YPOG Briefing:
German Federal Financial Supervisory Authority updates its Interpretation and Application Guidance on the Money Laundering Act ("GwG") – Key Points for Fund Managers

Hamburg, January 9, 2025 | Lennart Lorenz, LL.M., Stefanie Nagel

On November 29, 2024, the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "**BaFin**") published a new version of the general part of its Interpretation and Application Guidance on the German Money Laundering Act ("**AuA 3.0**" – German Version). The last revision of the AuA dates back to October 2021. Since then, the nation has not only been overrun by a pandemic and a wave of AML-special audits. The European Union's four-part legislative package aimed at harmonizing and strengthening the fight against money laundering and terrorist financing has also been adopted. In addition to the establishment of an EU-wide Authority for Anti-Money Laundering and Countering the Financing of Terrorism (short: "**AMLA**"), which is due to commence its activities in Frankfurt am Main, Germany, this year, the European AML package also includes a revised version of the Transfer of Funds Regulation[1], the new 6th Anti-Money Laundering Directive[2] and – for the first time – a regulation on combating money laundering and terrorist financing ("**AML-Regulation**")[3]. The latter is particularly exciting in that it will be directly applicable to (most) obliged entities from July 2027 and will therefore largely replace the current Money Laundering Act (*Geldwäschegesetz*, "**GwG**"). Obliged entities are therefore well advised to prepare for the upcoming changes in good time. However, according to BaFin, the AuA 3.0 now published are expressly not intended to anticipate the regulations that will apply in the future.

This briefing provides a brief overview of the most relevant changes of AuA 3.0 for registered and authorized fund managers[4], which are to be applied from **February 1, 2025**. For ease of reference, the structure of this briefing is based on the structure of AuA 3.0.

1 Regulation (EU) 2023/1113, which is likely to be irrelevant for most readers of this briefing and has therefore been left out of consideration.
2 Regulation (EU) 2024/1640.
3 Regulation (EU) 2024/1624.
4 This refers to asset management companies within the meaning of Section 17 (1) of the German Investment Code (*Kapitalanlagegesetzbuch*, "KAGB"), which are obligated parties under anti-money laundering law pursuant to Section 2 (1) no. 9 GwG.

Risk Analysis (Section 5 GwG)

The central element of anti-money laundering risk management is and remains the risk analysis. Its 5-stage structure also remains unchanged. However, as is so often the case, the devil lies in the detail and requires obligated parties to make some noticeable changes when preparing the next company's own risk analysis. The most important ones are briefly outlined below.

Risk Identification

One significant change is that from February 2025, a **clear distinction** must be made between the specific **risks** of **money laundering** and those of **terrorist financing**. As terrorist financing funds can also come from legal sources, relevant typologies must be observed, and relevant sources of information must be consulted regularly. In this respect, a comprehensible *ad hoc* analysis of current developments should also be carried out in a risk-appropriate manner. So far, only very few fund managers are likely to meet this requirement.

There has always been a wide range of information sources to be used to determine the individual, relevant risk factors. The AuA 3.0 now provide a good selection of these themselves, naturally with the disclaimer that this is by no means an exhaustive list. In addition, existing or yet to be acquired knowledge within the company (e.g. adverse media screening), the evaluation of suspected cases, the exchange of experience with other money laundering officers, etc. can also provide information on possible risk factors.

The requirements profile of BaFin in terms of the scope of risk identification is very high and should not be underestimated.

Risk Assessment

An important part of the risk assessment is (still) the analysis of the **residual risk** (taking into account already implemented security measures). It is not necessary to reduce the risk to zero. Rather, it is crucial that obligated parties are aware of the remaining residual risk and address it appropriately.

In contrast to the consultation version of the AuA, which still foresaw an obligation, it is now at the discretion of the responsible member of management (Section 4 (3) sentence 1 GwG) whether or not they wish to make the handling of the remaining residual risk the subject of a management resolution.

Documentation Obligation

In order to facilitate the traceability of the risk analysis, obligated parties must now also present the **methodology** used in each case. Any (*ad hoc*) changes to the risk analysis must be documented and approved by the responsible member of management **immediately** after completion. Depending on the scope of the risk analysis, BaFin also recommends the preparation of a **Management Summary** summarizing the main contents and changes to the risk analysis.

Internal Security Measures and their Outsourcing (Sections 6 and 7 GwG)

The comments on internal security measures have also been revised, although in many places these are merely editorial in nature. The most interesting substantive changes are briefly outlined below.

The Function of the Money Laundering Officer (MLO)

The specific tasks, responsibilities and powers of the MLO and its deputy must be defined in writing by the obligated parties. Unless explicit reference is made to deviations, the same requirements apply both to the MLO and its deputy.

By law, the MLO must carry out its activities **domestically**. The AuA 3.0 now stipulate that a deputy residing abroad is permitted, provided that the activity is carried out in Germany in the event of representation. As a rule, either the MLO or its deputy must at least have a command of the **German language**.

The requirements for avoiding conflicts of interest have also been tightened to a certain extent. For example, the MLO may not, in principle, act as an outsourcing officer for the outsourcing of the data protection officer or internal audit.

The obligation to carry out certain monitoring activities is probably not new to most money laundering officers. According to AuA 3.0, the object/objective, scope, responsibilities and due dates/frequencies of the individual monitoring activities must be set out in writing, for example in a control plan. The implementation and results of the monitoring activities and any need for action must be documented in a comprehensible manner.

Outsourcing of Internal Security Measures

Despite the explicit declaration by BaFin not to preempt the AML-Regulation, it does so in the context of the outsourcing requirements: Article 18 (6) of the AML-Regulation prohibits outsourcing to third parties domiciled in a high-risk country. This prohibition can now also be found in the AuA 3.0 and, contrary to the wording of the regulation, without any exceptions.

For the question of whether the activity performed by a third party is a notifiable outsourcing or merely an external procurement, the AuA 3.0 wording refers to the provisions of Section 10 of BaFin Circular 01/2017 (WA), which is generally only applicable to authorized fund managers. The decision and its reasons must be documented.

If obliged entities use multi-client service providers, for example for the function of the MLO and/or its deputy, they must ensure from now on that such service providers have adequate resources available to fulfill their duties.

Whistleblowing

Fund managers are obliged to set up an internal reporting office under both the GwG and the German Whistleblower Protection Act (*Hinweisgeberschutzgesetz*, "**HinSchG**"). Fortunately, BaFin not only clarifies in the AuA 3.0 that the establishment of only one reporting channel is sufficient for both legal regimes, but also that Sections 8 to 10 and 13 to 18 of the HinSchG apply to the whistleblower channel to be established under the GwG.

Anti-Money Laundering Due Diligence Obligations (Sections 10 et seqq. GwG)

A mixture of editorial, clarifying and substantive amendments[5] can also be found in customer due diligence obligations.

More Frequent Update Cycles

The documents, data or information used by the obligated parties to fulfill their customer due diligence obligations must be updated periodically and, if required, *ad hoc*. BaFin has drastically shortened the cycles for the periodic updating obligation:

- For customers to whom **simplified due diligence obligations** apply (Section 14 GwG), the update must be **risk-appropriate until further notice**. Developments at national and European level are important for risk appropriateness. BaFin has deliberately left the updating cycle for the simplified due diligence obligations open – according to its own statements due to uncertainties in the interpretation of the corresponding provisions of the AML-Regulation. BaFin therefore explicitly reserves the right to make changes in the future. The previous version of the AuA provided for an updating obligation after 15 years at the latest.
- For customers subject to **enhanced due diligence obligations** (Section 15 GwG), the interval between updates of customer information must not exceed **one year**. Previously, updates in this risk group had to be carried out after two years at the latest.
- For customers subject to **general due diligence obligations**, the AuA 3.0 provides for an update within a period not exceeding **five years**. Previously, the update had to take place every ten years at the latest.

IMPORTANT: Even though the AuA 3.0 will generally apply from February 1, 2025, the new update periods only have to be implemented by the obliged entities when the new AML-Regulation comes into force, i.e. from July 10, 2027.

No Recording of "All" Fictitious Beneficial Owners

The GwG stipulates that the so-called fictitious beneficial owner must be recorded in certain constellations. If several persons fulfill this requirement, it was generally sufficient to record only one person. The consultation version of the AuA 3.0 published in the summer provided for all fictitious beneficial owner to be recorded instead. Fortunately, however, this was not included in the final AuA 3.0. The previous practice will therefore **continue unchanged**, so that the recording of one fictitious beneficial owner is generally sufficient.

Notes on Lists of Politically Exposed Persons (PeP)

BaFin's reference to the PeP list published by the European Commission, which can be accessed on its website, is also of clarifying nature. Persons who hold the public offices listed therein are considered politically exposed persons. However, it would be too easy for normal legal practitioners to rely solely on the long-awaited list. BaFin therefore explicitly clarifies that the publication of this list is not intended to restrict the scope of application of Section 1 (12) no. 1 GwG, which defines the term "politically exposed person". In plain language, this means that

[5] For example, the clarifying note was added that the person acting on behalf of the contractual partner/customer can only be a natural person.

positions that are not on the list can also make their holder a politically exposed person. It is therefore not possible to rely on the list alone. It merely provides a good starting point.

Most obliged entities are likely to use corresponding databases for PeP and sanctions list screening anyway. In principle, this also indicates the appropriate fulfillment of the corresponding obligations under anti-money laundering law. However, the indicative effect does not apply if there are concerns regarding the data quality or functionality of the database used. In addition, obliged entities must always ensure that the comparison against PeP lists is carried out using the current lists provided by the service provider.

Obtaining Transparency Register Extracts

If the contractual partner to be identified is not a natural person, Section 12 (3) sentence 2 GwG generally requires an excerpt from the Transparency Register to be obtained. Alternatively, proof of registration can also be obtained. It was rumored that this meant the notification of receipt issued as part of the registration with the Transparency Register. BaFin has now rejected this view and at the same time clarified that there is no scope of application for this alternative - at least in Germany.

Suspicious Activity Reports (Sections 43 et seqq. GwG)

Even if the number of suspicious activity reports submitted to date by most fund managers is likely limited, this is a key component in the fight against money laundering and terrorist financing.

Consideration of Publications

BaFin has therefore included a detailed reference to the technical information provided in the internal section of the Financial Intelligence Unit ("**FIU**") right at the beginning of the relevant section in the AuA 3.0. Special mention is made here of the key point papers on the determination of circumstances that do not trigger a reporting obligation as well as the joint guidance notes of BaFin and FIU on the terms "promptness" (*Unverzüglichkeit*) and "completeness" (*Vollständigkeit*) of a suspicious activity report pursuant to Section 43 GwG.

General Clarifications

Clarifications include the fact that the submission of a discrepancy report in accordance with Section 23a (1) GwG does not automatically trigger the submission of a suspicious activity report and that the submission of a suspicious activity report in accordance with Section 43 (1) GwG does not automatically result in the termination of the business relationship.

Updates for Feedback Concepts

Whether obliged entities have to apply enhanced due diligence obligations to a customer after submitting a suspicious activity report now depends on the reason for the suspicious activity report:

- Reports on suspicion of terrorist financing: In this case, enhanced due diligence obligations must be applied for at least 6 months, irrespective of any feedback from FIU.
- Other suspicious activity reports: If the obliged entity receives feedback from the FIU within 21 calendar days that its report has been identified for further analysis, enhanced due diligence obligations must also be applied; outside this period, only in the event of further suspicious activity.

Summary

The revised AuA 3.0 pose significant challenges for companies subject to BaFin supervision. Fund managers should carefully analyze the extent to which they need to revise their internal measures to prevent money laundering and terrorist financing.

While most of the changes are of editorial nature or reflect existing administrative practice and therefore do not require any immediate action, certain new accentuations entail important adjustments. These could make it necessary to revise the internal organization and processes.

It is therefore recommended that fund managers familiarize with the new AuA 3.0 to recognize the specific need for action and implement it in good time.

In addition, it is essential to continuously develop compliance structures to meet the constantly growing regulatory requirements in the prevention of money laundering and terrorist financing. This area will continue to develop dynamically in the coming years.

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