of sections 13, 14 and 15 of the Act in respect of the clients of such person or entity, subject to the condition that the latter Accountable Institution has reasonable grounds to believe that the account is to be used solely for the purposes of such clients.”

The above cited Exemption Order was saved in terms of section 73 of the FIA and remains in force until repealed. The exemption was granted on the grounds that professional intermediaries (asset managers/lawyers/estate agents etc.) are Accountable Institutions who have the duty in terms of the FIA and regulations issued thereunder to

⁷ Government Gazette No 4253 of 5 May 2009

identify their clients. The exemption was also granted on the notion that implementation of risk mitigating measures begins with professional intermediaries in this regard.

Notwithstanding the exemption order, the banking institutions when effectively applying the risk based approach, may identify the underlying client who is a PEP/or any other category of high risk clients. This is premised on the ground that PEPs and other categories of high risk clients pose high risks of ML/TF/PF. Therefore, banking institutions must adopt the risk based approach as it leads to the evaluation of each scenario's circumstances in order to device the most effective risk mitigating measure.

6. Ultimate responsibility

Regulation 5(10) importantly cautions that despite any allowances that may have been granted in respect of this sub-regulation or in the general process of establishing the identity of a client, the ultimate responsibility for client identification and verification remains with the accountable or reporting institution that chooses to rely on the client identification and verification of another accountable or reporting institution or a third party accountable or reporting institution.

Banking institutions may accordingly rely on the Professional Intermediary to provide the bank with the underlying client CDD information and documents. However, the bank remains ultimately responsible where it chooses to do so.

7. Conclusion

In summary, unless circumstances otherwise dictate, the Guidance herein provides that for:

- a. **pooled accounts** (funds which are co-mingled) = there is no expectation on the bank to subject underlying clients of the Professional Intermediary to CDD measures;

- b. **single/sub-accounts** (funds which are not co-mingled) = the bank to subject the Professional Intermediary's underlying client(s) to the necessary CDD measures; and
- c. **Ultimate responsibility** = the ultimate responsibility for client identification and verification remains with the accountable or reporting institution that chooses to rely on the client identification and verification of another accountable or reporting institution.

8. Comments

The contents of this Guidance Note shall be reviewed from time to time. Accountable Institutions will be notified of any aspect that may necessitate revoking or amending any guidance set out in this Guidance Note. If you have any comments or suggestions to help improve this Guidance Note, please send your comments to the mailing address provided below.

9. HOW TO CONTACT THE FIC

All Correspondence and enquiries must be directed to:

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