

AML/CFT

Anti-money laundering and countering financing of terrorism

Updated July 2019

Clarification of the position the AML/CFT supervisors are taking with respect of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (“the Act”) interpretation of a trust as a customer.

The following is a response made by the AML/CFT supervisors to a query questioning whether a trust can be a customer for the Act's purposes. This clarification is supplemental to the Trusts Fact Sheet:

The AML/CFT supervisors are fully aware that a trust would not usually have a legal personality. However, the interpretation of the Act has been given careful thought by the AML/CFT supervisors in conjunction with the Ministry of Justice. In particular, the Ministry of Justice has confirmed that language which refers to a “customer that is a trust” was intentionally included in the legislation

We understand that the interpretation that a trust can be a customer is, to some extent, inconsistent with the definition of a ‘customer’ in section 5 of the Act, which implies that the customer is usually the entity in whose name a facility is established, but on balance we have taken the view that the repeated references to trusts as customers must mean that the legislation envisages trusts being capable of being customers.

The Ministry of Justice and the AML/CFT supervisors agree that it is necessary to consider the purpose of the Act when interpreting its provisions. Section 3 of the Act states that one of the purposes of the Act is to adopt, where appropriate in the New Zealand context, ‘recommendations issued by the Financial Action Task Force’ (‘FATF’). These recommendations are available on the FATF website and envisage customer due diligence being conducted on ‘legal arrangements’ that are not ‘legal persons’. The New Zealand legislation can therefore be seen to be adopting the FATF recommendation that customer due diligence should be completed on a trust itself and not just on the trustees.

Further weight is added to this interpretation if you consider the information that would need be collected by a financial institution based on this interpretation:

Trustees:

If the trustees were the ‘customer’, then customer due diligence (‘CDD’) would need to be completed on them and on any individual that either owned more than 25% of a trustee; or had effective control over a trustee. If the trust itself is the customer, then the trustees would be beneficial owners. Therefore, CDD would still need to be completed on the trustees, but CDD would only need to be completed up the ownership/control chain above the trustees to the extent that there is any individual that meets the ownership/control requirements *over the trust*. This is therefore less

onerous for your clients and more focused on minimising AML/CFT risk by focusing CDD on the source and control of trust funds. The Ministry of Justice and the

AML/CFT supervisors believe that the clear purpose of the Act is to identify who has control or ownership of the *trust*, not who has control or ownership of the *trustees*.

Beneficiaries:

If the trustees were the customer, then the beneficiaries of the trust could still be beneficial owners, as they may be the people on whose behalf a transaction is conducted (see the Beneficial Ownership Guideline dated December 2012). If the trust is the customer, then it is easier for your clients to understand exactly which trust beneficiaries they need to complete CDD on: Beneficiaries of the trust that have effective control over the trust will be 'beneficial owners'. Also, beneficiaries of the trust that have a vested interest of more than 25% in the trust property will be 'beneficial owners'. This is consistent with the purpose of the Act, as the focus is on the people who will stand to gain from the funds. Where a beneficiary of the trust is a beneficial owner, then full CDD will have to be completed on such person. If a beneficiary of a trust is not a beneficial owner, then section 23(2) of the Act will determine the level of information required about such beneficiaries.

For the avoidance of doubt, please note that section 23(2)(b) of the Act only limits the obligation imposed by section 23(2)(a). If a trust beneficiary is a 'beneficial owner' then the financial institution is required to complete CDD on that person even if section 23(2)(b) of the Act applies.

The purpose of the Trusts Fact Sheet is to provide a clear bullet point list of information that we would expect any financial institution to obtain and verify when dealing with a trust. We strongly encourage you to advise your clients obtain at least the information set out in the Fact Sheet.

Version History

June 2013	Original version
December 2017	Update
July 2019	Removal of "at least 25%" and inclusion of "more than 25%" in Beneficiaries paragraph to clarify beneficial ownership threshold. Updated reference to section 23(2) of the AML/CFT Act in place of Regulation 6 of the AML/CFT (Requirements and Compliance) regulations 2011.

