Administrative Measure Publication Notice

This Notice is being published by the Financial Intelligence Analysis Unit (FIAU) in terms of Article 13C of the Prevention of Money Laundering Act (PMLA) and in accordance with the policies and procedures on the publication of AML/CFT penalties and measures established by the Board of Governors of the FIAU.

This Notice provides select information from the FIAU's decision imposing the respective administrative measures and is not a reproduction of the actual decision.

DATE OF IMPOSITION OF THE ADMINISTRATIVE MEASURE:

7 December 2022

SUBJECT PERSON:

Triton Capital Markets Limited (previously FXDD Malta Limited)

RELEVANT ACTIVITY CARRIED OUT:

Investment Services

SUPERVISORY ACTION:

Onsite Compliance Review carried out in 2019.

DETAILS OF THE ADMINISTRATIVE MEASURE IMPOSED:

Administrative Penalty of €226,902 and a Follow-Up Directive in terms of Regulation 21 of the Prevention of Money Laundering and Funding of Terrorism Regulations (PMLFTR).

LEGAL PROVISIONS BREACHED:

- Regulation 5 of the PMLFTR
- Regulation 5 of the PMLFTR
- Regulations 7(1)(a) and 7(1)(b) of the PMLFTR and Section 3.1.1.2[1] of the Implementing Procedures (IPs) applicable at the time of the review
- Section 3.1.1.2(ii)(a)[2] of the IPs applicable at the time of the review
- Regulation 7(5) of the PMLFTR and Section 3.2.1[3] of the IPs applicable at the time of the review
- Regulation 11(1)(b) of the PMLFTR
- Regulation 7(1)(c) of the PMLFTR
- Section 3.5.3.1[4] of the IPs applicable at the time of the review
- Regulations 7(2)(a) and 7(2)(b) of the PMLFTR

[1] Currently Section 4.3.1 of the Revised IPs, issued on 18 October 2021

[2] Currently Section 4.3.1.2 of the Revised IPs, issued on 18 October 2021

[3] Currently Section 4.6.1 of the Revised IPs, issued on 18 October 2021

[4] Currently Section 4.9.2.2 of the Revised IPs, issued on 18 October 2021

REASONS LEADING TO THE IMPOSITION OF THE ADMINISTRATIVE MEASURE:

The Business Risk Assessment (BRA) – Regulation 5 of the PMLFTR:

Prior to the compliance examination, the Company was requested to provide the latest BRA and evidence of its approval, however, this was not provided. The absence of a BRA was further confirmed during the initial interview held, wherein it was explained that the drafting of the BRA was still in its final stages, as the Company had engaged a third party to assist in its formulation. Therefore, at the time of the compliance review the Company had failed to take appropriate steps, proportionate to the nature and size of its business, to assess the risks of ML/FT arising from its operations and to adequately document such assessment. The Committee reiterated that by not having an adequately documented BRA, the Company diminished both its ability to comprehensively identify the threats and vulnerabilities to which it was exposed and to adequately implement the necessary controls to mitigate the risks.

In view of this, the Members of the Committee determined that at the time of the compliance examination the Company's shortcomings with regards to the BRA were serious and systematic, and concluded that the Company was in breach of its obligations as envisaged under Regulation 5(1) of the PMLFTR.

Customer Risk Assessment (CRA) – Regulation 5 of the PMLFTR

It was observed that apart from the risk rating assigned, none of the files reviewed contained a documented CRA. The Company rebutted that the CRAs were conducted at on-boarding and recorded in a spreadsheet which included the risk rating of each customer. However, the Committee stressed that irrespective of having risk ratings assigned to each of its customer files, there was no clear rationale behind such risk ratings. The information necessary to confirm an understanding of risks, including the risk factors that were being taken into consideration, the effectiveness of the control measures implemented, how all this would contribute to the final risk score and how the overall risk rating assigned to the customer was allocated, were not defined.

Further to the above, the Committee noted that the CRA adopted was not rigorous and comprehensive enough to enable the Company to understand the risks posed by customers and to effectively apply the risk-based approach. Therefore, the measures being applied did not include the identification and the assessment of all risks in relation to every business relationship that the Company entered. For example:

- The interface factor is not recorded, since the Company had determined that the interaction with all customers takes place through the same channels, and hence it does not vary at on-boarding. The Committee remarked that while it is true that the same channel of delivery is used, the consideration of the risks posed by this delivery method is still to be considered, to ensure that any control measures necessary are indeed identified and implemented.

- No consideration was given to the product/service risk, given that there is only one service that is provided. To this effect, while comprehending that the product is one, the Committee stressed that the different investment opportunities vary and need to be factored in as a risk consideration.

- While the Company was taking into consideration the jurisdiction of residence, the Committee remarked that it is important to also take into consideration those jurisdictions with which the customer or its beneficial owner have relevant personal links.

- All corporate entities were classified by the Company as high risk due to their customer type classification. While this is not per se a shortcoming from the obligation to carry out a CRA, the Committee emphasised that an effective CRA is one where all the risk criteria are exhaustively considered, and an understanding of risk is obtained.

Consequently, in view of the above shortcomings the Company was found in breach of its obligations in terms of Regulation 5(5)(a)(ii) of the PMLFTR.

Identification and Verification - Regulations 7(1)(a) and 7(1)(b) of the PMLFTR and Section 3.1.1.2 of the IPs applicable at the time of the review

The compliance review revealed that in 20% of the files reviewed, the Company had failed to obtain the necessary identification and verification of natural persons as required. The Committee noted that most of the failures identified related to the identification and verification of the address and that otherwise the customers and BOs were listed. However, there were instances where the residential address verified did not tally with the one provided by the customer at onboarding, and yet the Company did not question this. Similarly, at times the identity information did not match and yet again the Company did not enquire about this discrepancy.

In view of the resulting shortcomings, the Committee considered the Company to have breached Regulations 7(1)(a), 7(1)(b) and 7(3) of the PMLFTR and Section 3.1.1.2 of the IPs applicable at the time of the review.

Certification – Section 3.1.1.2(ii)(a) of the IPs applicable at the time of the review

The Company did not certify Customer Due Diligence (CDD) documentation appropriately and consistently, therefore the Committee was unable to understand if the documentation had been obtained prior to the establishment of the business relationship. For instance, in three (3) files, documentation obtained to verify the identity or residential address of the individuals involved and/or documentation obtained to verify the legal status of the entity, was either not certified or else was certified but not dated.

In its deliberations, the Committee considered all the factors it had at hand and considered that the findings in relation to Certification were only identified in isolated cases. Hence the Committee concluded that for these failures, the Company would be served with a Reprimand.

Timing of Customer Due Diligence (CDD) - Regulation 7(5) of the PMLFTR and Section 3.2.1 of the IPs applicable at the time of the review

Five (5) files reviewed contained CDD documentation that was dated after on-boarding. To address this issue, the Company had developed a 5-year Action Plan. Whilst acknowledging that in view of the volumes involved it was expected for the exercise to take considerable time; the Committee could not overlook the fact that almost five years later, this remediation had not yet been completed.

However, the Committee observed that the shortcomings were only noted in a limited number of cases . Consequently, the Committee determined that the Company had only minor breaches with regards to the obligations in terms of Regulation 7(5) of the PMLFTR and Section 3.2.1 of the IPs applicable at the time of the review. In view of this, the Company was served with a Reprimand.

Enhanced Due Diligence (EDD) - Regulation 11(1)(b) of the PMLFTR

It was brought to light that eight (8) files held no evidence of EDD measures applied, to which the Company replied that its Risk Matrix includes an indicative list of enhanced measures that must be taken for all high-risk corporate entities. The Committee here discussed that although a general reference was made to the circumstances that would require EDD measures, the procedures were generic and noncomprehensive since most of the measures focused on obtaining verification documents or validating the customer's residential address. Therefore, the Company had failed to ensure that the risk management procedures implemented are commensurate to the levels of risks met or that could possibly be encountered. The below are just a few examples noted:

- In one (1) file, only Senior Management Approval was applied and hence, the file did not contain adequate EDD measures to counteract the risks emanating from political connections. As a result, insufficient documentation was collected as to the source of wealth (SoW) and expected source of funds (SoF) to be used in the business relationship. The Committee reiterated that for the purposes of mitigating the higher risk identified, the Company was at least expected to take adequate measures to be satisfied that it does not handle proceeds derived from corruption or other criminal activities which are risks associated with a customer who was a PEP. The latter was more important since during the file review it was noted that the customer had initially intended to open an introducing broker relationship, however, it was then decided that they would trade their own funds. Understanding the provenance of the funds and the PEPs wealth was thus indispensable.

- The Company also failed to conduct adequate mitigating measures to address the risks presented by a hedge fund specialising in algorithmic trading, which type of trading attempts to leverage the speed and computational resources of computers relative to human traders. In its deliberations the Committee observed that the only justification provided by the Company in this regard was that the customer never deposited any funds. The Members here clarified that the Company still had to bear in mind that the purpose will differ between customers and this in turn has a bearing on the risk the customer presents as well as the measures implemented to safeguard its operations. Hence the importance of obtaining the information and/or documentation such as the SoW would have enabled a thorough understanding that the product required, and its purpose are justified.

Consequently, in view of all the resulting shortcomings, the Company was found in breach of its obligations in terms of Regulation 11(1)(b) of the PMLFTR for its failure to carry out the necessary EDD measures that would address the higher ML/FT risk the customer was exposing the Company to.

Information on the Purpose and Intended Nature of the Business Relationship - Regulation 7(1)(c) of the PMLFTR

The Committee observed that the information obtained for 21 client files was insufficient since the Company mainly focussed its resources on obtaining identification and verification details and documentation. Consequently, the Company was not able to build a comprehensive business and risk profile on its customers prior to entering into a business relationship, which profile would subsequently allow the carrying out of effective transaction monitoring. The below are some examples:

- In one (1) file, the Committee observed that the customer stated that he is a self-employed Biologist having an annual income between $25,000-$50,000 from which he will be depositing less than $25,000. Therefore, the Company was aware of the source that would generate the customer's income and the expected income to be earned and that the amounts passing through the accounts made sense in view of such information. Nevertheless, despite being aware of the economic sector in which the customer operated in, further information such as the type of customers being serviced, and their relationship would have been merited.

- The Company had not obtained sufficient information on the customer's occupation in an additional file. Indeed, the Company did not have an understanding as to the expected SOF, as well as how such funds would be sourced. The Company had also failed to obtain information on the customer's SOW. Such information is even more important since there was a great discrepancy between the estimated annual income ($52,000) and the customer's net worth ($900,000). Additionally, the Committee stated that at the onset of the relationship, the Company was expected to have an understanding on the value and volume of the transactions that the customers would be undertaking.

For these reasons, the Committee found the Company to have systemically failed from adhering to Regulation 7(1)(c) of the PMLFTR.

Politically Exposed Persons (PEPs) - Section 3.5.3.1 of the IPs applicable at the time of the review:

The compliance review revealed that in four (4) of the files reviewed, PEP identification measures were not done for all the individuals involved. Moreover, in another file, although the customer was not marked as a PEP on the Company's system, no evidence to confirm this status was found on file at on-boarding nor presented during the visit. In its defence, the Company put forward the fact that when the old retail customers were transferred from the entity in the United States, they were run through the compliance database which screens customers for PEPs, sanctions, and adverse media. However, the Company was not able to provide evidence to confirm that searches on the PEP status of customers and BOs were indeed carried out.

Consequently, it was decided that the potential breach in terms of Section 3.5.3.1 of the IPs would be confirmed by the Committee. However, the Committee concluded that the shortcoming was only identified in four of the files reviewed, and hence did not merit the imposition of an administrative penalty. Therefore, the Company was served with a Reprimand.

On-Going Monitoring – Regulations 7(2)(a) and 7(2)(b) of the PMLFTR:

When it comes to maintaining information and documentation valid and up to date, it was evident from the file review, that the Company did not always implement this requirement in practice. In fact, it was noted that in nine (9) files where documentation used to verify the identity details of the relevant parties had expired, it had not been updated. Concerns were heightened given that for 8 files, it was stated that these had been on-boarded under a less stringent regulatory regime than that currently in force in Malta.

The Committee reiterated that when the transfer of clients took place, the Company was to ensure that CDD measures were undertaken on a risk-sensitive basis as soon as reasonably practicable, ensuring that in the interim period any ML/FT risks are appropriately mitigated. However, in this respect, the Members remarked that this cannot be extended to ongoing monitoring. Moreover, the Committee, whilst noting

that the Company worked on a 5-year action plan to remediate any previous findings, it could not overlook the fact that almost five years later, such remediation had not yet been completed.

Following due consideration of the above-mentioned findings, the Committee determined that the Company, does not have sufficiently robust measures to ensure that the documents, data, or information held are kept up to date. In conclusion therefore and after considering all findings pertaining to on-going monitoring, the Committee concluded that the Company breached Regulations 7(2)(a) and 7(2)(b) of the PMLFTR.

ADMINISTRATIVE MEASURES TAKEN BY THE FIAU'S COMPLIANCE MONITORING COMMITTEE (CMC):

After taking into consideration the abovementioned breaches by the Company, the Committee decided to impose an administrative penalty of two hundred twenty-six thousand, nine hundred and two Euro (€226,902) with regards to the breaches identified in relation to:

- Regulation 5 of the PMLFTR
- Regulation 5 of the PMLFTR
- Regulations 7(1)(a) and 7(1)(b) of the PMLFTR and Section 3.1.1.2 of the IPs applicable at the time of the review
- Regulation 11(1)(b) of the PMLFTR
- Regulation 7(1)(c) of the PMLFTR
- Regulation 7(2)(b) of the PMLFTR

The Committee also imposed a Reprimand for the Company's breaches of:

- Section 3.1.3.3 of the IPs applicable at the time of the review
- Regulation 7(5) of the PMLFTR and Section 3.2.1 of the IPs applicable at the time of the review
- Sections 3.5.3.1 and 3.5.3.2 of the IPs applicable at the time of the review

When deciding on the administrative measures to impose and on the amount of any administrative penalty, the Committee must ascertain that these are effective, dissuasive, and proportionate to the seriousness of the failures identified. In doing so, the Committee took into consideration the importance of the obligations that the Company breached, together with the seriousness of the findings identified and their material impact. The Committee also considered whether the breaches identified could have led to the unintentional facilitation of ML/FT. It also considered the impact that the Company's failures may have had on both its operations, as well as on the local jurisdiction, the size of the Subject Person, as well as the fact that the Subject Person's officials were overall cooperative during the compliance examination.

In addition to the above, in terms of its powers under Regulation 21(4)(c) of the PMLFTR, the FIAU served the Company with a Follow-up Directive. The aim of the Follow-up Directive is for the FIAU to ensure that the Company enhances its AML/CFT safeguards and that it becomes fully compliant with the obligations imposed in terms of the PMLFTR and the FIAU's IPs, as well as perform any required follow-up measures in relation to the Company's adherence to its AML/CFT legal obligations.

In virtue of this Directive, the Company is required to make available an Action Plan indicating the remedial actions that it has carried out and implemented since the compliance examination, together with remedial actions which are expected to be carried out to ensure compliance following the identified breaches, this including but not limited to:

- An updated BRA, including the process that has been followed to carry out the Company's risk assessment, as well as for the assessment of the effectiveness of the controls implemented.

- An updated and documented CRA measure in accordance with Regulation 5(5)(a)(ii) of the PMLFTR which is based on customer risk, product/service risk, delivery/interface risk and geographical risk. The Company shall also provide documented CRA procedures which include an explanation of the updated CRA methodology, that is, how each risk factor is assessed and scored, and an explanation of how the final risk rating is obtained.

- Moreover, the Company is expected to carry out a review of all its active clients to make sure that the risk assessments maintained by the Company are accurate, adequate and in accordance with the updated CRA methodology of the Company.

- To ensure that all the required information to identify and verify the applicants for business, principals, and agents, as well as the beneficial owners (where applicable) is obtained.

- The updating of the Company's procedures for EDD to ensure that:
    - The necessary documentary evidence is obtained to mitigate the risks identified. Therefore, the information obtained from customers should include documentary evidence to corroborate the information provided.
    - The inclusion of the documentation necessary to be obtained in such circumstances in the Company's procedures manual.
    - The reference to the taking of actions in circumstances where the customer would not be collaborative in making available all the necessary information and documentation.

- To update its measures so that generic understanding of employment is not the only information obtained but that this is substantiated with the detail necessary to be able to create an understanding of the expected source that will fund the customer's activity. Moreover, the Company is to carry out a review of its active customer files and update these in accordance with the information and documentation necessary to form a comprehensive customer profile and to ensure that the information on the purpose and intended nature of the business relationship of all its customers.

- A detailed timeline explaining the different phases of the Company's plan to update the expired customer file reviews and the implementation of measures to ensure that the Company avoids situations of being overdue in the review of customer relationships in the future

Finally, the Company has also been duly informed that if it fails to provide the above-mentioned action plan and supporting documentation available within the specified deadline, the Company's default will be communicated to the Committee for its eventual actions, including the possibility of the imposition of an administrative penalty in terms of the FIAU's powers under Regulation 21 of the PMLFTR.

The administrative penalty hereby imposed is not yet final and may be appealed before the Court of Appeal (Inferior Jurisdiction) within the period as prescribed by the applicable law. It shall become final upon the lapse of the appeal period or upon final determination by the Court.

Key Take aways:

- Subject persons need to assess the risks that they are exposed to because of the business relationships they engage in. This needs to be done by assessing the inherent risk which depends on the identification of the existent threats and vulnerabilities as specified by Regulation 5(1) of the PMLFTR. This can be done by considering "risk factors including those relating to customers, countries or geographical areas, products, services, transactions and delivery channels".

- It is of utmost importance that any decisions relative to the CRA and changes to it are duly documented to evidence that an appropriate assessment has taken place. Retaining documentation both to confirm when the assessment was done, as well as the considerations taken to arrive at the final risk score are indispensable. This, not only to satisfy the legal obligations but also to be able to effectively utilise such information to understand the customer as well as to be able to monitor the same and request updates as necessary.

- Subject Persons should keep in mind that the CRA is one of the pillars of a sound AML/CFT compliance program, a measure which is necessary both to determine the level of due diligence required to build comprehensive customer profiles, as well as to ascertain the degree of on-going monitoring necessary. Therefore, the CRA is one where all the risk criteria are exhaustively considered, and an understanding of risk is obtained. The rationale which led the customer to be rated in a particular manner is to be clearly outlined by a subject person's CRA and in turn it is to be ensured that appropriate mitigating measures/controls are applied to minimize the specific increased ML/FT risk identified. The importance of implementing the risk-based approach cannot be overlooked.

- The carrying out of EDD measures are indispensable where the risk presented cannot be mitigated and managed through the implementation of normal CDD measures. Therefore, subject persons need to ensure that there is significant consideration of which risks can be mitigated and managed through the carrying out of normal CDD and which risks require the implementation of EDD.

- The purpose and intended nature of the business relationship includes important information that is crucial to create a good customer business and risk profile. Details of the employment of business endeavours, the source of the customer's wealth, the expected source that would fund the operations through the relationship established, and the expected level of activity through the accounts available, need to be obtained. The degree of information and documentation collected will vary depending on the perceived level of risks, always ensuring that the customer's profile is well understood.

- PEPs pose a high risk of ML/FT due to the position they occupy and the influence they may exercise through their prominent public function. Risks include those of being involved in corrupt practices, accepting bribes, or abusing or misappropriating public funds. The failure to carry out checks to determine whether a customer is politically exposed or otherwise exposes a subject person to a heightened risk of ML/FT without the necessary mitigating measures being employed.

This notice is being published beyond the period prescribed by law pending a warrant filed by the subject person attempting to inhibit this publication notice, which warrant was subsequently turned down by the Court.

23 December 2022

APPEAL – On the 2nd January 2023, the FIAU was served with a copy of the appeal application filed by the Company before the Court of Appeal (Inferior Jurisdiction), from the decision of the FIAU.

The Company's grievances include, *inter alia*, that the FIAU's decisions in relation to the BRA, CRA, CDD and Ongoing Monitoring were unjustified and not motivated, and that the penalties attributed were excessive and disproportionate.

The Company thus asked the Court to uphold its grievances and consequently annul the penalties or alternatively reduce such penalties to a more equitable amount.

Pending the outcome of the appeal, the decision of the FIAU is not to be considered final and the resulting administrative penalty cannot be considered as due, given that the Court may confirm, vary or reject in whole or in part, the decision of the FIAU. As a result, the FIAU may not take any action to enforce the administrative penalty pending judgement by the Court.

This publication notice shall be updated once the appeal is decided by the Court so as to reflect the outcome of the same.

5 January 2023