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The Third Money Laundering Directive: Implementation in the Netherlands

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As of Friday August 1, 2008, the Third Money Laundering Directive 2005/60/EEC has been implemented in the Netherlands.

To implement the Third Money Laundering Directive, the Act on the Prevention of Money Laundering and Terrorist Financing (*Wet ter voorkoming van witwassen en financieren van terrorisme* (Wwft)) entered into force. The entering into force of the Wwft has resulted in changes to the rules regarding customer due diligence.
The Third Money Laundering Directive envisions providing a framework that is more "risk based" than "principle based". This means that an institution is required to attain the object of the law, namely, the combating of money laundering and the prevention of financing of terrorism, but they are allowed a certain amount of discretion as to the manner in which they structure their policy in order to achieve the envisioned result. Institutions may adjust the degree of the investigation according to the type of client, relationship or transaction.
The entering into force of the Wwft provides institutions with greater opportunities to harmonise their identification policy on the concrete risks of getting involved in money laundering and the financing of terrorism within the institutions.

Scope of the Wwft

The scope of the Wwft is restricted to "institutions". Institutions which fall within the scope of the Wwft include: certain credit institutions, financial institutions, life insurance companies, investment firms, investment institutions, financial service providers, money market institutions, trust offices, certain external accountants and tax advisors, certain natural persons such as lawyers and notaries, casinos, companies which distribute credit cards and certain natural or legal persons trading in goods, to the extent that payments are made in cash in an amount of €15,000 or more.
The main rule of the Wwft is that institutions conduct client investigations whereby the following is of importance:

- the identity of clients must be established and verified;
- under certain circumstances the ultimate beneficial owner must be identified and sufficient measures must be taken to verify the identity;
- if it concerns a legal entity, foundation or trust, measures must be taken to gain insight into the ownership and control structure of the client;
- information must be obtained such as to determine the object and the nature of the business relationship; and

- if possible the business relationship and the transactions must be subject to ongoing monitoring.

Institutions must in principle conduct client investigations in the following cases:

- if the client enters into a business relationship in or from the Netherlands;
- if the institution effects a transaction of €15,000 or more for a client;
- if there are indications that the client is involved in money laundering or financing of terrorism;
- if the institution has doubts as to the reliability of data previously received; and
- if there is a risk of money laundering or financing of terrorism that gives reason to conduct a client investigation.

The identity of natural persons must be established on the basis of documents, data or information obtained from a reliable and independent source, such as a passport or a Dutch driver's license.
If the client is a legal entity which is established in the Netherlands, the identity is established on the basis of a(n) (non-certified) excerpt from the trade register of the Chamber of Commerce or by means of a deed executed by a civil law notary.
If it concerns a foreign legal entity, the identity can be established on the basis of reliable, documents, data or information which are standard in international business practice or on the basis of documents data or information which are acknowledged by law as a valid means of identification in the country of origin.
Under Dutch law there is a new provision that institutions must identify the ultimate beneficial owner in order to prevent a person who is engaged in criminal activities from being able to hide behind one or more legal entities. The explanatory memorandum clarifies that the ultimate beneficial owner should only be determined in situations where there is a high risk of money laundering or financing of terrorism. However, when this is the case is not further elaborated on. It is up to the institution to decide when a case may be considered a high risk.
The ultimate beneficial owner is defined as the natural person who is the ultimate owner of, or who has control over, the client and/or the natural person for whose account a transaction is effected or activity is performed.
The legislator has explained this in such a way that the identity of the ultimate beneficial owner must be established as being a natural person who owns 25 per cent or more of the shares or voting rights or who exercises substantial control over the enterprise in another manner. In the case of, for example, a foundation or a trust, the ultimate beneficial owner is the beneficiary of 25 per cent or more of the equity of the foundation or trust or the one who has special control over 25 per cent or more of the equity.
In the case of a foundation or a trust, sufficient measures must be taken in order to obtain insight into the ownership and control structure.
It is forbidden to enter into a relationship or to effect a transaction if the above described client investigation has not been conducted or if this investigation has not led to the intended result. If the institution entered into the business relationship, the relationship should be ended.

Simplified identification procedure

A simplified identification procedure may be applied with respect to certain clients. If the simplified procedure can be applied, this means that identification of the client does not have to take place. However, sufficient data must be collected in order to establish whether the simplified procedure can be applied. In many cases, even when the simplified procedure is applied, it would seem necessary, for example, to request an extract from the trade register of the Chamber of Commerce or to inspect the public register of the Netherlands Authority for the Financial Markets or the Dutch Central Bank. Thus, it can first be established whether this is an institution to which this procedure is applicable.
Institutions may, amongst others, apply a simplified identification procedure if, for example, the client falls under one of the following categories within the meaning of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*):

- credit institutions;
- financial institutions;
- money transaction offices;
- life insurance companies;
- investment firms; and
- investment institutions.

Further, the simplified identification procedure may be applied if the client is:

- a financial service provider insofar as it acts as intermediary in insurances as referred to in the Dutch Financial Supervision Act;
- a listed company of which the securities are admitted for trading on a regulated market in one or more Member States;
- a government authority in so far as it concerns a government institution which satisfies the following four conditions:

  - the authority is charged with a public function by virtue of the Treaty on European Union, the European Communities or a derivative version thereof;

- the authority is due to render account to authorities of the Member State or to a Community authority or with respect to which other appropriate procedures exist for the purpose of examining the activities;
- the identity of the authority is accessible to the public, transparent and unequivocal; and
- the activities and accounting practices of the authority must be transparent.

If a client does not fall under one of the categories to which the simplified procedure is applicable, under certain circumstances the simplified procedure may be applied if the client is considered a client with a low risk, such as Community institutions. Before a simplified identification procedure can be applied, investigation must be conducted into whether the client, the products or transactions could be accompanied by a risk of money laundering or terrorism.

Further, there is an exemption to the main rule that institutions must conduct client identification. For example, the main rule does not apply in respect of certain relationships or transactions concerning life insurance policies, certain products in respect of pensions and under certain circumstances electronic money within the meaning of the Dutch Financial Supervision Act. To use these exemptions, sufficient data should be collected to establish whether or not it concerns a product to which the exemption applies.

Enhanced customer due diligence

In situations which by their nature hold a greater risk of money laundering and/or financing of terrorism, enhanced customer due diligence must be conducted. If a client does not appear in person, the enhanced customer due diligence must establish the identity of the client by means of supplementary documentation, data or information. An alternative is that the documents that have been presented must be assessed as to authenticity or that the first payment that bears connection with the relationship or transaction is made in favour of or charged to an account of the client with a bank with its seat in a Member State or in a State which has been indicated by the Minister of Finance and which is disposed of a license to operate its business in that Member State or State.

Politically exposed persons

A new provision under Dutch law is that special attention must be devoted to politically exposed persons, or otherwise natural persons who hold or have held prominent public positions, and this particularly to those people who originate from countries known for corruption. An institution must have a risk-based policy in order to determine whether the client is a politically exposed person. This concerns solely persons who are not resident in the Netherlands. Politically exposed persons are persons who fulfil political functions at national level and functions equivalent thereto. Here, consider government leaders, members of parliament, people employed by a Chamber of Audit, members of Supreme Courts and senior army officers. Persons who have held a politically prominent position continue to be deemed a politically prominent person for one year after termination of the relevant function. Direct family members or other near relatives must also be deemed politically exposed persons. It is not the intention that an institution conducts intensive investigation into the family members of politically prominent persons. It only concerns family members of persons who are publicly known.

If it has been established that an institution is dealing with a politically exposed person, the institution must have internal permission to enter into the relationship from designated persons. Once such a relationship has been entered into, sufficient measures must be taken in order to establish the source of the equity. Monitoring of the relationship throughout the course of the entire period that services are provided must also be tightened up.

NEWS DESK

UNITED KINGDOM

FSA to consult on changes to Disclosure and Transparency Rules

The Financial Services Authority (FSA) announced on July 21, 2008 that it would consult on a proposal that financial institutions in receipt of liquidity support from a central bank will have a legitimate interest for delaying the public disclosure of such support.

The proposal is the next update on this issue, following the joint Bank of England, Treasury and FSA (Tripartite Authorities) consultation document *Financial stability and depositor protection: strengthening the framework* (available at *http://www.fsa.gov.uk/pubs/cp/JointCP_banking_stability.pdf* [Accessed September 11, 2008]) published in January 2008 and the consultation paper, *Strengthening financial stability and depositor protection* (available at *http://www.fsa.gov.uk/pubs/cp/jointcp_stability.pdf* [Accessed September 11, 2008]) published on July 1, 2008. The details of the proposal are contained within the FSA's CP08/13 Consultation Paper published today.