Legal Sector Affinity Group
Anti-Money Laundering Guidance for the Legal Sector
2021

Part 2a
Specific Guidance for Barristers & Advocates

Introductory note to Part 2a

This is one of three "Part 2" sections of the Legal Sector Affinity Group (LSAG) anti-money laundering guidance for the legal sector in the UK.

These Part 2 sections are intended to provide more tailored AML guidance for specific types of legal practices or practitioners or those providing certain services.

- Part 2a – Barristers/Advocates
- Part 2b – Trust or Company Service Providers (TCSP)
- Part 2c – Notaries

Barristers and advocates should read this part of the Guidance in the first instance, drawing on Part 1 where relevant.

2b and 2c are to be read alongside Part 1 of the guidance.

Intended Audience

The content of Part 2a is only relevant for barristers and advocates.

Legal practices and practitioners who do not undertake work as a barrister or advocate should refer to LSAG guidance Part 1 (along with Parts 2b & 2c should they undertake any TCSP or notarial work).

The Status of this Guidance

This guidance replaces previous guidance and good practice information on complying with AML/CTF obligations.
This guidance, prepared by the Bar Council of England and Wales, the Bar Council of Northern Ireland, the Faculty of Advocates in Scotland and the Bar Standards Board, is issued by the Legal Sector Affinity Group, which comprises the AML Supervisors for the legal sector.

The authors will aim to keep this guidance up to date with new legislation as it comes into force, but this guidance cannot be regarded as a definitive statement of the law or of the effect of the law, and does not comprise, and should not be relied on as giving, legal advice. It has been prepared in good faith, but neither the Legal Sector Supervisors nor any of the bodies or individuals responsible for or involved in its preparation accept any legal responsibility or liability for anything done in reliance on it.

Barristers and advocates are not required to follow this guidance, however relevant AML supervisors will consider whether a barrister or advocate has complied with this guidance when undertaking their role as regulators of professional conduct, and as supervisory authorities for the purposes of the Regulations. You may be asked by your regulatory body to justify a decision to deviate from this guidance.

This guidance has been submitted to HMT for approval. In accordance with sections 330(8) and 331(7) of the Proceeds of Crime Act 2002, section 21A(6) of the Terrorism Act 2000, and Regulation 86(2)(b) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, once approved the court is required to consider compliance with this guidance in assessing whether a person committed an offence or took all reasonable steps and exercised all due diligence to avoid committing the offence.

Money Laundering, Terrorist Financing and the Proceeds of Crime

Purpose:	To alert barristers and advocates to their obligations in relation to countering money-laundering and terrorist financing, and to make practical suggestions in that regard.
Scope of application:	All practising barristers and advocates within the three jurisdictions of the UK, including BSB entities.
Issue Date:	**April 2021**
Last reviewed:	**March 2022**
Status and effect:	Please see the notice at end of the 'Executive Summary' section of this document. **This is not "guidance" for the purposes of the BSB Handbook I6.4.**

EXECUTIVE SUMMARY

Introduction

1. This guidance has been prepared for barristers and advocates practising throughout their respective jurisdictions across the UK. It has also been prepared for BSB entities. The principles and key messages contained within the guidance are considered to be universally applicable to all barristers and advocates even if, as may occasionally feature in the guidance, references are made to a specific feature or term that is synonymous with one specific jurisdiction. Where this arises the barrister or advocate should seek to interpret the guidance in the relevant local context. Where necessary, assistance on how to make such interpretations, can be found from the Bar Council of England and Wales, the Bar Council of Northern Ireland or the Faculty of Advocates in Scotland as the case may be.

2. This guidance addresses the issues raised for such barristers and advocates by Part 7 of the *Proceeds of Crime Act* 2002, as amended ["POCA"], the *Terrorism Act* 2000 as amended ["TA"] and the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations* 2017, as amended ["the Regulations"].

3. Money laundering is commonly regarded as the process whereby the proceeds of crime are changed or disguised so as to hide their unlawful origin. However,

in UK law money laundering is any activity in relation to the proceeds of crime, even passive activity such as mere possession.

4. Terrorist financing is the raising, moving, storing and using of financial resources for the purposes of terrorism.

5. The guidance is laid out as follows:

- Executive Summary
- Table of Contents
- Detailed Guidance
- Annex 1 – A Basic Guide to Customer Due Diligence
- Annex 2 – FAQs
- Annex 3 – Relevant Requirements
- Annex 4 – Typologies

Essential Matters

6. It is the duty of every barrister and advocate to understand the principles of money laundering and terrorist financing and how to recognise them. The essential principles are set out in this document.

7. Every barrister and advocate owes an obligation not to become involved in money laundering or terrorist financing. These concepts are broadly defined. There is authority from the Court of Appeal of England and Wales that the "*ordinary conduct of litigation*" does not fall within the concept of becoming concerned in a money laundering arrangement under s.328 of POCA, which will mean that most of the things that you do as a barrister or advocate will not trigger anti-money laundering or counter-terrorist financing obligations. However, you should be alert to circumstances that may take litigation out of the "*ordinary*" and note that the "*ordinary conduct of litigation*" exception does not apply to activities performed outside a litigation or arbitration context.

8. Barristers and advocates within the regulated sector have additional obligations under the Regulations. Those obligations include the requirement to carry out a risk assessment, undertake Customer Due Diligence ["CDD"] before acting, keep a record of their compliance with the Regulations and disclose suspicious activity to the authorities. You will need to be able to determine whether the service that you are providing to your client is subject to the Regulations. Work involving financial or real property transactions or tax advice or assistance on non-contentious matters is potentially within the scope of the Regulations. Barristers and advocates undertaking work as a Trust or Company Service Provider ("TCSP") may also fall within the scope of the Regulations when

undertaking that work. However, being instructed in relation to a trust is not the same as acting as a TCSP within the meaning of the Regulations. In each case the consideration of whether you are within the scope of the Regulations is fact specific. You will need to need to individually determine on a case by case basis whether what you are instructed to do brings you within scope or not.

9. While the risk of a barrister or advocate becoming involved in conduct that involves money laundering or terrorist financing is relatively low (in particular because barristers and advocates are not permitted to handle client money or manage their affairs) some risk remains. You must know how to address those risks and how and when to take the correct and necessary action when such risks arise.

10. If your practice is in England and Wales you must act in compliance with the anti-money laundering and counter-terrorist financing requirements of the BSB and the BSB Handbook. If your practice is in Scotland you must comply with the Faculty's Guide to Professional Conduct and if your practice is in Northern Ireland you must observe the requirements of the Bar of Northern Ireland's Code of Conduct.

11. The law is in many respects broadly drafted and the consequences of failing to comply with these obligations are potentially severe, including criminal penalties of up to 14 years' imprisonment. Please read the guidance, including the Typologies, carefully and be alert to the dangers.

POCA and Terrorism Act Offences

Proceeds of Crime Act 2002

12. The money laundering offences are:

(i) concealing, disguising, converting or transferring the proceeds of crime or removing the proceeds of crime from the jurisdiction [s.327];

(ii) entering into or becoming concerned in an arrangement that facilitates the acquisition, retention, use or control of criminal property [s.328];

(iii) the acquisition, use and possession of criminal property [s.329]; and

(iv) making an unauthorised disclosure or taking an action or causing an action to be taken that that is likely to prejudice an investigation [s.342].

Terrorism Act 2000

13. The terrorist financing offences are:

(i) Fund-raising for terrorism [s.15];

(ii) Use or possession of property for terrorism [s.16];

(iii) Entering into or becoming concerned in an arrangement that makes property available for the purposes of terrorism [s.17];

(iv) Making a payment under a contract for insurance against a payment made in response to terrorist demands [s.17A] (for payments made from 12 February 2015 onwards);

(v) Entering into or becoming concerned in an arrangement that facilitates the retention or control of terrorist property [s.18]; and

(vi) Failing to disclose a suspicion obtained in the course of a trade, profession or business of the commission of a terrorist financing offence [s.19].

Legal Professional Privilege

14. The provisions of POCA and TA do not override a client's legal professional privilege ["LPP"]. You must not make any form of disclosure to the authorities of information protected by LPP.

15. LPP does not protect communications made in furtherance of a crime.

The Litigation Exemption

16. In *Bowman v. Fels* [2005] 1 W.L.R. 3083 the Court of Appeal considered s.328 of POCA and held that it was not intended to cover or affect the involvement of a barrister or advocate in the "*ordinary conduct of litigation*" or its consensual resolution.

17. Although the Court was considering s.328 alone, its reasoning in relation to the lawyer-client relationship is of application to each of the money laundering offences within POCA.

The Money Laundering Regulations 2017

18. **If the work that you are undertaking is not transactional (as per reg. 12(1)) and not providing advice, material aid or assistance in connection with the tax affairs of other persons and not that of a TCSP, then you are not subject to the Regulations**.

Legal Services

19. If you are instructed:

    (i) as an independent legal professional when participating in financial or real property transactions, and

    (ii) the "financial or real property transactions" concern:

        a. the buying and selling of real property or business entities;

        b. the managing of client money, securities or other assets;

        c. the opening or management of bank, savings or securities accounts;

        d. the organisation of contributions necessary for the creation, operation or management of companies; or

        e. the creation, operation or management of trusts, companies, foundations or similar structures, and

    (iii) you are participating in the transaction by

        a. assisting in the planning or execution of the transaction or

        b. otherwise acting for or on behalf of a client in the transaction,

    you are within the scope of the Regulations.

Tax Advice

20. Where you undertake work as a tax adviser within the meaning of reg. 11(d) you are within the scope of the Regulations. You should note that the definition of a "tax adviser" is particularly wide. A "firm or sole practitioner who by way of business provides material aid, or assistance or advice, in connection with the tax affairs of other persons, whether provided directly or through a third party, when providing such services" is a tax adviser.

Trust or Company Service Provider (TCSP)

21. If you are acting as a TCSP, then you are within the scope of the Regulations. In these Regulations, TCSP means a firm or sole practitioner who by way of business provides any of the following services to other persons, when that firm or practitioner is providing such services—

(a) forming companies or other legal persons;

(b) acting, or arranging for another person to act—
(i) as a director or secretary of a company;
(ii) as a partner of a partnership; or
(iii) in a similar capacity in relation to other legal persons;

(c) providing a registered office, business address, correspondence or administrative address or other related services for a company, partnership or any other legal person or legal arrangement;

(d) acting, or arranging for another person to act, as—
(i) a trustee of an express trust or similar legal arrangement; or
(ii) a nominee shareholder for a person other than a company whose securities are listed on a regulated market.

Obligations under the Regulations

Policies, Controls and Procedures

22. You must have in place policies, controls and procedures that address the risk of money laundering or terrorist financing in your practice.

Risk Assessment

23. You must carry out a risk assessment in relation to work within the scope of the Regulations. This assessment should take into account risk factors including those relating to the client, the countries or areas in which you practise, the nature of the services you offer, the type of transactions you advise on and the source of your instructions. You must keep an up-to-date record of the steps you have taken in this regard.

Customer Due Diligence

24. You must undertake CDD. This means that you must:

- identify the client and verify the client's identity on the basis of documents or information from a source independent of the client;
- assess the purpose and intended nature of the transaction;

- where the client is a corporate body, identify and verify its name, its company number, the address of its registered office and its principal place of business. Except where it is listed on a regulated market you must take reasonable measures to determine and verify the law to which it is subject, its constitution, the names of its board of directors and the senior persons responsible for its operations;

- where the client is beneficially owned by another person you must identify the beneficial owner and take reasonable measures to verify the identity of the beneficial owner. If the beneficial owner is a legal person (including trust or a company) you must take reasonable measures to understand its ownership and control structure. If the client is a company listed on a registered exchange these requirements do not apply;

- where a person such as a solicitor or other instructing agent purports to act on behalf of a client, you must verify that person is authorised to act on the client's behalf, identify the person so acting, and verify that person's identity on the basis of documents or information obtained from a reliable independent source.

25. You **must keep a record** of the CDD that you carry out.

Ongoing Monitoring

26. You **must monitor your relationship** with your client (the "customer"). You will be required to renew your Due Diligence where:
    (i) you come under a legal duty in the course of a calendar year to contact an existing client to review information that is:

        (a) relevant to your risk assessment for that client, and
        (b) relates to the beneficial ownership information of the client, including information which helps them understand the ownership or control structure of any entity that is in the beneficial owner of the client; or
        (c) you have to contact an existing client in order to fulfil any duty under the *International Tax Compliance Regulations* (2015).

Enhanced Due Diligence

27. There may be circumstances where the risk of money laundering or terrorist financing is such that you may need or will be obliged to apply an <u>enhanced level of CDD</u>, for example where the lay client is based in or operating from a country that is known to present such a risk or is a Politically Exposed Person

["PEP"]. In those circumstances you will need to apply greater due diligence to mitigate the increased level of risk.

How to Address those Obligations

28. You must take a **risk-based approach** to the above obligations: the measures that you take must be sufficient to meet the perceived level of risk.

29. Therefore, you need to know how to assess and determine the existence and level of the risk of money laundering or terrorist financing.

Risks and Indicators

30. Potential indicators of money laundering or terrorist financing activity will come in a variety of forms but may include: the lay client being based in a high-risk country or region; the nature of the business operated by the lay client; the source of funds involved in the transaction or the personal circumstances of the lay client or someone involved in your instructions.

31. You need to be able to consider the different risk factors, assess any indicators of suspected criminal activity and decide what steps you need to take to mitigate those risks.

Reliance

32. Where you act upon the instructions of a professional client, such as a solicitor, it may be possible, with their consent, to rely on the CDD that they have carried out. However, if you do, you remain legally responsible for the regulatory compliance of the checks undertaken and therefore for any failings in them. You must therefore ensure that you have complied with Regulation 39 and obtained the necessary "information" to satisfy, on a risk-based approach, the CDD obligations upon you.

33. You should note that simply obtaining copies of the CDD material obtained by the person instructing you does *not* meet the 'Reliance' requirements of Regulation 39. Even where you do obtain copy documents, the obligation upon you is to ensure that the information provided to you permits you to meet the requirements of Regulation-compliant CDD.

Other Obligations Under the Regulations

34. Where you are undertaking work that falls within the scope of the Regulations you may commit a criminal offence if:

(i) you suspect that money laundering is taking place and you fail to make the required disclosure to the authorities (s.330), or

(ii) you make an unauthorised disclosure of your suspicion of money laundering or of your knowledge of a money laundering investigation to another person (aka "*tipping-off*") (s.333A).

35. Like offences exist in relation to terrorist financing within the TA (ss.21A and 21D).

Making a Disclosure

36. Where you are required to make a disclosure of suspected money laundering or money laundering this must be done by way of making a Suspicious Activity Report ["SAR"] to the NCA. Such reports should be made electronically via the NCA's website.

Public and Licensed Access

37. Where you undertake public access work the requirements of the Regulations, e.g. the CDD obligations fall upon you directly. If you are instructed on a licensed access basis by a suitable professional on behalf of a lay client, you may be able to utilise the Reliance provisions referred to above, but you will otherwise be in a similar position to those acting on a public access basis. You should note that undertaking public or licensed access work does not, of itself, bring you within the scope of the Regulations. The Regulations apply depending upon the kind of work undertaken, not the means by which you are instructed.

38. If you practice in Scotland and accept work under the Faculty's direct access rules you will need to confirm that the individual appointing you is a member of an organisation listed on the Faculty's website. You are not required to verify the existence or bona fides of the organisation itself as the Faculty has already done so.

Important Notice

39. This paper only provides professional guidance. Its aim is to assist you in understanding the obligations placed upon you by the primary legislation and the Regulations. **It is not "guidance" for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.**

40. This paper cannot be regarded as a definitive statement of the law or of the effect of the law, and does not comprise, and should not be relied on as giving, legal advice. It has been prepared in good faith, but neither the Bar Council of England & Wales, the Bar Council of Northern Ireland, the Faculty of Advocates nor any of the individuals responsible for or involved in its preparation accept any legal responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see here.

41. If you are unclear as to your obligations you must take independent legal advice from a suitably qualified legal adviser.

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DETAILED GUIDANCE

OVERVIEW: THE LEGAL FRAMEWORK

1. The background to the UK's anti-money laundering and counter-terrorist financing legislation is as follows.

The 40+9 Recommendations published by the Financial Action Task Force ("FATF")

2. FATF is an inter-governmental body, created in 1989, whose purpose is the development and promotion of national and international procedures to combat money laundering and terrorist financing. The 40 Recommendations are concerned with anti-money laundering measures; the additional 9 Special Recommendations are concerned with anti-terrorist finance measures.

EU Money Laundering Directives

3. The First Money Laundering Directive was issued by the EU in 1991, and required member states to make money laundering a criminal offence. The directive was incorporated into UK law by the *Criminal Justice Act* 1993, the *Drug Trafficking Act* 1994 and the *Money Laundering Regulations* 1993.

4. The Second Money Laundering Directive was issued in 2001, and extended the scope of anti-money laundering obligations from financial institutions to the activities of a number of professional service providers including lawyers. It was incorporated into UK law by the *Proceeds of Crime Act* 2002 and the *Money Laundering Regulations* 2003.

5. The Third Money Laundering Directive was issued in 2005. It introduced the concept of a 'risk-based' approach and extended the reach of anti-money laundering obligations to the identification of beneficial owners. The Third Money Laundering Directive was incorporated into UK law by the *Money Laundering Regulations* 2007. The Regulations, (which came into force on 15 December 2007) replaced the *Money Laundering Regulations* 2003.

6. The Fourth Money Laundering Directive (2015/849) was published on 25 June 2015. It was brought into domestic effect by the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations* 2017 which came into force on 26 June 2017. The Regulations replaced their predecessor, the 2007 *Money Laundering Regulations*.

7. The Fifth Money Laundering Directive (2018/843) was published on 19 July 2018. It was brought into domestic effect by the *Money Laundering and Terrorist*

Financing (Amendment) Regulations 2019 which came into force on 10 January 2020. This guidance reflects the Regulations as amended by these amending regulations.

***Proceeds of Crime Act* 2002**

8. The *Proceeds of Crime Act* 2002 (as amended) ["POCA"] came into force on 24 February 2003. Part 7 of POCA creates a number of substantive money laundering offences, such as concealing, disguising, converting or transferring the proceeds of crime, offences in relation to failing to report suspicion of money laundering and offences in relation to money laundering investigations.

***Terrorism Act* 2000**

9. With the exception of s.17A (which came in to force on 12 February 2015), the substantive terrorist property offences in part III of the *Terrorism Act* 2000 (as amended) ["TA"] came into force on 19 February 2001. Part III also creates offences in relation to failing to disclose a suspicion of a terrorist financing (s.21A, into force from 20 December 2001) and tipping off (s.21D, into force from 6 October 2013).

10. This guidance focuses on the responsibilities imposed on barristers and advocates pursuant to the Regulations.

THE MONEY LAUNDERING, TERRORIST FINANCING AND TRANSFER OF FUNDS (INFORMATION ON THE PAYER) REGULATIONS 2017

Introduction

11. The primary purposes of the Regulations are to further enshrine the risk-based approach to AML/CTF procedures, to extend the ambit of regulated activity to previously uncovered areas, including letting agents, art market participants, cryptoassets exchange providers and custodian wallet providers and to strengthen enhanced due diligence measures. The creation of policies, controls and procedures for the identification and management of AML/CTF risks and the application of case-by-case risk assessments are central to the requirements of the Regulations as they apply to legal professionals.

12. The Regulations are important to all barristers and advocates who undertake transactional, tax advisory and TCSP work, particularly in relation to the planning or execution stages of real property and business transactions, the

creation, operation or management of trusts, companies or similar entities and advising and assisting in relation to non-contentious tax affairs.

Supervision

13. For the purposes of the Regulations, the supervisory authority for self-employed barristers and BSB entities in England and Wales is the General Council of the Bar of England and Wales (reg. 7(1)(b) and Schedule 1). As with its other regulatory functions, this role has been delegated to the BSB. The Bar Council of Northern Ireland is the relevant supervisory authority for all barristers in Northern Ireland and the Faculty of Advocates is the relevant supervisory authority for all advocates in Scotland. Some employed barristers work in organisations that are regulated by other bodies and will need to confirm with their regulator who their anti-money laundering Professional Body Supervisor is.

Meaning of a Business Relationship

14. Where you enter into a professional relationship with a "customer" (referred to in this Guidance as your client) that arises out of your practice and which is expected by you, at the time when contact with the client is established, to have an element of duration, you will have entered into a "business relationship" within the meaning of the Regulations (reg. 4(1)).

The "Customer"

15. The Regulations do not distinguish between lay and professional clients. They apply to all clients with whom you have entered into a "business relationship" within the meaning of reg. 4(1). In approving this guidance, HM Treasury has stated that, in its opinion, where you are instructed by a professional client (such as a solicitor) on behalf of a lay client, your "customer" under the Regulations is both your instructing professional client and your lay client. You should therefore carry out 'Customer Due Diligence' ["CDD"] on both your lay and professional client. In doing so you will have to take care to also observe any specific obligations placed on you by your relevant supervisory body relating to lay clients and professional clients.

16. Barristers in England and Wales should note that their AML/CTF obligations in relation to both their lay and professional client are distinct from their overall *ethical* obligations to the lay client as set out in the BSB Handbook.

17. Where barristers and advocates are instructed on a licensed or public access basis where there is no instructing professional client, the business relationship will be with the licensed or public access (lay) client, who will therefore also be the barrister/advocate's "customer" under the Regulations.

The "Relevant Person"

18. The Regulations apply to anyone who is a "relevant person" within the meaning of Regulations 3 and 8, and this includes independent legal professionals and trust or company service providers within the meaning of reg. 12 and those providing tax advice or assistance or material aid within the meaning of reg. 11(d). A reference to a 'barrister' or 'advocate' in this section of the Guidance is a reference to a barrister or advocate who, by virtue of the Regulations, is a 'relevant person'.

19. By reg. 8, the Regulations apply to the following persons acting in the course of business carried on by them in the UK (and who are therefore "relevant persons"):

(i) credit institutions,

(ii) financial institutions,

(iii) auditors, insolvency practitioners, external accountants and tax advisers,

(iv) independent legal professionals,

(v) trust company service providers,

(vi) estate agents and letting agents,

(vii) high value dealers,

(viii) casinos,

(ix) art market participants,

(x) cryptoasset exchange providers, and

(xi) custodian wallet providers.

Tax Advisers

20. You should note that the definition of a "tax adviser" is a wide one and includes where, by way business, you provide material aid, assistance or advice in connection with the tax affairs of other persons, whether directly or through a third party (reg. 11(d)).

Independent legal professionals

21. For the purposes of the Regulations "independent legal professionals" means a firm or sole practitioner who by way of business provides legal or notarial services to other persons, when participating in financial or real property transactions concerning:

    (i) the buying and selling of real property or business entities,

    (ii) the managing of client money, security or other assets,

    (iii) the opening or management of bank, savings or securities accounts,

    (iv) the organisation of contributions necessary for the creation, operation or management of companies, or

    (v) the creation, operation or management of trusts, companies, foundations or similar structures;

    and for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction (reg. 12(1)). Accordingly, the Regulations only apply to those legal professionals who provide services as defined by reg. 12.

22. The European Court of Justice ("the ECJ"), in the *Ordre des Barreaux Francophones et Germanophones v. Conseil des Ministres* case,[1] confirmed that this list is intended to be exhaustive. In a test case taken to the ECJ by the professional body of Belgian lawyers, the court pointed out that Article 6 of the European Convention on Human Rights was concerned with the concept of a "fair trial", which included elements such as rights of the defence, equality of arms and a right of access to lawyers, amongst others. Those rights would be compromised if lawyers were obliged to pass to the authorities information that they obtained in the course of legal consultations. The court went on to state that Article 2a (5) of the Second Directive (91/308) makes it clear that the obligations in respect of information and co-operation apply to lawyers:

    > "33. ... only insofar as they advise their client in the preparation or execution of certain transactions—essentially those of a financial nature or concerning real estate, as referred to in Art.2a(5)(a) of that directive—or when they act on behalf of and for their client in any financial or real estate transaction. As a rule, the nature of such activities is such that they take place in a context with no link to judicial proceedings and, consequently, those activities fall outside the scope of the right to a fair trial.

[1] Case C-305/05; [2007] ECR I-5305

34. Moreover, as soon as the lawyer acting in connection with a transaction as referred to in Art.2a(5) of Directive 91/308 is called upon for assistance in defending the client or in representing him or her before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings, that lawyer is exempt, by virtue of the second sub-paragraph of Art.6(3) of the directive, from the obligations laid down in Art.6(1), regardless of whether the information has been received or obtained before, during or after the proceedings. An exemption of that kind safeguards the right of the client to a fair trial."

23. The provision of legal advice by a barrister or advocate, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.

24. You should consider with care whether a particular piece of work in which you are instructed falls within the scope of the Regulations; "*participating in a transaction*", for example, is a broad term. Whilst the Regulations do not apply to contentious matters, non-contentious trust, company, corporate and matrimonial matters may engage areas of activity by your lay clients that come within the scope of the Regulations. If you are uncertain whether the Regulations apply to your work, you should seek legal advice on the individual circumstances of your practice.

25. It is a criminal offence to fail to comply with the Regulations.

Policies, Controls and Procedures

26. Where your practice brings you within the scope of the Regulations you must establish and maintain written policies, controls and procedures to mitigate and manage effectively the risks of money laundering and terrorist financing identified in your risk assessment (reg. 19(1)).

Proportionality: Risk Profile

27. The policies, controls and procedures established by you must be proportionate to the size and nature of your practice as it falls within the scope of the Regulations (reg. 19(2)(a)). In determining what is appropriate or proportionate with regard to the size and nature of your practice, you may take into account this Guidance (reg. 19(5)). Barristers in England and Wales may also consider the BSB's AML/CTF Risk Assessment for the profession (reg. 19(1)). The BSB's current assessment places the overall risk of money

laundering for barristers as "low".[2] However, that does not mean that the risk in your practice or any matter in which you are instructed is at the same level. You must determine what is appropriate or proportionate in relation to the risk of your practice and avail of any risk assessments undertaken by the relevant supervisor in your jurisdiction.

Mandatory requirements

28. The policies, controls and procedures established by you must include:

(i) risk management practices;

(ii) internal controls;

(iii) CDD, *i.e.* the means by which you check and verify your client's identity (see [57] *et seq* below);

(iv) reporting and record keeping; and

(v) the monitoring and management of compliance with, and the internal communication of, such policies and procedures (reg. 19(3)).

29. The policies, controls and procedures must also:

(i) provide for the identification and scrutiny of any case where a transaction is complex or unusually large, or there is an unusual pattern of transactions, or the transaction or transactions have no apparent economic or legal purpose. They must also provide for the identification and scrutiny of any other activity that you regard as particularly likely by its nature to be related to money laundering or terrorist financing (reg. 19(4)(a));

(ii) specify the taking of additional measures, where appropriate, to prevent the use for money laundering or terrorist financing of products and transactions which might favour anonymity (reg. 19(4)(b));

(iii) ensure that when you adopt new products, business practices (including new delivery mechanisms) or technology, you take appropriate measures to assess and if necessary mitigate any money laundering or terrorist financing risks the new product, practice, or technology may cause (reg. 19(4)(c)); and

[2] https://www.barstandardsboard.org.uk/for-barristers/compliance-with-your-obligations/anti-money-laundering-counter-terrorist-financing.html

(iv) ensure that anyone employed by you or your chambers or entity who, as a result of information received by them as a result of or in the course of your practice, knows or suspects (or has reasonable grounds for knowing or suspecting) that a person is engaged in money laundering or terrorist financing is required to comply with Part 3 of TA or with Part 7 of POCA (reg. 19(4)(d)).

Systems and Procedures for a Politically Exposed Person

30. You are required to have in place appropriate risk-management systems and procedures to determine whether your client or the beneficial owner of your client is—

(i) a Politically Exposed Person ["PEP"]; or

(ii) a family member or a known close associate of a PEP, and to manage the enhanced risks arising from your business relationship or transactions with such a client (reg. 35(1)).

Determining Appropriateness

31. In determining what risk-management systems and procedures are "appropriate" under the Regulations you must, pursuant to reg. 35(2), take account of:

(i) the risk assessment you carried out in respect of your practice under reg. 18;

(ii) the level of risk of money laundering and terrorist financing inherent in your practice;

(iii) the extent to which that risk would be increased by your business relationship with a PEP, or a family member or known close associate of a PEP, and

(iv) any relevant information identified by your supervisory authority in relation to the risks of money laundering and terrorist financing (pursuant to reg. 17(9) and reg. 47), i.e. supervisory reports and risk assessments, in relation to which see [27] above.

BSB entities

32. In addition to the above and in England and Wales, BSB entities should consider whether the nature of their organisation requires them to comply with the obligation to communicate the policies, controls and procedures

which it establishes and maintains in accordance with this regulation to its branches and subsidiary undertakings which are located outside the United Kingdom (reg. 19(6)).

33. BSB entities should also consider whether the obligations under reg. 20 in relation to the policies controls and procedures at group, subsidiary and branch level, including those in relation to data protection and information sharing (reg. 20(1)(b)), apply to them.

Internal Controls: Responding to Investigations

34. Where you are subject to the Regulations you must establish and maintain "systems" which enable you to respond, "fully and rapidly" to enquiries from financial investigators and other law enforcement officers as to whether you have, or in the past five years, have had a "business relationship", within the meaning of reg. 4, with any person, and if so, the nature of that relationship (reg. 21(8) & (9)). Before responding to such enquiries you should consider whether the information you are asked to provide is privileged.

Additional Internal Controls

Application

35. Additional "internal controls" requirements apply to certain persons undertaking work within the scope of the Regulations. The internal controls requirements *do not* apply to a person within the scope of the Regulations who is an individual and who neither employs nor acts in association with any other person (reg. 21(6)).

36. If you directly employ your clerk(s), or any other employee or agent that falls within the definition of reg. 21(2)(b), the "internal controls" requirements of reg. 21 may be of application to your practice (reg. 21(6)). You will need to make an assessment of the factual circumstances and the application of the regulation. Such an assessment would include considering the nature of your professional relationship with your clerk (or other relevant third-party) and the level of involvement that person has in your AML/CTF policies and procedures. Even where reg. 21 does not apply you should be aware of your broader obligations with regards to appropriate risk management procedures (see, for example, in relation to practitioners in England and Wales, the BSB Handbook, rC 89.8).

37. In Scotland, Faculty Services Ltd employs the clerks of members who are subscribers and there is therefore no direct employment relationship with such advocates. Advocates who are not subscribers to Faculty Services Ltd and who employ their clerks need to make an assessment of the factual

circumstances as the "internal controls" requirements of reg. 21 may apply to them.

38. Where the additional internal control requirements of reg. 21 *do apply* to you and "where appropriate with regard to the size and nature" of your practice, you must carry out screening of relevant employees and agents appointed by you, both before the appointment is made and at regular intervals during the course of the appointment (reg. 21(1)(b)).

39. A "relevant employee or agent" is defined by Regulation 21(2)(b) as an employee or agent whose work is:

(i) relevant to your compliance with any requirement under the Regulations, or

(ii) otherwise capable of contributing to the

(a) identification or mitigation of the risks of money laundering and terrorist financing within your practice, or
(b) prevention or detection of money laundering and terrorist financing in relation to your practice.

40. "Screening" is defined by reg. 21(2)(a) as an assessment of:

(i) the skills, knowledge and expertise of the individual to carry out their functions effectively;

(ii) the conduct and integrity of the individual.

41. Where the additional "internal controls" requirements of reg. 21 apply and where "appropriate with regard to the size and nature" of your practice, you must also establish an independent audit function with the responsibility—

(i) to examine and evaluate the adequacy and effectiveness of your AML/CTF policies, controls and procedures;

(ii) to make recommendations in relation to those policies, controls and procedures, and

(iii) to monitor your compliance with those recommendations (reg. 21(1)(c)).

Determining Appropriateness

42. In determining what is "appropriate with regard to the size and nature" of your practice:

(i) you *must* take into account your risk assessment under reg. 18(1); and

(ii) you *may* take into account any relevant guidance which was at the time issued by the FCA, supervisory authority or appropriate body and approved by the Treasury, e.g. if approved, this Guidance. Pursuant to reg. 19(1), practitioners in England and Wales may also take into account the current BSB AML/CTF Risk Assessment, see [27]above.

BSB-regulated entities

43. In addition to the above and in England and Wales, BSB entities, where appropriate with regard to the size and nature of their business, should appoint:

(i) an individual who is a member of the board of directors (or, if there is no such board, the equivalent management body) as the officer responsible for the entity's compliance with the Regulations (reg. 21(1)(a)), and

(ii) a nominated officer (reg. 21(3));

(iii) and inform the BSB of those appointments and any subsequent appointments to either of those positions (reg. 21(4)(b))

Duty of the Nominated Officer in BSB entities upon receipt of a disclosure

44. Where a disclosure is made to the nominated officer of a BSB entity, that officer must consider it in the light of any relevant information that is available to the relevant person and determine whether it gives rise to knowledge or suspicion or reasonable grounds for knowledge or suspicion that a person is engaged in money laundering or terrorist financing.

45. Regulation 21(3) requires a nominated officer to be appointed within a professional organisation to receive disclosures made pursuant to POCA and TA. However, reg. 21(6), states that the requirement to appoint a nominated officer does not apply where the relevant person is an individual who neither employs nor acts in association with any other person.

46. Self-employed barristers are individually responsible for their own professional practices (see, for example in relation to practitioners in England and Wales, in the BSB Handbook, each of the Core Duties, gC2, and rC20) and, where applicable, chambers staff provide administrative support only (as opposed to being fee-earners). It is therefore not considered necessary or

desirable for self-employed barristers or their chambers to appoint a nominated officer to whom other barristers must report.

Disclosure Reporting in Scotland

47. Advocates practising in Scotland are all self-employed and are individually responsible for their own practices. The staff of stables provide administrative support only (as opposed to being fee-earners). It is therefore not considered necessary or desirable for self-employed advocates or their stables to appoint a nominated officer to receive disclosures made pursuant to POCA and TA.

48. There is also therefore no nominated officer for the Faculty as a body. The Faculty has appointed its Chief Executive Officer to oversee its supervisory responsibilities but that role is not covered by LPP and neither he nor the Faculty is a nominated officer under reg. 21(3). Advocates should reach their own conclusions as to whether to report any AML related concerns or suspicions bearing in mind the guidance given in this document. Advocates should consider seeking independent legal advice in such circumstances.

Awareness and Training: Relevant Employees and Agents

49. Where you are subject to the Regulations you must take "appropriate" measures to ensure that relevant employees and agents are made aware of the law relating to money laundering, terrorist financing and data protection and are regularly given training in how to recognise and deal with transactions and other activities which may be related to money laundering or terrorist financing (reg. 24(1)). In Scotland this responsibility falls on Faculty Services Limited and not individual advocates unless they directly employ their own staff.

Determining Appropriateness

50. In determining what measures are "appropriate" you must take account of the size and nature of your practice and the attendant nature and extent of the risk of money laundering and terrorist financing (reg. 24(3)). You may also take into account any relevant guidance which was at the time issued by the FCA, supervisory authority or appropriate body and approved by the Treasury, *e.g.* if approved, this Guidance (reg. 24(3)(b)). Pursuant to reg. 19(1), practitioners in England and Wales may also take into account the current BSB AML/CTF Risk Assessment, see [27] above.

51. A "relevant employee or agent" is an employee or agent whose work is defined by reg. 24(2) as:

(i) relevant to your compliance with any requirement under the Regulations, or

(ii) otherwise capable of contributing to the:

(a) identification or mitigation of the risks of money laundering and terrorist financing within your practice, or

(b) prevention or detection of money laundering and terrorist financing in relation to your practice (reg. 24(2)(a) &(b)). Chiefly this will mean your clerks.

52. Clerks and any other staff must regularly be given training to recognise and report suspected money laundering or terrorist financing and breaches of data protection law. The training provided must be of sufficient depth and quality to create a risk-aware culture and must be regularly reviewed.

53. Self-employed barristers practising from a set of chambers may opt to have chambers organise and provide the required training. However, the requirement for such awareness to be in place and training to be undertaken remains the responsibility of each individual barrister who makes use of the employee or agent's services whilst acting within the scope of the Regulations: it is a personal liability. Equally, should suspected money laundering or terrorist financing be reported to you by an employee or agent, you must personally assess and determine what to do about the information provided to you. The responsibility to ensure that the Regulations have been complied with and that the required CDD has been properly conducted falls upon each individual practitioner.

Risk Assessment

54. Where you are instructed in a matter that brings you within the scope of the Regulations you must take appropriate steps to identify and assess the risks of money laundering and terrorist financing (reg. 18). In deciding what steps are "*appropriate*" you must take into account the size and nature of your practice (reg. 18(3)).

55. Regulation 18 states that in carrying out your risk assessment there are certain factors that you *must* take into account:

(i) any relevant information identified by your supervisory authority in relation to the risks of money laundering and terrorist financing

(pursuant to reg. 17(9) and reg. 47), i.e. supervisory reports and risk assessments, in relation to which see [27] above.

(ii) Risk factors specific to your practice (reg. 18(2)(b)) including factors relating to:

(a) your client;

(b) the country or geographic area in which you are practising;

(c) the service that you are providing;

(d) the relevant transaction; and

(e) the delivery channels through which your service is being provided (reg. 18(3));

56. You must keep an up-to-date written record of all steps taken in carrying out the risk assessment, and provide this, together with the risk assessment and any information on which that assessment was based, to your supervisor on request (reg. 18(4) & (6)).

Customer Due Diligence

57. Where you are instructed to act in relation to a matter to which the Regulations apply you are required to undertake CDD in relation to your client. Your obligations in relation to CDD are set out in regs 27 to 31 of Part 3 of the Regulations.

The Requirements of Customer Due Diligence

58. Where you are required to apply CDD measures, and where your client's identity is not already known to and verified by you, you must:

(i) identify the client;

(ii) verify their identity from a reliable and independent source (reg. 28(2)); and

(iii) assess, and where appropriate obtain information on, the purpose and intended nature of the business relationship that you are being asked to enter into (reg. 28(2)(c)).

59. Here, and in relation to corporate and beneficially owned clients, "verify" means verify on the basis of documents or information in either case obtained from a reliable source that is independent of the person whose identity is being

verified, and this includes documents issued or made available by an official body (reg. 28(18)).

60. CDD should be applied on a case-by-case basis applying a risk-based approach. The ways in which you apply CDD and the extent of the measures that you take must reflect the risk assessment carried out by you in relation to your practice and your assessment of "*the level of risk arising in any particular case*" (reg. 28(12)).

61. In assessing the level of risk in a particular case, you must take account of factors including, among other things:

    (i) The purpose of an account, transaction or business relationship;

    (ii) The level of assets to be deposited by a client or the size of the transactions undertaken by the client;

    (iii) The regularity and duration of the business relationship (reg. 28(13)).

62. The essence of CDD is that you, as the relevant person, must know who you are really representing, and obtain information as to your client's intention and purpose for instructing a barrister or advocate. CDD requires you to carry out both identification and verification, *i.e.* you must obtain details of the client's identity, and evidence that supports that identity.

A Risk-Based Approach

63. The obligation in applying CDD under the Regulations is to do so on the basis of the risks of money laundering or terrorist financing as assessed by you in your risk assessment. To do this you should apply a sliding scale of risk assessment: the greater the perceived risk of money laundering, the greater the extent of CDD measures that should be applied.

CDD Practicalities

64. You must identify and verify your client's identity on the basis of documents, data or information obtained from a reliable and independent source. In the case of your lay client, and where the matter is low risk, this is the relatively familiar territory of, for example, obtaining a certified copy passport. The requirement to maintain records means that the documents provided should be copied and endorsed with a contemporaneous note, for example that you consider a copy passport to be a likeness of the person seeking your assistance.

65. If the client cannot come in and be seen face to face, then you must attempt to complete your CDD in a risk-sensitive and realistic manner. Alternative solutions may be available. For example, if the client is overseas, can their

identity documents be taken and authorised in the British Consulate in the country in which they are in? Can the client's identity be verified by other independent means, for example if the client is a company registered on the London Stock Exchange or similar regulated institution?

66. To assist you in relation to the requirements of identification and verification, "*A Basic Guide to Customer Due Diligence*" can be found at Annex 1 to this guidance. It should be noted that Annex 1 contains suggestions only, it is not an exhaustive list.

Electronic Identification Processes

67. Electronic identification services (as defined in EU Regulation 2014/910/EU) may be regarded as a reliable form of identification where they are secure from fraud and misuse and capable of providing appropriate assurance clients are who they say they are. More guidance on this is available in Part 1.

CDD requirements in respect of Corporations

Corporations listed on a Regulated Market

68. Where your client is a body corporate (*e.g.* a company) that is listed on a regulated market, in order to comply with your CDD obligations, you *must* obtain and verify—

(i) its name;

(ii) its company number or other registration number;

(iii) the address of its registered office, and if different, its principal place of business (reg. 28(3)(a)).

Additional Requirements for Corporations not listed on a Regulated Market

69. Where your client is body corporate that is not listed on a regulated market you must *additionally* take reasonable measures to determine and verify:

(i) the law to which the body corporate is subject, and its constitution (whether set out in its articles of association or other governing documents);

(ii) the full names of the board of directors (or if there is no board, the members of the equivalent management body) and the senior persons responsible for the operations of the body corporate (reg. 28(3)(b) & (5)).

Beneficially Owned Clients Not Listed on a Regulated Market

70. Where your client is beneficially owned by another person but is *not* listed on a regulated market, in order to comply with your CDD obligations you must also:

(i) identify the beneficial owner;

(ii) take reasonable measures to verify the identity of the beneficial owner so that you are satisfied that you know who the beneficial owner is; and

(iii) if the beneficial owner is a legal person, trust, company, foundation or similar legal arrangement take reasonable measures to understand its ownership and control structure (reg. 28(4) & (5)).

71. Additionally, in relation to undertaking due diligence on a non-natural person (*i.e*. a "legal person, trust, company, foundation or similar legal arrangement") you must also take reasonable measures to understand the ownership and control structure of that person (reg. 28(3A)).

Inability to Identify the Beneficial Owner

72. Where your client is a body corporate and you have "exhausted all possible means" of identifying its beneficial owner, you may treat the senior person in that body corporate responsible for managing it as its beneficial owner (reg. 28(6)). Where this is the case you must:

(i) keep written records of all the actions you have taken to identify the beneficial owner of the body corporate,

(ii) take reasonable measures to identify and verify the identity of the senior person responsible for managing the body corporate, and

(iii) record in writing all the actions and any difficulties encountered in doing so (reg. 28(8)(a) & (b)).

73. You will only be regarded as having "exhausted all possible means" of identifying the beneficial owner where:

(i) you have not succeeded in doing so, or

(ii) you are not satisfied that the individual identified is in fact the beneficial owner (reg. 28(7)).

Use of Public Registers

74. You will not satisfy the CDD obligations upon you in relation to a beneficially owned client by relying solely on the information, either:

(i) contained in—

(a) the register of people with significant control kept by a company under section 790M of the *Companies Act* 2006 (duty to keep register);

(b) the register of people with significant control kept by a limited liability partnership under section 790M of the *Companies Act* 2006; or

(c) the register of people with significant control kept by a European Public Limited-Liability Company under section 790M of the *Companies Act* 2006; or

(ii) referred to in sub-paragraph (a) and delivered to the registrar of companies (within the meaning of section 1060(3) of the *Companies Act* 2006 (the registrar)) under any enactment (reg. 28(9)).

Agents

75. Where a person ("A") purports to act on behalf of the client, you must:

(i) verify that A is authorised to act on the client's behalf;

(ii) identify A; and

(iii) verify A's identity on the basis of documents or information in either case obtained from a reliable source which is independent of both A and your client.

When must CDD be undertaken?

76. Where you are within the scope of the Regulations you must apply CDD when you:

(i) establish a business relationship,

(ii) carry out an occasional transaction that amounts to a transfer of funds above €1,000;

(iii) suspect money laundering or terrorist financing, or

(iv) doubt the veracity or adequacy of documents, data or information previously obtained for the purpose of identification or verification (reg. 27).

77. You will be required to renew your CDD where:

(i) you come under a legal duty in the course of a calendar year to contact an existing client to review information that is:
  (a) relevant to your risk assessment for that client, and
  (b) relates to the beneficial ownership information of the client, including information which helps them understand the ownership or control structure of any entity that is in the beneficial owner of the client; or

(ii) you have to contact an existing client in order to fulfil any duty under the *International Tax Compliance Regulations* (2015)

(iii) at other "appropriate times" as assessed by applying a risk based approach, and

(iv) when you become aware that the circumstances of an existing client have changed in a way relevant to your risk assessment of them (Regulation 27(8)).

78. In deciding whether it is an appropriate time to apply CDD to an existing client, you must take into account, among other things—

(i) any indication that the identity of the client, or of the client's beneficial owner, has changed;

(ii) any transactions which are not reasonably consistent with your knowledge of the client;

(iii) any change in the purpose or intended nature of your relationship with the client;

(iv) any other matter which might affect your assessment of the money laundering or terrorist financing risk in relation to the client (reg. 27(9)).

79. You will also need to keep under review the information that you hold with regard to the identification or verification of your client (*i.e*. previous CDD documentation), and consider whether you are satisfied as to its veracity and adequacy (reg. 27(1)(d)).

80. Save for where the re-application of CDD is mandatory, the decision as to when CDD should be applied to an existing client must be fact specific and risk based (reg. 27(8)(a)). For example, it would not usually be necessary to re-

apply CDD where a partner in a law firm who has instructed you in the recent past, on behalf of the same firm, wishes to instruct you again in relation to a low-risk matter on behalf of the same client. You should keep a record that a risk-based approach was taken and that due to the existing relationship and the low-level of money laundering/terrorist financing risk, fresh CDD measures did not need to be applied.

81. If you are undertaking public and licensed access work you will need to remain particularly alert to any change in the nature of the relationship with your client as your involvement in the matter progresses. You will also need to keep under review the information that you hold with regard to the identification or verification of your client (*i.e.* previous CDD documentation), and consider whether it remains satisfactory.

82. **There is no obligation under the Regulations to conduct CDD for work that is not within the scope of the Regulations**.

Completing CDD

83. Regulation 30(2) provides that CDD should ordinarily be completed before the relevant person establishes a business relationship or carries out an occasional transaction.

84. However, the Regulations permit some leeway in the application of this provision. Provided that the verification is completed "as soon as practicable" after contact is first established, verification may be completed during the 'establishment of a business relationship' if:

(i) it is necessary not to interrupt the normal conduct of business, and

(ii) it is adjudged that there is little risk of money laundering or terrorist financing occurring (reg. 30(3)).

85. The assessment of risk must be fact-specific. The exception in reg. 30(3) will be of use to you where instructions to advise are received at short notice. You will, however, have to exercise your own judgment about whether reg. 30(3) applies to allow you to proceed with your instructions, finalising CDD as soon as possible thereafter. Such an approach would be assisted by a preliminary CDD enquiry, such as identification checks, a search of open source material, public listings or approved stock exchanges.

86. Where you are unable to comply with your CDD obligations, reg. 31(1) requires that you must not accept your instructions or act upon any instructions that you have already accepted; in both situations, your instructions should be returned. You should also consider the reason why you

have not been able to undertake CDD. Where those reasons lead you to consider that you have reasonable grounds to suspect money laundering or terrorist financing, then you are obliged to make a Suspicious Activity Report to the NCA.

87. Regulation 31(3) provides that the obligation in reg. 31(1):

> "does not apply where a lawyer or other professional adviser is in the course of ascertaining the legal position for his client or performing his task of defending or representing that client in, or concerning, legal proceedings, including advice on the institution or avoidance of proceedings".

88. However, this exception only applies to litigation and contentious matters not to transactional work that may be subject to the Regulations.

Requirement to Report Discrepancies in Registers

89. Before establishing a business relationship with a company (registered or unregistered as defined in the *Unregistered Companies Regulations* 2009 (SI 2009/2436)), a Limited Liability Partnership or a Scottish Partnership you must collect proof of registration or an excerpt of the register from the company, the unregistered company, or the limited liability partnership (as the case may be) or from the registrar (in the case of an eligible Scottish partnership) - reg. 30A(1).

90. When undertaking this process you must report to the relevant registrar any material discrepancy that you find as between information relating to the beneficial ownership of the client and the register (reg. 30A(2)). You are not required to actively seek out such discrepancies.

91. The responsibility to report does not apply where the information is subject to LPP (reg. 30A(3)).

92. Material discrepancies should be reported to Companies House (via the online reporting tool available on the Companies House website) as soon as reasonably possible. Examples of non-material discrepancies are given at 12.6 of the Part 1 Guidance and further information regarding the duty to report discrepancies has been provided by the government (available here).

Ongoing monitoring

93. You are required to conduct ongoing monitoring of a business relationship, including:

(i) scrutiny of transactions undertaken throughout the course of the relationship (including, where necessary, the source of funds) to ensure that the transactions are consistent with your knowledge of your client, their business and their risk profile;

(ii) undertaking reviews of existing records and keeping the documents or information obtained for the purpose of applying CDD measures up-to-date (reg. 28(11)).

94. The ongoing monitoring should be carried out using a risk-based approach. It should apply to the on-going relationship that you have with your professional and lay clients and any other intermediaries.

95. Where you receive information, whether from the client or elsewhere, which leads you to believe that there has been a significant change to your client's status, for example, where the lay client is a company and ceases to be a publicly listed entity, you should consider immediately reviewing your CDD in relation to that client.

96. In relation to a client who does not attract simplified due diligence, where you receive information, whether from your client (in writing or orally) or elsewhere, which leads you to believe that:

(i) the shareholders for whom you hold CDD documentation are no longer shareholders of the client company,

(ii) the directors for whom you hold CDD documentation are no longer directors of the client company,

(iii) the partners for whom you hold CDD documentation are no longer part of the client partnership or LLP, or

(iv) the trustees or beneficiaries for whom you hold CDD documentation are no longer trustees or beneficiaries of the client trust or pension scheme,

then you should undertake CDD on the replacement shareholders/ directors/ partners/ trustees/ beneficiaries.

97. Furthermore, you need to consider whether any unexplained or odd behaviour or aspects of the client's ongoing business activity give grounds for suspicion of money laundering or terrorist financing. In particular, you should consider the following on an ongoing basis:

(i) What is the commercial rationale for the transaction and does it make sense?

(ii) Are the client's funds for the transaction coming from a legitimate source?

(iii) Does the documentation make sense?

(iv) Have there been any unexpected developments or occurrences on the transaction?

(v) Do the instructions make sense in relation to what you already know about your client?

98. Where your ongoing monitoring leads you to consider that you have reasonable grounds to suspect money laundering or terrorist financing then you must comply with your obligations in relation to Suspicious Activity Reports.

CDD and Suspicious Activity Reports

99. Where you have:

(i) undertaken CDD measures in relation to your client;

(ii) made a SAR (whether pursuant to Part 7 of POCA or Part 3 of TA), and

(iii) continuing to apply CDD in relation to that client would result in the commission of the offence of tipping-off by you (whether pursuant to s.21D of TA or s.333A of POCA),

you are not required to continue to apply CDD (reg. 28(14) & (15)).

Supervisory Inspection

100. You must be able to demonstrate to your supervisory authority (e.g. the BSB, Faculty of Advocates or Bar of Northern Ireland) that the extent of the measures you have taken to satisfy your CDD obligations are appropriate in view of the risks of money laundering and terrorist financing, including risks:

(i) identified in the risk assessment carried out by you in relation to your practice (pursuant to Regulation 18(1);

(ii) identified by your supervisory authority's Risk Assessment and any information made available to you by them in relation to the risks of

money laundering and terrorist financing (pursuant to reg. 17(9) and 47) (reg. 28(16)) (see [27] above).

Simplified Due Diligence

Application

101. Where you are entitled to apply simplified CDD measures, you must:

(i) continue to comply with the requirements of CDD (reg. 28) but you are entitled to adjust the extent, timing or type of CDD measures that you undertake to reflect your determination of a low risk of money laundering and terrorist financing; and

(ii) carry out sufficient monitoring of any business relationships or transactions which are subject to those measures to enable you to detect any unusual or suspicious transactions (reg. 37(1)).

Requirements

102. You may apply simplified CDD measures in relation to a particular business relationship or transaction where you determine that the business relationship or transaction presents a low degree of risk of money laundering or terrorist financing, having taken into account:

(i) the risk assessment you carried out in respect of your practice under Regulation 18(1); and

(ii) any relevant information identified by your supervisory authority in relation to the risks of money laundering and terrorist financing (pursuant to reg. 17(9) and reg. 47), i.e. supervisory reports and risk assessments, in relation to which see [27] above.

103. Where simplified CDD is applied, your file records should clearly record:

(i) the fact that it has been applied and

(ii) The reason why it has been applied.

Low Risk Situations: Mandatory Risk Factors:

104. When assessing whether there is a sufficiently low degree of risk of money laundering or terrorist financing so as to justify the application of simplified due diligence measures, you *must* take account of risk factors including, among other things:

(i) customer risk factors, for example whether the client is a public body or an individual resident in a geographical area of lower risk;

(ii) product, service, transaction or delivery channel risk factors, for example whether the product or service is a low value life insurance policy or a low risk pension scheme or child trust fund;

(iii) geographical risk factors, for example whether the country where the client is resident is the UK or a third country which has been identified by credible sources, such as the Financial Action Task Force, the International Monetary Fund, the World Bank or the OECD as having effective systems to counter money laundering and terrorist financing that are consistent with the revised Recommendations published by the Financial Action Task Force in February 2012 and updated in October 2016 and effectively implements those Recommendations.

NB:- You should refer to reg. 37(3) for the full list of mandatory risk factors.

105. In making the assessment referred to in reg. 37(3) above you must bear in mind that the presence of one or more risk factors may not always indicate that there is a low risk of money laundering or terrorist financing in a particular situation (reg. 37(4)).

When Simplified Customer Due Diligence may no longer be applied

106. You must cease to apply simplified CDD measures where:

(a) you doubt the veracity or accuracy of any documents or information previously obtained for the purposes of identification or verification;

(b) your risk assessment changes and you no longer consider that there is a low degree of risk of money laundering and terrorist financing;

(c) you suspect money laundering or terrorist financing; or

(d) if any of the conditions set out in reg. 33(1) (the obligation to apply enhanced due diligence) apply (reg. 37(8)).

Enhanced Due Diligence

107. There may be circumstances in which it is appropriate to apply an 'enhanced' level of CDD than would normally be required. The risk of money laundering, or terrorist financing, is variable in nature. Where there is an enhanced level of risk, an enhanced level of CDD should be applied to mitigate against the threat.

When enhanced due diligence must be applied

108. When carrying out CDD, reg. 33(1) requires that enhanced CDD measures, coupled with enhanced ongoing monitoring, *must* be applied in the following circumstances:

(i) in any case identified as one where there is a high risk of money laundering or terrorist financing either:

(a) in the risk assessment carried out by you in respect of your practice (pursuant to reg. 18(1)), or

(b) in information made available to you by the relevant supervisory authority i.e. the BSB, Bar of NI or the Faculty of Advocates (pursuant to reg. 17(9) and 47);

(ii) in any business relationship with a person established in a high-risk third country or in relation to any relevant transaction where either of the parties to the transaction is established in a high-risk third country;

(iii) in relation to correspondent relationships with a credit institution or a financial institution (in accordance with reg. 34);

(iv) if you have determined that a client or potential client is a PEP or a family member or known close associate of a PEP (in accordance with reg. 35);

(v) in any case where you discover that a client has provided false or stolen identification documentation or information and you propose to continue to deal with that client;

(vi) In any case where—

(a) a transaction is complex or unusually large,

(b) there is an unusual pattern of transactions, or

(c) The transaction or transactions have no apparent economic or legal purpose (reg. 33(1)(f)),

and

(vii) In any other case which by its nature can present a higher risk of money laundering or terrorist financing (reg. 33(1)(g)).

High Risk Situations: Mandatory Risk Factors

109. The Regulations require you to identify where there is a high risk of money laundering or terrorist financing (reg. 33(1)(a)). When assessing the level of risk in such a situation, and the extent of the measures which should be taken to manage and mitigate that risk, reg. 33(6) states that you must take account of risk factors including, among other things:

(i) customer risk factors, for example where the business relationship is conducted in unusual circumstances, where the client is resident in a geographical area of high risk, the beneficiary of a life insurance policy, or where the client is a legal person or legal arrangement that is a vehicle for holding personal assets (e.g. a trust);

(ii) product, service, transaction or delivery channel risk factors, for example where the product involves:

(a) private banking;

(b) non-face-to-face business relationships or transactions, without certain safeguards, such as an electronic identification process which meets the conditions set out in reg. 28(19);

(c) there is a transaction related to oil, arms, precious metals, tobacco products, cultural artefacts, ivory or other items related to protected species, or other items of archaeological, historical, cultural or religious significance or of rare scientific value;

(iii) geographical risk factors, for example, countries:

(a) that do not have effective systems to counter money laundering or terrorist financing or have significant levels of corruption or other criminal activity, such as terrorism, money laundering, and the production and supply of illicit drugs;

(b) providing support for terrorism;

(c) identified by credible sources, such as the Financial Action Task Force, the International Monetary Fund, the World Bank or the OECD as not implementing requirements to counter money laundering and terrorist financing that are consistent with the recommendations published by the Financial Action Task Force in February 2012 and updated in June 2019.

NB:- You should refer to reg. 33(6) for the full list of mandatory risk factors.

110. In making the assessment referred to in reg. 33(6) above you must bear in mind that the presence of one or more risk factors may not always indicate that there is a high risk of money laundering or terrorist financing in a particular situation (reg. 33(7)).

High-Risk Third Countries

111. For the purposes of reg. 33(1)(b), a "high-risk third country" means a country a country which is specified in Schedule 3ZA (reg.33(3)(a)). As at 29th March 2022, Sched. 3ZA listed the following countries as high-risk: Albania, Barbados, Burkina Faso, Cambodia, Cayman Islands, Democratic People's Republic of Korea, Haiti, Iran, Jamaica, Jordan, Mali, Malta, Morocco, Myanmar, Nicaragua, Pakistan, Panama, Philippines, Senegal, South Sudan, Syria, Turkey, Uganda, United Arab Emirates and Yemen (SI No. 392 of 2021, as amended by SI No. 393 of 2022).

High-Risk Third Countries, Exemptions

112. The requirement in reg. 33(1)(b) in relation to a person established in a high-risk third country does not apply when the client is a branch or majority owned subsidiary undertaking of an entity which is established in a third country if all the following conditions are satisfied—

(i) the entity is—

(a) subject to the requirements in national legislation having an equivalent effect to those laid down in the Fourth Money Laundering Directive on an obliged entity (within the meaning of that Directive), and

(b) supervised for compliance with those requirements in a manner equivalent to section 2 of Chapter VI of the Fourth Money Laundering Directive;

(ii) the branch or subsidiary complies fully with procedures and policies established for the group under requirements equivalent to those laid down in Article 45 of the Fourth Money Laundering Directive; and

(iii) applying a risk-based approach, you do not consider that it is necessary to apply enhanced CDD measures (reg. 33(2)).

Enhanced Customer Due Diligence Measures

113. Whilst the application of enhanced CDD measures should be assessed on a case-by-case basis, the Regulations state that the measures required under reg. 33(1) may, "depending on the requirements of the case", also include, "among other things":

(i) seeking additional independent, reliable sources to verify information provided or made available to you;

(ii) taking additional measures to understand better the background, ownership and financial situation of the client, and other parties to the transaction;

(iii) taking further steps to be satisfied that the transaction is consistent with the purpose and intended nature of the business relationship;

(iv) increasing the monitoring of the business relationship, including greater scrutiny of transactions (reg. 33(5)).

Mandatory measures for high-risk third countries

114. In addition to the above measures the enhanced CDD measures that you are required to take for the purposes of reg. 33(1)(b) (high-risk third countries) "*must* include":

(i) obtaining additional information on the client and on the client's beneficial owner;

(ii) obtaining additional information on the intended nature of the business relationship;

(iii) obtaining information on the source of funds and source of wealth of the client and of the client's beneficial owner;

(iv) obtaining information on the reasons for the transactions;

(v) obtaining the approval of senior management for establishing or continuing the business relationship;

(vi) conducting enhanced monitoring of the business relationship by increasing the number and timing of controls applied, and selecting patterns of transactions that need further examination (reg. 33(3A)).

Mandatory measures for complex, unusual etc, transactions

115. In addition to the above measures, the enhanced CDD measures that you are required to take for the purpose of reg. 33(1)(f) (complex or unusual transactions, transactions with unusual patterns and transactions that have no apparent economic or legal purpose) must include:

(i) as far as reasonably possible, examining the background and purpose of the transaction, and

(ii) increasing the degree and nature of monitoring of the business relationship in which the transaction is made to determine whether that transaction or that relationship appear to be suspicious (reg. 33(4)).

Politically Exposed Persons

116. A PEP is a person who has been entrusted within the last year with prominent public functions, other than as a middle-ranking or more junior official (reg. 35(12) (a)).

117. Those with a "prominent public function" *include*:

(i) Heads of State, heads of government, ministers and deputy or assistant ministers;

(ii) Members of Parliament or of similar legislative bodies;

(iii) members of the governing bodies of political parties;

(iv) members of supreme courts, of constitutional courts, or of any judicial body the decisions of which are not subject to further appeal except in exceptional circumstances;

(v) members of courts of auditors or of the boards of central banks;

(vi) Ambassadors, charges d'affaires and high-ranking officers in the armed forces;

(vii) members of the administrative, management or supervisory bodies of State-owned enterprises;

(viii) Directors, deputy directors and members of the board or equivalent function of an international organisation (reg. 35(14)).

118. PEPs also include:

(i) family members of a PEP – spouse, civil partner, children and their spouses or civil partners and parents (reg. 35(12) (b)), and

(ii) known close associates of a PEP – people with whom joint beneficial ownership of a legal entity or legal arrangement is held, with whom there are close business relationships, or who is a sole beneficial owner

of a legal entity or legal arrangement which is known to have been set up for the benefit of a PEP (reg. 35(12) (c)).

119. For the purpose of deciding whether a person is a known close associate of a politically exposed person, you need only have regard to information which is in your possession, or to credible information which is publicly available (reg. 35(15)).

Risk Assessment of a PEP

120. Where you have determined that a client or a potential client is a PEP, or a family member or known close associate of a PEP, you must assess:

(i) the level of risk associated with that client, and

(ii) the extent of the enhanced CDD measures to be applied to that client (reg. 35(3)).

The Application of Enhanced Due Diligence to a PEP

121. Your assessment of the extent of the enhanced CDD measures to be taken in relation to a PEP must be made on a case by case basis. However, you *must* take account of any information made available to you by your supervisory authority in relation to the risks of money laundering and terrorist financing (see, reg. 35(4) and 17(9) and 47).

122. You also *may* take into account any guidance which has been:

(i) issued by the FCA; or

(ii) issued by any other supervisory authority or appropriate body and approved by the Treasury, *e.g.* if approved, this Guidance (reg. 35(4)).

123. In addition to the enhanced due diligence measures required by reg. 33, where you propose to have, or to continue, a business relationship with a PEP, or a family member or a known close associate of a PEP (or a person of which they are a beneficial owner), you must:

(i) have approval from senior management for establishing or continuing the business relationship with that person[3];

[3] Not applicable to self-employed barristers.

(ii) take adequate measures to establish the source of wealth and source of funds which are involved in the proposed business relationship or transactions with that person; and

(iii) where the business relationship is entered into, conduct enhanced ongoing monitoring of the business relationship with that person (reg. 35(5) & (13)).

Persons Who Cease to be a PEP: ongoing monitoring

124. Where a person who was a PEP is no longer entrusted with a prominent public function, you must continue to apply the requirements in regs 35(5) and (8) in relation to that person either:

(i) for a period of at least 12 months after the date on which that person ceased to be entrusted with that public function; or

(ii) for such longer period as you consider appropriate to address the risk of money laundering or terrorist financing in relation to that person (reg. 35(9)).

125. However, the extended monitoring referred to above does not apply in relation to a person who—

(i) was not a PEP within the meaning of reg. 14(5) of the Money Laundering Regulations 2007, when those Regulations were in force (a non-foreign PEP); and

(ii) ceased to be entrusted with a prominent public function before the date on which the 2017 Regulations came into force (26th June 2017).

126. When a person who was a PEP is no longer entrusted with a prominent public function, you are no longer required to apply the requirements in regs 35(5) and (8) in relation to a family member or known close associate of that PEP (whether or not the period referred to in reg. 35(9) has expired - reg. 35(11).

Clients Who are PEPs

127. The exercise of discovering whether someone is a PEP may well present a challenge to you as practising barristers or advocates. Your instructing solicitors may be able to assist you. They may have access to databases to which some solicitors' firms subscribe which can be used to run a name check and produce a report in relation to a named individual. The report will say whether the name searched against matches that of a PEP and will also indicate whether there has been any negative press on the individual or entity.

It is important to remember that even if you do make use of such a service, it is not definitive. You will also be able to conduct your own 'open source' searches, for example on the internet.

128. Barristers practising in England and Wales and in Northern Ireland who accept public access instructions will have to undertake such searches themselves. This does not mean that you are required to suspect every new client of being a PEP but that that you need to make sufficient enquiries as to the client's identity and pay attention to publicly available information or such information as you are able to obtain. All barristers should remain alert to situations suggesting that the client is a PEP, for example, correspondence received from the client on official letterhead, or news reports which comes to your attention suggesting that the client is a PEP.

129. In all cases where you intend to act for a client: (i) who is, or was a PEP, (ii) is a family member or close associate of a PEP, or (iii) who has a PEP as a beneficial owner, you must apply an enhanced level of CDD in accordance with reg. 35(4). You must carefully consider the PEP's source of wealth and funds and the nature and purpose of the business relationship that you are being asked to establish. You will need to consider, in light of the information that you have obtained, whether it is appropriate to make a report of any suspicions, in relation to which see [174] below (re making a SAR).

Applying Customer Due Diligence – lay clients, professional clients, and other intermediaries

130. Your due diligence obligations apply in relation to your "customer", *i.e.* someone with whom you enter a "business, professional or commercial relationship...which arises out of [your practice as a barrister or advocate] and is expected by you at the time when contact is established, to have an element of duration" [reg. 4(1)]. HM Treasury has interpreted this to mean both your professional and lay client(s) (see [15] above).

131. In England and Wales and in Northern Ireland barristers involved in public and licensed access cases, may also have an intermediary who is not a professional client. Similar considerations will apply, except that the practical application of your CDD obligations may be more onerous in relation to the intermediary than in the case of a professional client.

Professional Clients and Other Intermediaries

132. Solicitors in England and Wales are subject to the Regulations and regulated by the SRA. Solicitors in Scotland are also subject to the Regulations and are regulated by the Law Society of Scotland. Solicitors in Northern Ireland are

also subject to the Regulations and are regulated by the Law Society of Northern Ireland. You may have regard to your instructing solicitor's regulatory position as part of your risk-based approach to CDD upon them. In other words, applying a risk-based approach, you may take into account the potentially lower risk that results from the fact that your instructions come from a solicitor or firm of solicitors who themselves owe duties under the Regulations and whose conduct and compliance is overseen by their own regulator (e.g. the SRA).

133. In relation to partnerships such as law firms, the necessary enquiries should be met by confirming the solicitor's regulated status through reference to the current membership directory of the relevant professional association (for example, law society or accountancy body).

134. Where you are required to conduct CDD upon an instructing solicitor, such a check is the standard requirement and, given the regulatory position of solicitors, will usually be sufficient. Where the person instructing you is understood to be a solicitor practising in England and Wales, a check should be made of the SRA's database of organisations and people providing legal services in England and Wales who are regulated by the SRA (see here). Advocates in Scotland and barristers in Northern Ireland should perform the equivalent check with their corresponding Law Societies and other relevant regulatory authorities.

135. Where an instructing solicitor has instructed you in the recent past, the application of a risk-based approach may mean that you are not required to re-apply CDD measures in relation to the solicitor upon receipt of fresh instructions. In such circumstances what is required is that you keep a record that a risk-based approach was taken and that due to the existing relationship and the low-level of money laundering/terrorist financing risk, fresh CDD measures did not need to be applied. Your obligation to undertake CDD upon your lay client would remain.

136. A risk-based approach must be taken. If for any reason there is an enhanced level of risk then greater checks and confirmation will be necessary as per the enhanced due diligence requirements of reg. 33. Whilst such occasions are likely to be rare, circumstances may arise where steps are required to confirm the identity of those seeking to instruct you: for example, where the distinction between your professional and lay client seems blurred or non-existent or where the details provided by the individual solicitor or a firm on its letterhead or in its communications do not match those held by the SRA or equivalent in your relevant jurisdiction. In such circumstances you should take such proportionate steps as are required to confirm and verify their identity. Accordingly, you may need to ask the person seeking to instruct you

to confirm their identity and in some, exceptional, cases you may need to consider whether you require such confirmation from an independent and authoritative source such as a passport or a driving licence.

137. You should keep a record of the steps you take to check the status of your instructing solicitor.

138. Where you are unable to complete CDD satisfactorily, you cannot accept or proceed with your instructions (reg. 31(1)). Where you have reasonable grounds to suspect that money laundering or terrorist financing is taking place you are also obliged to make a SAR.

139. The guidance above applies *only* to solicitors instructing you in their professional capacity.

140. You should also be alert to risk of impersonation, and accordingly whether the documents said to have emanated from the solicitor or their firm have been forged.

141. In considering the identity of the person who seeks to instruct you, you should also bear in mind that, in the case of England & Wales, the Scope of Practice rules in the Handbook require you in any event to check that your instructions come from a genuine and authorised "professional client" (rS24) when there are circumstances that suggest that the position may be in doubt. Advocates in Scotland and barristers in Northern Ireland should refer to their applicable equivalent rules.

142. You are also required to continue to monitor your relationship with your professional client for risks of money laundering or the financing of terrorism. That monitoring must be carried out using a risk-based approach. You also remain subject to the statutory obligations to report any suspicion of money laundering or terrorist financing.

143. An example of circumstances existing in relation to a solicitor, or other professional client, that gives rise to a suspicion of money laundering or terrorist financing would be where the type of matter on which you are instructed is far removed from what you would expect in view of the nature, size or specialism of the practice: *e.g.* a high street firm undertaking publicly-funded criminal and family work asks for advice in relation to a multi-million pound international transaction on behalf of an offshore entity. In such circumstances, you should take such steps as are proportionate to the money laundering risks involved in proceeding with your instructions and, where you consider that you have reasonable grounds to suspect money laundering or terrorist financing, you must make a SAR to the NCA.

Licensed and Public Access Cases (England and Wales) and Direct Professional Access Cases (Northern Ireland)

144. Licensed access and public access cases present their own challenges in relation to CDD and intermediaries.

Licensed Access Cases

145. In many, although not all licensed access cases the licensed access client will be a formal intermediary between you and the lay client. This will usually arise in circumstances where the intermediary is also acting on behalf of the lay client: *e.g*. a surveyor or an accountant who is already acting for the client, who instructs you on a licensed access basis on behalf of that client. In such cases you will need to carry out risk-sensitive CDD on both the licensed access client and the lay client (reg. 28(10)).

146. As with other clients, continued risk-based monitoring of the relationship is required.

147. In other cases, the licensed access client will be, or will be identifiable with, the lay client, for example where you are instructed by and on behalf of an organisation that has a licence to instruct counsel in relation to its own affairs. In those circumstances, the necessary due diligence will concern the licensed access entity. Again, on-going risk-based monitoring is required.

Public Access Cases

148. In Public Access cases, the more usual situation is that the lay client instructs you directly, without the assistance of an intermediary. Where the lay client does instruct you via an intermediary, the default position under the BSB Handbook is that the intermediary is an agent of the client, and not a client in their own right. However, under reg. 28(10), where a person "purports to act" on behalf of a client you must verify that the intermediary is are entitled to act on the client's behalf and verify their identification from independent information (Reg 28 (10)(a)-(c)).

149. Advocates in Scotland and barristers in Northern Ireland are advised to establish the equivalent position within each of their jurisdictions, noting that public access is not permitted in certain jurisdictions.

150. As with all other instructions you should continue to apply risk-based monitoring to your instructions and the nature of any relationship between your Public Access client and any person acting on their behalf as an intermediary.

151. Should the relationship between your client and the intermediary alter in such a way as to make you consider that the intermediary has become the source of your instructions or has replaced your original client, you will need to address the altered situation. First, you will need to consider whether it is appropriate for you to continue to act. If you consider it appropriate to continue, you should then apply the required risk-sensitive CDD measures to the intermediary. If those measures are satisfied and you continue to act, thereafter you should continue to monitor your relationship with the client and, applying a risk-based approach, comply with your statutory obligations to report any reasonable suspicions of money laundering or terrorist financing to the NCA.

Reliance & Outsourcing

152. Regulation 39(1) permits you, in certain circumstances, to rely on the CDD carried out by a third party. The third party must be someone who falls within the definition of reg. 39(3) and must also agree to you relying on their CDD measures.

153. Notwithstanding your reliance on the other person, however, you remain liable for any failure to correctly apply the required CDD measures; reliance should be considered in those terms.

Persons on Whom Reliance Can be Placed

154. Regulation 39(3) provides that you can only rely on the following persons within the UK to apply any CDD measures that are required by the Regulations:

(i) credit institutions, as defined by reg. 10;

(ii) financial institutions (reg. 10);

(iii) auditors, insolvency practitioners, external accountants and tax advisers (reg. 11);

(iv) independent legal professionals (reg. 12);

(v) trust or company service providers (reg. 12(2);

(vi) estate agents (reg. 13);

(vii) high value dealers (reg. 14(1)(a));

(viii) casinos (reg. 14(1)(b));

(ix) auction platforms (reg. 14(1)(c));

(x) art market participants (reg. 14(1)(d));

(xi) cryptoasset exchange providers (reg. 14A); and

(xii) custodian wallet providers (reg. 14A).

155. You can only rely on a person who carries on business in a third country, other than a high-risk third country (reg. 33(3), see [111] above), if they are:

(a) subject to requirements in relation to CDD and record keeping which are equivalent to those laid down in the Fourth Money Laundering Directive; and

(ii) supervised for compliance with those requirements in a manner equivalent to section 2 of Chapter VI of the Fourth Money Laundering Directive (reg. 39(3)).

156. You cannot rely on a third party established in a high-risk third country (reg.33(4)). Reliance may be placed upon a branch or majority owned subsidiary of an entity established in a high-risk third country, if all the following conditions are met—

(i) the entity is—

(a) a person who is subject to the requirements in these Regulations as a relevant person within the meaning of regulation 8 and who is supervised for compliance with them; or

(b) subject to requirements in national legislation having an equivalent effect to those laid down in the Fourth Money Laundering Directive on an obliged entity (within the meaning of that Directive) and supervised for compliance with those requirements in a manner equivalent to section 2 of Chapter VI of the Fourth Money Laundering Directive;

(ii) the branch or subsidiary complies fully with procedures and policies established for the group under—

(a) regulation 20 of these Regulations, or

(b) requirements in national legislation having an equivalent effect to those laid down [in] Article 45 of the Fourth Money Laundering Directive (reg. 33(5).

Reliance on a Third Party

157. In order to rely upon the CDD measures of a third party, reg. 39(2) requires you to both:

(i) immediately obtain from the other person all the information needed to satisfy the requirement to apply CDD measures in accordance with Regulations 28(2) to (6) and (10) (reg. 39(2)(a)); and

(ii) enter into arrangements with the other person, that

(a) enable you to obtain from the other person immediately on request copies of any identification and verification data and any other relevant documentation on the identity of the client or its beneficial owner; and

(b) require the third party to retain copies of the data and documents for the period referred to in reg. 40 (reg. 39(2)(b)).

158. Reliance does not mean simply obtaining the third party's CDD documents. Rather, it means obtaining from them all of the "information" that you need to meet all of your CDD obligations under reg. 28. This does not mean and does not require you to obtain the underlying documentation. Even where you do obtain copy documents, the obligation upon you is to ensure that the information provided to you permits you to meet the requirements of Regulation-compliant CDD.

159. To undertake reliance you should enquire of the third party what steps it has taken to satisfy its CDD obligations, review and check the CDD information provided to you and consider whether the steps taken by the third party are sufficient to meet the requirements of the Regulations. You should assess whether the CDD upon which you propose to rely is sufficient for you to comply with your CDD obligations under the Regulations. If it is not, then you should not rely upon it.

160. In practice, you need to know:

- the identity of the customer or beneficial owner whose identity is being verified;
- the level of CDD that has been carried out; and
- confirmation of the third party's understanding of their obligation to make available, on request, copies of the verification data, documents or other information.

If you routinely rely on CDD checks done by a particular third party, it is good practice to request sample documents to test their reliability.

161. You must confirm that the third party is someone who can grant reliance under the Regulations and keep a written record of having done so. You should also consider whether you are required to undertake CDD upon the third party upon whom you are seeking reliance.

162. You should take a risk-based approach to reliance and in doing so factor in that placing reliance upon a third party contains its own level of risk. Reliance must be undertaken in a critical manner and must not be a 'tick-box' exercise.

163. Regulation 39(2)(a) requires you immediately to obtain all the "information" needed to satisfy the requirement to apply CDD in accordance with reg. 28. As such, there may be cases in which it may be more practical to obtain the documents and carry out your own CDD, rather than try to persuade the person who instructs you to comply with the requirements of reg. 39 and permit you to rely upon their CDD.

Responding to a Request for Reliance

164. Whilst it is unlikely, there may be circumstances where another relevant person seeks to rely upon any CDD measures that you as a barrister or advocate have carried out. If such a request is made, you should consider whether you wish to provide the reliance requested. In making that determination you should bear in mind that it might assist your client were you to provide the reliance sought.

165. Before agreeing to enter into such an arrangement, you should ensure that:

(i) you have the consent of your client, and any necessary third-party information providers, to disclose the requested CDD information to the other party, and

(ii) you can make the requested CDD identification and verification information available immediately on request.

166. As a matter of good practice, you should record any reliance arrangement with another person in writing.

167. As part of that arrangement you should consider whether you require an exclusion of liability agreement from the other person. Such an agreement would address the risk that the other party may seek redress against you should they suffer a loss as a result of their reliance.

Outsourcing CDD

168. Nothing in reg. 39 prevents you from applying CDD by means of an agent or an outsourcing service provider. However, as with reliance, you will remain liable for any failure by that service provider or agent to apply CDD measures properly, and you are obliged to ensure that any arrangements you enter into for such a service reflect that position.

169. Whatever approach you take, liability for carrying out the required CDD remains with you as the relevant person. Where you rely upon another person conducting the CDD checks, the responsibility remains yours. You cannot avoid criminal sanction by the plea that you relied upon your solicitor's CDD or paid an external provider and that they failed to do the job properly - the buck stops with you.

Public and Licensed Access Cases (England and Wales) and Direct Professional Access Cases (Northern Ireland)

170. Where you are instructed without a professional intermediary, for example in most public access matters, you will have to conduct your own CDD in any event.

171. However, there may be circumstances where you can rely upon the CDD of a professional intermediary: for example, in a licensed access situation where the licensed access client is also a professional who is subject to the Regulations (as with a professional client under the Handbook). In those circumstances, you should make an assessment of the risk of relying upon the CDD carried out by the intermediary. This will include making an assessment of the status and bona fides of the intermediary and the checks that they have undertaken: for example, how thoroughly has the intermediary's CDD been carried out, do they hold adequate documentation and how certain are you of their identity? The lower the perceived risk of such reliance, the more you may be comfortable relying upon the intermediary's CDD, and vice versa. Either way, you retain personal responsibility for compliance with the requirements of the Regulations.

172. Bear in mind that, if the intermediary is in effect fulfilling the role of your professional client (see [148] onwards above), then you will also need to undertake CDD upon them.

Direct Access in Scotland

173. If you practice in Scotland and accept work under the Faculty of Advocates direct access rules you will need to confirm that the individual appointing you is a member of an organisation listed on the Faculty's website. You are not required to carry out CDD on the organisation itself as the Faculty has already done so.

Reporting Suspicion

174. Section 330 of POCA makes it a criminal offence for those in the regulated sector to fail to disclose suspicious transactions. Covered in more detail below (see [236] onwards), the essential elements are that:

(i) the information must be received in the course of conducting business in the regulated sector; and

(ii) the regulated person must know or suspect, or have reasonable grounds for knowing or suspecting, that another person is engaged in money laundering;

175. The maximum penalty for an offence under the section is 5 years' imprisonment (with a custodial sentence a high probability: see e.g. *R v. Griffiths and Pattison* [2007] 1 Cr.App.R.(S) 95).

Suspicious Activity Reports

176. A SAR is made to the NCA. The NCA is the UK's Financial Intelligence Unit ("UKFIU").

177. As the UKFIU, the NCA receives and analyses SARs concerning suspected proceeds of crime in order to combat money laundering and terrorism, and makes them available to law enforcement agencies for appropriate action.

178. SARs are also known as 'disclosures'. The NCA states that such disclosures can contribute intelligence to existing law enforcement operations, identify the proceeds of crime, and initiate investigation into previously unknown criminal activities. Where the SAR seeks consent to carry out a transaction, it is also known as a 'defence against money laundering' or DAML.

Making a SAR

179. The NCA web page "*Making a NCA Regulated Sector Suspicious Activity Report*" states that the NCA's preferred method for someone to submit an SAR is for the report to be submitted in the "NCA Suspicious Activity Report Format" and to be submitted electronically. Hard copy versions, may however, be

submitted by post. Guidance on requesting a DAML is available on the NCA website.[4]

Electronic reporting

180. The NCA states that "SAR Online" is a web-based reporting facility that has been designed to facilitate the secure and efficient completion and submission of SARs. It can be found here.

181. Guidance as to the completion of the form, and online help, can be found on those pages. New users will be required to register their details before they can activate their account, log in and make a report (see here).

182. Where "SAR Online" does not suit the needs of the reporting person, but you wish to report using electronic means, you should call the NCA on +44 207 238 8282.

Hard copy reporting (not preferred)

183. The NCA advises that a reporting person choosing not to use one of the electronic reporting methods should obtain a copy of the NCA Preferred Form. Those wishing to complete reports on their own computer should download the form(s) from the NCA website. Alternatively, to request versions of the forms (for completion by hand) and the guidance on completing the form, the reporter is advised to telephone +44 207 238 8282. Registration remains a requirement, even with hard copy reporting.

184. Reporting persons are asked not to provide handwritten forms.

185. Hard copy reports should be sent to: UK FIU, PO Box 8000, London SE11 5EN.

What information should a SAR contain?

186. If a hard copy form is being submitted, the form should be completed on the computer-generated template, which is available to download from the NCA website.

187. Where this is not possible, it should be typed onto a paper copy.

188. A number of fields within the computer-generated template can be completed by selecting options from dropdown menus. The guidance notes explain what

[4] https://www.nationalcrimeagency.gov.uk/who-we-are/publications/43-requesting-a-defence-under-poca-tact/file

information is required in the standard form template, and are to be read in conjunction with the form itself.

189. The NCA guidance states that it is important that the relevant information be completed within the appropriate fields and not merely placed within the "Reasons for Suspicion" field.

190. There are a number of fields that should be completed in order for a report to be accepted by the NCA. Those fields are:

- Your Reference ("even if none")
- Disclosure Type
- New or Update
- Source ID
- Source Outlet ID
- Today's Date
- Surname or Company Name and
- Reasons for Suspicion.

191. Additional information can also be submitted.

192. The NCA advises that for a more detailed explanation of the template itself, the reporting person should contact the NCA SAR Team (presumably on +44 207 238 8282).

193. The NCA will not acknowledge any SAR sent by fax or post.

194. Electronic submissions will receive an acknowledgment which will include an automatically generated 'ELMER' reference number.

195. If the Report is a request for consent, the NCA states that the "Consent Team" will contact you directly with the decision by telephone within the seven "working day" notice period, followed by written confirmation by way of a letter.

196. If you have a query relating to acknowledgments the NCA advises that you write to the SAR Team at UKFIU, PO BOX 8000, London, SE11 5EN.

Disclosure

197. The Regulations do not authorise or require a disclosure which is prohibited by any of Parts 1 to 3 or 5 to 7 of the *Regulation of Investigatory Powers Act* 2000, *i.e.* restrictions on the use of material obtained through covert investigations

such as intercepted material, surveillance records and communications data etc.

Section 335 – the 'moratorium period'

198. Section 335 makes provision for a timetable regarding the processing and monitoring of SARs by the NCA, as follows:

- Where an authorised disclosure is made, then the person making the disclosure must receive consent from the NCA before proceeding with an otherwise prohibited act.
- Once disclosure is made, there is a seven "working day" notice period that starts with the first working day after the disclosure (s.335(5)).
- If consent is not refused within the notice period then it is permissible to act (s.335(3)).
- If consent is refused, there is a moratorium period during which it is not permissible to act unless consent is given.
- The moratorium period is 31 days, starting with the day on which the person receives notice that consent is refused (s.335(6)).
- Once the moratorium period has expired, it is permissible to act (s.335(4)).

199. Sections 336A-D of POCA grant the court the power, upon an application by a senior officer (for example a police officer of at least the rank of inspector), to extend the moratorium period in monthly iterations up to a maximum of 6 months.[5]

200. The NCA is under an obligation to keep a refusal of consent under review. The Court of Appeal in *R. (on the application of UMBS Online Ltd) v. Serious Organised Crime Agency* [2007] Bus. L.R. 1317 confirmed, in relation to SOCA, the NCA's predecessor, that there is nothing in s.335 that requires a request to revisit the decision regarding consent to be made by the person who had originally requested it. Instead, the NCA can and must act independently of a request from anybody.

201. Furthermore, consent must be kept under review, and granted as soon as there is no longer any good reason for withholding it.

[5] The extended moratorium provisions (inserted by the Criminal Finances Act 2017 apply only to relevant disclosures made on or after 31st October 2017

Sharing Information in the Regulated Sector

202. Sections 339ZB-339ZG of POCA enable the voluntary sharing of information between specified relevant persons in the regulated sector and between those relevant persons and the NCA, in connection with suspicions of money laundering.

203. As at 22d July 2020 the only relevant persons specified within the Criminal Finances Act 2017 ["CFA"] in relation to POCA for the purposes of information sharing are financial institutions and credit institutions, and not independent legal professionals (§2(b), *The Criminal Finances Act 2017 (Commencement No. 2 and Transitional Provisions) Regulations* 2017 (2017, No. 991), §2(a), *The Criminal Finances Act 2017 (Commencement No. 3) Regulations* 2017 (2017, No. 1028) & *The Criminal Finances Act 2017 (Commencement No. 4) Regulations* 2018, No.78).

Further Information Orders

Criminal Property

204. Sections 339ZH-339ZK of POCA (as inserted by s.12 of the CFA) grants the magistrates' court or, in Scotland, the sheriff, the power, upon an application by the Director General of the National Crime Agency, to make a further information order where it is satisfied that either one of two statutory conditions is met (s.339ZH (1)). However, material subject to LPP ("privileged information") is expressly excluded from the ambit of further information orders (s.339ZK (1) & (2))

205. The power to make a further information order can only be applied to cases where the information required to be given under the order relates to a matter arising from a disclosure made on or after 31 October 2017 (§3(2), *The Criminal Finances Act 2017 (Commencement No. 2 and Transitional Provisions) Regulations* 2017 (2017, No. 991)).

Terrorist Property

206. Sections 22B-22E of TA (as inserted by s.37 of CFACT) grants the magistrates' court or, in Scotland, the sheriff, the power, upon an application made by a "law enforcement officer" to make a like further information order, in connection with suspected terrorist property.

207. The power to make a further information under s.22B (1) of the TA can only be applied to cases where the information required to be given under the order relates to a matter arising from a disclosure made on or after 31 October 2017 (§3(3), *The Criminal Finances Act 2017 (Commencement No. 2 and Transitional Provisions) Regulations* 2017 (2017, No. 991)).

Supervision and Enforcement

208. The Faculty of Advocates is the supervisory authority under the Regulations for advocates practising in Scotland. The Bar Council of Northern Ireland performs this role for all barristers practising in Northern Ireland. The Bar Council of England and Wales is the supervisory authority under the Regulations for the Bar of England and Wales. It has delegated the performance of its supervisory role to the BSB. A supervising authority is under a duty to monitor barristers acting under the Regulations and take such "necessary measures for the purpose of securing compliance" with the Regulations (reg. 46(1)). In doing so it must adopt a "risk-based approach to the exercise of its supervisory functions" (reg. 46(2)(a)). That approach must be informed by its assessment of the national and international risks of money laundering and terrorist financing to which the Bar is subject as set out in the risk assessment it must prepare in compliance with Regulation 17.

209. The obligations upon a supervising authority also require it to:

(i) Take appropriate measures, in accordance with a risk-based approach, to review barristers' risk assessments and their policies, controls and procedures (reg. 46(4));

(ii) report to the NCA any suspicion that a barrister has engaged in money laundering or terrorist financing (reg. 46(5));

(iii) make up-to-date information on money laundering and terrorist financing available to the Bar (reg. 47(1));

(iv) co-operate and co-ordinate their activities with other supervisory authorities, HM Treasury and law enforcement authorities (reg. 50); and

(v) collect certain information about the persons it supervises, and any other information it considers necessary for exercising its supervisory function (reg. 51(1)); and upon request provide such information to HM Treasury (reg. 51(2)).

210. As self-regulatory organisations both the Faculty of Advocates and the Bar Council of Northern Ireland must observe the specific requirements of Regulation 49 which include obligations to ensure that:

(a) their supervisory functions are exercised independently of any of their other functions which do not relate to disciplinary matters;

(b) sensitive information relating to the supervisory functions is appropriately handled within the organisation;

(c) they employ only persons with appropriate qualifications, integrity and professional skills to carry out the supervisory functions;

(d) contravention of a relevant requirement by a relevant person they are responsible for supervising renders that person liable to effective, proportionate and dissuasive disciplinary measures under their rules.

211. In compliance with reg. 47(1), supervisory authorities (including self-regulatory organisations) must make up to date information available on money laundering and terrorist financing. You are advised to refer to your supervisory authority's website and keep abreast of regulatory updates that are made available to you. The information a supervisory authority provides must include:

(a) information on the money laundering and terrorist financing practices the supervisory authority considers apply to those relevant persons that it supervises;

(b) a description of indications which may suggest that a transfer of criminal funds is taking place at the Bar;

(c) a description of the circumstances in which the supervisory authority considers that there is a high risk of money laundering or terrorist financing (reg. 47(2)).

Supervision and Enforcement in Scotland

212. The Faculty of Advocates' Guide to Professional Conduct requires advocates undertaking work subject to the Regulations to register with the Faculty and that registration has to be renewed annually if required. The Guide to Professional Conduct also requires all advocates to comply with the relevant legislation covered by this guidance.

213. The Faculty has developed an annual monitoring process under which registered advocates may be required to attend supervisory meetings to review their compliance with the Regulations. Members will be required to produce their practice risk assessments, policies and procedures for review together with a listing of work undertaken in the previous year. Examples of CDD undertaken will also be reviewed. Any breach of the Regulations will be handled under the Faculty's disciplinary process.

Information and Investigation

214. To assist a supervisory authority in achieving its goal of ensuring compliance with the Regulations, it is empowered to require the provision of information in relation to AML/CTF compliance, investigate concerns it has in relation to compliance and impose disciplinary penalties upon barristers for failures of AML/CTF compliance. Part 8 of the Regulations provides the supervisory authority with a series of powers to enable it to perform those functions, they include:

(i) power to require attendance, information and documents from barristers acting under the Regulations, without a warrant, at a specified time and place (reg. 66);

(ii) power to retain documents taken under Regulation 66 or 70 (reg. 71); and

(iii) power to request the assistance of overseas authorities (reg. 68).

215. In addition to the powers granted to the supervisory authority, the FCA and HM Revenue and Customs have been provided with the following additional powers in relation to persons acting under the Regulations:

(i) power to enter and inspect premises used by a barrister in connection with their practice without a warrant (reg. 69);

(ii) power to enter premises used by a barrister in connection with their practice under a warrant (reg. 70), such a warrant to be issued by a justice of the peace (reg. (70) (1)) where they are satisfied that the relevant conditions (reg. 70(3) -(6)) are met.

216. In exercising the power under reg. 69 (entry and inspection without a warrant) the duly authorised officer of the FCA or HMRC may, on producing evidence of the officer's authority, at any reasonable time:

(i) enter the premises;

(ii) inspect the premises;

(iii) observe the carrying on of business or professional activities by the barrister;

(iv) inspect any documents or other information found on the premises;

(v) require any person on the premises to provide an explanation of any document or to state where documents or information might be found;

(vi) inspect any cash found on the premises;

(vii) take copies of, or make extracts from, any documents found in the course of the officer's inspection (reg. 69(2) & (3)).

217. In exercising the power under reg. 70 (entry under a warrant) the executing officer of the FCA or HMRC may,

(i) enter the premises specified in the warrant;

(ii) search the premises and take possession of any documents or information appearing to be documents or information of a kind in respect of which the warrant was issued ("the relevant kind") or to take, in relation to any such documents or information, any other steps which may appear to be necessary for preserving them or preventing interference with them;

(iii) inspect any cash found on the premises;

(iv) take copies of, or extracts from, any documents or information appearing to be of the relevant kind;

(v) require any person on the premises to provide an explanation of any document or information appearing to be of the relevant kind or to state where it may be found; and

(vi) use such force as may be reasonably necessary.

Limitations: Excluded Material and Legal Professional Privilege

218. Regulation 72 provides that the powers under regs 66, 69 or 70 may not be used to require you to:

(i) produce "excluded material", or

(ii) to provide information, produce documents or answer questions which you would be entitled to refuse to provide, produce or answer on grounds of LPP in proceedings in the High Court.

219. However, the above exception does not apply to a request to provide the full name and address of your client.

Civil Penalties and Notices

220. The Regulations also provide the FCA and HMRC (each of which are a "designated supervisory authority" (reg. 76(8)(b)) with powers to:

(i) impose a financial penalty (reg. 76(2)(a));

(ii) publish a statement of censure (reg. 76(2)(b));

(iii) cancel or suspend, for such period as considered appropriate, any permission which an authorised person has to carry on a regulated activity (reg. 77(2)(a));

(iv) impose, for such period as considered appropriate, such limitations or other restrictions as it considers appropriate in relation to the carrying on of a regulated activity by an authorised person (reg. 77(2)(b));

(v) prohibit, temporarily or permanently, an individual from having a management role within a relevant person (reg. 76(2)); and

(vi) seek injunctions restraining the contravention of a relevant requirement under the Regulations (reg. 80).

Compliance with Professional AML/CTF Guidance

221. In deciding whether a person has contravened a relevant requirement, the "designated supervisory authority" must consider whether at the time the person followed:

(i) any relevant guidelines issued by the European Supervisory Authorities;

(ii) any relevant guidance which was at the time issued by the FCA, any other supervisory authority or appropriate body and approved by the Treasury, e.g. if approved, this Guidance (reg. 76(6)).

222. Conduct which fails to comply with AML/CTF obligations may also be a breach of your professional obligations and may lead to additional action against you by the BSB, the Faculty of Advocates or the Bar of Northern Ireland as appropriate.

Criminal Offences and Penalties

223. By virtue of reg. 86 breaches of specified "relevant requirements" of the Regulations have been designated criminal offences.

224. Such offences are punishable, on summary conviction, with up to 3 months imprisonment, to a fine or both, and upon indictment, with up to 2 years imprisonment, to a fine, or both.

Relevant Requirements

225. The "relevant requirements" are listed in Schedule 6 of the Regulations. A number of them apply to specific businesses, such as money service bureaus. Those considered most relevant to practice at the Bar are listed at Annex 3, but you should refer to Schedule 6 for the full list.

Compliance with Professional AML/CTF Guidance

226. In deciding whether a person has committed an offence under reg. 86(1), the court must decide whether that person followed:

(i) any guidelines issued by the European Supervisory Authorities;

(ii) any relevant guidance which was at the time issued by the FCA, supervisory authority or appropriate body and approved by the Treasury, *e.g.* the Legal Sector AML Guidance (reg. 86(6)).

227. A person is not guilty of an offence under this regulation if that person took all reasonable steps and exercised all due diligence to avoid committing the offence.

Offences of prejudicing investigations

228. Regulation 87 provides that where a person knows or suspects that an officer is acting (or proposing to act) in connection with an investigation into a potential contravention of a relevant requirement which is being or is about to be conducted, that person will commit the offence of prejudicing an investigation if that person:

(i) makes a disclosure which is likely to prejudice the investigation; or

(ii) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, documents which are relevant to the investigation.

229. The person will not have committed the offence where:

(i) the person does not know or suspect that the disclosure is likely to prejudice the investigation;

(ii) the disclosure is made in the exercise of a function under, or in compliance with a requirement imposed by the Regulations, POCA, TA or an Act relating to criminal conduct or benefit from criminal conduct; or

(iii) the person is a professional legal adviser and the disclosure is to a client in connection with the giving of legal advice or to any person in connection with legal proceedings or contemplated legal proceedings, as defined by reg. 87(6).

230. Offences under reg. 87 are punishable, on summary conviction, with up to 3 months imprisonment, to a fine or both, and upon indictment, with up to 2 years imprisonment, to a fine, or both.

Information offences

231. Pursuant to reg. 88(1) a person commits an offence if, in purported compliance with a requirement imposed on them under the Regulations, that person provides information to any person which is false or misleading in a material, and that person:

(i) knows that the information is false or misleading; or

(ii) is reckless as to whether the information is false or misleading.

232. Offences under reg. 88(1) are punishable, on summary conviction, with up to 3 months imprisonment, to a fine or both, and upon indictment, with up to 2 years imprisonment, to a fine, or both.

233. Pursuant to reg. 88(3), a person who discloses information in contravention of a relevant requirement is guilty of an offence.

234. It is a defence for a person charged with the offence to prove that they reasonably believed:

(i) that the disclosure was lawful; or

(ii) that the information had already and lawfully been made available to the public (reg. 88(4)).

235. Offences under reg. 88(3) are punishable, on summary conviction, with up to 3 months imprisonment, to a fine or both, and upon indictment, with up to 2 years imprisonment, to a fine, or both.

Disclosure Offences under POCA

236. Sections 330-332 and 333A of POCA make provision for offences committed by those working in the regulated sector. Self-employed barristers, advocates and, in England and Wales, those working in BSB entities will principally be concerned with offences under sections 330 and 333A.

Schedule 9 of POCA

237. The "regulated sector" is defined in Schedule 9 of POCA. In so far as it applies to 'legal professionals' it is essentially the same definition as that for "relevant persons" in the Regulations (see [18] onwards above).

"Section 1, Business in the regulated sector

...

(m) the provision of advice about the tax affairs of other persons by a firm or sole practitioner who by way of business provides advice about the tax affairs of other persons

(n) the participation in financial or real property transactions concerning:

- the buying and selling of real property (or, in Scotland, heritable property) or business entities;
- the managing of client money, securities or other assets;
- the opening or management of bank, savings or securities accounts;
- the organisation of contributions necessary for the creation, operation or management of companies; or
- the creation, operation or management of trusts, companies or similar structures,

by a firm or sole practitioner who by way of business provides legal or notarial services to other persons;

(o) the provision to other persons by way of business by a firm or sole practitioner of any of the following services:

(4) (a) forming companies or other legal persons;
(b) acting, or arranging for another person to act—
(i) as a director or secretary of a company;
(ii) as a partner of a partnership; or
(iii) in a similar position in relation to other legal persons;

(c) providing a registered office, business address, correspondence or administrative address or other related services for a company, partnership or any other legal person or arrangement;

(d) acting, or arranging for another person to act, as—

(i) a trustee of an express trust or similar legal arrangement; or

(ii) a nominee shareholder for a person other than a company whose securities are listed on a regulated market."

Section 330: failure to disclose in the regulated sector

238. A person in the regulated sector commits an offence if they fail to make a disclosure of knowledge or suspicion (or where they have reasonable grounds for knowing or suspecting) of money laundering which came to them in the course of a business in the regulated sector. The maximum penalty is five years' imprisonment.

239. If that person knows, suspects or has reasonable grounds to suspect that another person is engaged in money laundering, they must disclose that information to a nominated officer (a Money Laundering Reporting Officer - MLRO) or an officer authorised by the Director General of the NCA.

240. "Money laundering" is defined in s.340(11).

241. It should be noted that in the Scottish case of *Ahmad v HM Advocate* [2009] HCJAC 60, High Court of Justiciary sitting as a court of appeal held that a s. 330 offence would be made out even if the act of money laundering had not taken place.

242. In order to comply, a disclosure must:

(i) give the identity of the suspected person, if known;

(ii) the whereabouts of the laundered property, so far as it is known;

(iii) and the details of the information on which the knowledge or suspicion is based, or which gives the person reasonable grounds for such knowledge or suspicion (s.330(5)).

243. Property that the person making the disclosure knows or suspects, or has reasonable grounds to suspect the other person to be engaged in laundering, is "laundered property" (s.330(5A)).

244. Self-employed barristers and advocates are unlikely to have a MLRO to report to, nor, in England and Wales, may some BSB- entities (see [44] above). If you do not have a MLRO to report to, you are required to make the disclosure to an officer nominated by the Director General of the NCA, see "Suspicious Activity Reports" at [174] above.

245. The threshold for committing an offence under s.330 is that of 'negligence', reflecting the fact that people carrying out activities in the regulated sector are expected to exercise a higher degree of diligence in handling transactions than those employed in other businesses (s.330(1)-(4)).

246. There is, however, a 'reasonable excuse' limitation in s.330(6)(a), namely that a person does not commit an offence if they have a reasonable excuse for not disclosing the information.

247. Equally, there is a statutory exemption for legal professionals who received the information in "privileged circumstances" (s.330(6)(b)). There is a further limitation in respect of an employee who does not know or suspect that another person is engaged in money laundering if his employer has not provided him with proper training, i.e. training specified by the Secretary of State (s.330(6)(c)).

248. Section 330(10) states that information will be provided to a professional legal adviser in "privileged circumstances" if it is communicated or given to that adviser:

(i) by (or by a representative of) a client of theirs in connection with the giving by the adviser of legal advice to the client,

(ii) by (or by a representative of) a person seeking legal advice from the adviser, or

(iii) by a person in connection with legal proceedings or contemplated legal proceedings.

249. Practitioners should note that s.330(11) states that *subs*. 10 does not apply to information which is "communicated or given with the intention of furthering a criminal purpose".

250. The concept of "privileged circumstances" is one created and defined by POCA. It is distinct from and more restricted than the common law protection of legal professional privilege that applies in relation to communications in connection with litigation and, separately, to communications in relation to legal advice by a barrister or advocate. More detailed guidance in relation to privileged circumstances and legal professional privilege can be found in Part 1.

Section 333A: tipping-off in the regulated sector

251. A person commits an offence if they disclose to the customer concerned or to any third party the fact that information about known or reasonably suspected money laundering has been disclosed to a MLRO or an authorised NCA

officer, or that a money laundering investigation is being, or may be, carried out.

252. In other words, a person who knows or suspects that a protected or authorised disclosure has been made, and then makes a disclosure of that fact which is likely to prejudice an investigation which might flow from the disclosure made, is guilty of tipping- off. However, a disclosure made to a client for the purpose of dissuading the client from engaging in conduct amounting to an offence is not a tipping off offence (s.333D).

Section 342: prejudicing an investigation

253. A person commits an offence if they know or suspect that a law enforcement investigation under POCA is being or is about to be conducted in relation to money laundering, confiscation, civil recovery, detained cash or exploitation proceeds and he:

(i) makes a disclosure which is likely to prejudice the investigation; or

(ii) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, documents which are relevant to the investigation.

254. A person will not however commit the offence of making a prejudicial disclosure if:

(i) he did not know or suspect that the disclosure was likely to be prejudicial to that putative investigation; and/or

(ii) the disclosure was made in carrying out a function relating to the enforcement of POCA or any enactment relating to criminal conduct or the investigation into a benefit derived from it; and/or

(iii) the disclosure is of a matter which is the subject of a tipping off obligation in the regulated sector (see s.333A above) and the information on which the disclosure is based came to the person in the course of business in the regulated sector; and/or

(iv) the person is a professional legal adviser and the disclosure was not made with the intention of furthering a criminal purpose and was to (or to a representative of) a client of the professional legal adviser in connection with the giving of legal advice to the client or to any person connected with legal proceedings or contemplated legal proceedings.

Annex 1 - A Basic Guide to Customer Due Diligence

This Guide sets out the minimum actions that should be taken to ensure that you have complied with your CDD requirements in a medium risk situation. It is only a Guide and does not supplant your obligation to make your own risk-based assessment of what is required to comply with the Regulations

A. Individual
A person with whom you have a direct relationship.

Identification

1. Full name
2. Residential address (including country of residence)
3. Date of Birth, and
4. Country of citizenship

Verification

Options for *documentary* verification:

1. A government-issued ID with a photo showing their name and either their:
   a. Current residential address, or
   b. Date of Birth.

OR

2. A government-issued ID without a photo supported by a second ID document that must:
   a. bear the client's full name and either their current residential address or date of birth; and
   b. be issued by a government, judicial authority, public sector body or authority, a regulated utility company, or another UK (or equivalent overseas jurisdiction) regulated financial firm.

3. *Non-documentary* means may be used. That includes electronic identification and verification tools, provided that the process is one that is secure from fraud and misuse and a capable of providing the necessary level of assurance as to the person's identity, within the meaning of reg. 28(19).

Nature of business
Determine and record the purpose and intended nature of the business relationship or occasional transaction.

If this is not self-evident from the product or relationship, determine from the client and ensure it is consistent with other known information.

B. Private entity

Privately owned companies and partnerships.

Identification

1. Full name
2. Registered number
3. Registered address in country of incorporation
4. Business address (if different from above)
5. Names of all Executive Directors (Chairman, CEO, CFO, COO etc.) and those exercising control over the management of the company, and
6. Names of individuals who own or control 25% or more of its shares or voting rights.

Verification

1. Obtain evidence of the above from an independent and authoritative source, for example documentary proof of the identities of two of the directors or partners including the individual providing you instructions (as for individuals) and consider obtaining a certified copy of any partnership agreement.

2. Publicly available, professional or trade information may be of assistance in the case of well-known or long-established entities.

3. At all times, a risk-based approach should be adopted to the verification process.

Control and ownership

If an entity claims that it does not have Ultimate Beneficial Owners ("UBOs") of 25% or more, ownership should still be understood along with the source of funds (the latter may be apparent from the nature of the entity).
Obtain understanding of the overall control and ownership structure and verify information according to risk categorization.

Nature of business

Obtain information on the nature of the customer's business, such as:

a. type and nature of industry in which it operates;
b. whether customer trades with or operates in high-risk countries.

C. Listed entity

Companies whose shares are traded on a market or exchange.

Identification

Corporations Listed on a Regulated Market

You must obtain the following:

1. Full name
2. Company number or other registration number
3. Address of the registered office, and if different, its principal place of business;
4. Name of the market or exchange on which the entity is listed.

Additional Requirements for Corporations Not Listed on a Regulated Market

You must take reasonable measures to determine:

1. The law to which the corporation is subject

2. Its constitution

3. The full names of the board of directors and the senior persons responsible for the corporation's operations.

Verification

Regulated Markets/Exchanges

Proof of Listing (either print out or electronic import). Record of the steps taken to verify the status of the market.

A Subsidiary of an Entity Listed on a Regulated Market or Exchange
Proof of 51% or more ownership by the listed entity.

If Listed, but on an Unregulated Market or Exchange
Additionally, obtain proof of the entity's existence that is consistent with the practices in the local market, for example:

a. printout of the web-page of a government-sponsored corporate registry
b. formation document
c. proof of Ultimate Beneficial Ownership, and
d. audited annual report/financial statements.

Verify the status of that market and record the steps taken to achieve that verification.

Control and ownership

For entities listed on an Unregulated Market or Exchange list, if the entity claims that it does not have UBOs of 25% or more, its ownership should still be understood along with the source of funds (which may be apparent from the nature of the entity).

Nature of business

Obtain information on the nature of the customer's business, such as:

a. type and nature of industry in which it operates;
b. whether customer trades with or operates in high-risk countries.

D. Government entity

Clients that are UK or overseas governments, supranational organisations, government departments, local authorities or central banks.

Identification

1. Full name
2. Address
3. Status and type of entity, and
4. Name of the home state authority.

For entities incorporated and/or domiciled within a high-risk jurisdiction, obtain the names of all Executive Directors (Chairman, CEO, CFO, COO etc.), or equivalent.

Verification

1. Proof of the entity's existence that is consistent with practices in the local market, for example a print-out of the web-page of a government-sponsored corporate registry;
2. Proof of address if not in the above; and
3. Proof of ownership if a government-owned entity.

Control and ownership

1. Ownership should be obtained and recorded for entities owned by a government.
2. Obtain an understanding of the overall control and ownership structure and verify as per the risk categorisation.

Nature of business

Obtain information on the nature of the customer's business, such as:

a. type and nature of industry in which it operates,
b. whether customer trades with or operates in high-risk countries.

E. Regulated entity

Institutions that carry on business in the EEA and are supervised according to the requirements laid down in the 5th EU Money Laundering Directive or equivalent non-EEA companies.

Identification

1. Full name
2. Registered number/Regulator's number
3. Registered address in country of incorporation
4. Business address (if different from above)
5. Names of UBOs of 25% or more, and
6. Name of controllers (Chairman, CEO, CFO, COO etc.) or equivalent.

Verification

Regulated Markets/Exchanges

1. Proof of the entity's existence that is consistent with the practices in the local market, for example a printout of the web-page of a government-sponsored corporate registry, or
2. Proof of regulated status, and
3. Proof of Address, if not in one of the above.

Control and ownership

Obtain an understanding of the overall control and ownership structure and verify as per the risk categorisation.

Nature of business

Obtain information on the nature of the customer's business, such as:

a. type and nature of industry in which it operates, and
b. whether customer trades with or operates in high-risk countries.

F. Trusts, Foundations or similar

A trust is a legal entity that is designed to manage and transfer property or assets from one party (settlor, trustor, grantor, donor or creator) to another party (beneficiary).

Identification

1. Registered address
2. Business address (if different from above);

AND

Further, for a Trust

1. Country of establishment, if different from the address
2. Name of settlor
3. Names of any beneficial owners/beneficiaries who are not minors, and
4. Name and address of any protector or controller including legal entities.
5. Name of the founder.

Verification

1. Proof of the entity's existence that is consistent with the practices in the local market, for example a printout of the web-page of a government-sponsored trust registry, or
2. Proof of registration with the Charity Commission, or similar body,
3. Proof of Address, if not in one of the above,
4. Review relevant extracts from the Trust deed (or equivalent), including the list of all trustees, and
5. Verify the identity of at least one trustee or equivalent.

Control and ownership

The beneficial owner of a trust is defined by three categories of individual:

- Any individual who is entitled to a specific interest in at least 25% of the capital of the trust property;
- For any trust other than one which is set up or operates entirely for the benefit of individuals with such specified interests, the class of persons in whose main interest the trust is set up or operates; and
- Any individual who has control over the trust.

1. Obtain an understanding of the overall control and ownership structure and verify as per the risk categorisation.

Nature of business

Obtain information on the nature of the customer's business, such as:

a. type and nature of industry in which it operates,
b. whether customer trades with or operates in high-risk countries.

Annex 2 - AML FAQs

The Scope of the Regulations

1. I prosecute/defend people accused of money laundering. Does that mean that the Regulations apply to me?

No.

You are instructed to act in criminal litigation, and not a transactional matter. You are not being asked to provide advice or representation to another person that falls within the ambit of the Regulations. That the litigation relates to an allegation of money laundering does not change that fact. The Regulations and their requirements in relation to CDD, monitoring and record keeping do not apply to you.

2. Where I am instructed in relation to a trust, does that mean that I am acting as a Trust or Company Services Provider (a "TCSP") and therefore need to disclose that to my supervisory authority, e.g. the BSB?

Being instructed to act or advise in relation to a trust does not of itself mean that you are acting as a TCSP within the meaning of the Regulations. The two are distinct.

The Regulations - TCSPs
Regulation 12(2) provides that a "trust or company service provider" is a firm or sole practitioner who by way of business provides any of the following services to other persons, when that firm or practitioner is providing such services—

(a) forming companies or other legal persons;
(b) acting, or arranging for another person to act—
  (i) as a director or secretary of a company;
  (ii) as a partner of a partnership; or
  (iii) in a similar capacity in relation to other legal persons;
(c) providing a registered office, business address, correspondence or administrative address or other related services for a company, partnership or any other legal person or legal arrangement;
(d) acting, or arranging for another person to act, as—
  (i) a trustee of an express trust or similar legal arrangement; or

(ii) a nominee shareholder for a person other than a company whose securities are listed on a regulated market.

Unless you are undertaking, by way of business, one or more of the activities listed above then you are not acting as a TCSP within the meaning of the Regulations. Where you are acting in relation to a trust, but not acting as a TCSP, then you do not need to disclose that fact to your supervisory authority.

Where you are acting as a TCSP then your work, in that respect, falls within the scope of the Regulations.

However, this does not mean that all of the work you undertake within your practice, i.e. non TCSP work, automatically is also within the scope of the Regulations.

In each instance you will have to separately consider whether the work you have been asked to undertake falls within the scope of reg. 12(1) or (2) of the Regulations.

You must not act as a TCSP unless you have registered with HMRC (reg. 56). Barristers and advocates who act as a TCSP must also inform their supervisory authority of that fact. In England and Wales, Unregistered barristers must register directly with HMRC. Practising barristers and BSB entities do not need to register directly with HMRC but must inform the BSB that they are acting as a TSCP, in which case the BSB will place their details on the HMRC register.

Working Within the Regulations

3. I am instructed by a solicitor. Do I have to do CDD or can I rely on them to do it?

The obligation to comply with your CDD obligations is personal to you and you must ensure that you have met the requirements of the Regulations.

Where you act upon the instructions of a professional client such as a solicitor it may be possible, with their consent, to rely on the CDD that they have carried out.

However, even if your instructing solicitor permits you to rely upon their CDD, that does not absolve you of the obligation to meet your CDD requirements:

you remain liable for "any failure to apply such [CDD] measures" (Regulation 39(1)).

Simply obtaining copies of the CDD material obtained by the person instructing you does *not* meet the 'Reliance' requirements of Regulation 39. You must satisfy yourself that you have obtained the necessary information to meet your CDD obligations. To do this, you will need to undertake a risk-based review of the CDD materials provided to you.

4. What do the Regulations mean by a "risk assessment"? How do I carry it out?

Where you undertake work within the scope of the Regulations you are required by reg. 18 to undertake and maintain a risk assessment of your practice. This is essential so that you can understand the level of AML/CTF risk that you face and apply the appropriate measures to meet and mitigate those risks, i.e. to take a risk-based approach to your AML/CTF obligations.

Practice-Based Risk Assessment

You should know and understand the level of AML/CTF risk that is associated with the nature of your practice and the instructions that you receive. That risk assessment should be specific to your practice, recorded in writing and reviewed in order to keep it up to date. You should keep a written record of the dates that it is reviewed and the actions taken.

To assess the level of risk you should consider all the relevant AML/CTF risk factors as they are apparent to you in your practice and the instructions that you receive. Those factors must include the following mandatory matters under reg. 18(2).

Client Risk (Regulation 18(2)(b)(i))

What is the risk profile of your clients? Consider what you know of them. Who are they and where are they based? For example, are any of your clients based in, or drawing funds from a country that itself represents a money laundering risk, e.g. a "high-risk third country" (per reg. 33(1)(b) and see this Guidance above in relation to Enhanced Due Diligence)? Are they a Politically Exposed Person? A convicted criminal or someone under investigation? Does either what you have been instructed about your clients or what you have discovered about them make them more likely to be a source of criminal property? Does your client's behaviour give you cause for suspicion? For example, are they unwilling to meet you in person where that is important or being evasive as to an aspect of their identity? Do they operate in a high-risk sector or operate a heavily cash-based business?

Geographic Risk (Regulation 18(2)(b)(ii))

Does the country or geographic area in which your clients are based or your instructions relate to represent or indicate a risk of money laundering or terrorist financing? Are they operating in a "high-risk third country"? If, as is most likely, you are being asked to act within England and Wales, consider that the UK, as a nation that offers financial stability, a mature and sophisticated financial market and high quality professional support services, is a target for those seeking to launder the proceeds of crime. This profile enhances the level of risk in any financial or property transaction.

Sector Risk (Regulation 18(2)(b)(iii))

The HM Treasury and Home Office 2020 AML/CTF National Risk Assessment, December 2020 ("NRA 2020") concluded that the risk of abuse of legal services for money laundering purposes remains "high overall". Whilst a small number of barristers do act as TCSPs, the services regarded as highest risk are not generally provided by the Bar, for example conveyancing and the provision of client accounts. You should be aware of and consider the view of the investigative authorities that the provision of *certain* legal services within the regulated sector contains an inherently high-risk of money laundering. The NRA 2020 found no evidence to suggest that its finding in the previous, 2017, National Risk Assessment ("NRA 2017") that barristers were "exposed to lower risks" had changed (NRA 2020, §10.14 & NRA 2017, §7.4).

In relation to terrorist financing, NRA 2020 found that "legal services are not attractive for terrorist financing and there remains no evidence of these services being abused for terrorist financing purposes". The risk of terrorist financing through the legal sector was assessed to be "low" (§10.16).

Professional Service Risk (Regulation 18(2)(b)(iii) & (3))

To what extent do the services that you provide to your clients entail a risk of participating in or facilitating money laundering? What is the nature of the legal service that you are providing? For example, are you assisting in the creation of a corporate structure for an offshore investment? Or, by way of contrast, are you providing legal assistance in relation to a specific issue such as the impact of a restrictive covenant upon a potential property transaction?

Product Risk (Regulation 18(2)(b)(iv))

Some products are inherently more at risk of misuse for money laundering purposes. You should consider the nature of the product or arrangement in relation to which you are being instructed. There is for example a distinction to be drawn between advising upon the pension scheme of a local authority as opposed to the creation of a merger between a series of Money Service Bureaus.

Consider the nature of the businesses and/or the products or services that you are instructed in relation to in your practice.

Delivery Channel Risk (Regulation 18(2)(b)(v))
What is the means by which your legal assistance is being given, e.g. an SRA-regulated solicitor? Do you know who your ultimate client is? Have you met them? Are you being asked to advise a non-professional intermediary instead?

Miscellaneous
Are there any other factors indicative of AML/CTF risk?

Assessing the Overall Risk
Having considered all of the different risk factors you should then assess what you consider to be the overall level of AML risk involved in your practice.

Weighting
In reaching that decision you will need to consider what weight to apply to the differing factors that you have applied. For example, you might conclude that whilst there is a low professional service, country or product risk, there is a risk associated with the identity of your client. The fact that only one risk factor is relevant to the situation does not mean that it should then be discounted. You should consider what weight needs to be assigned to those factors. If your lay client is, for example, a high-level PEP suspected of corruption, or a convicted drug trafficker, that alone may outweigh all other considerations as to what the level of risk is.

Decision
Once you have undertaken that process you should reach a decision as to what the level of risk is as applied to your practice. Having reached this decision you should be in a position to determine the extent of CDD measures that are required and the steps that you need to take to meet those requirements.

Record
You should make a written record of that decision and the process by which it was reached (Regulation 18(4)). Retain a copy of that record in a secure place. By virtue of Regulation 18(6) you will be obliged to provide the assessment and the information on which it was based to your supervisory authority if requested.

Report
If necessary in a specific case, make an authorised disclosure within the meaning of s.338 of POCA (see [172] of the Guidance re making a Suspicious Activity Report).

Monitor

Keep your decision as to risk level within your practice under review. In relation to any specific case also keep your assessment of the level of risk within that matter under review throughout the lifetime of your instructions. If the risk factors change, then refresh your decision, record it and act accordingly.

The above assessment cannot be guaranteed to prevent every risk of money laundering or terrorist financing being identified and addressed. However, it will act to mitigate such risks and permit you to demonstrate to your supervisory and any investigative authority that you assessed and understood the appropriate level of risk of money laundering or terrorist financing and took the required AML/CTF measures.

Client/Instruction Risk Assessment

In addition to your practice-based risk assessment you must carry out a documented (i.e. written) risk assessment for each set of instructions that fall within the scope pf the Regulations (reg. 18.1). That risk assessment should identify and assess the risk of money laundering and terrorist financing within your instructions and the work that you are asked to undertake.

In making the assessment of the level of risk for a specific client or set of instructions you should consider all the relevant AML/CTF risk factors as they are apparent to you. Those factors must include the mandatory matters under reg. 18(2) that were included in your practice-based risk assessment as set out above.

Public Access Cases

5. I do public access work. Do the Money Laundering Regulations apply to me?

Undertaking public or licensed access work does not, of itself, bring you within the scope of the Regulations. The Regulations apply depending upon the kind of work undertaken, not the means by which you are instructed. You should consider the nature of your instructions and whether they fall within the Regulations scope.

When providing legal services to a client you are subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

The provision of legal advice by a barrister or advocate, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.

You should consider with care whether a particular piece of work in which you are instructed falls within the scope of the Regulations.

A failure to comply with the Regulations can amount to a criminal offence.

Where you are acting as a tax adviser, within the meaning of reg. 11 (see [20] above), or as a TCSP, within the meaning of reg. 12(2) (see FAQ 2, above), you are also subject to the Regulations.

Where you undertake public or licensed access work the requirements of the Regulations, e.g. the CDD obligations, fall upon you directly. If you are instructed on a licensed access basis by a suitable professional on behalf of a lay client, you may be able to utilise the Reliance provisions referred to above, but you will otherwise be in a similar position to those acting on a public access basis.

6. Can I be paid by a direct public access client with money that I suspect to be the proceeds of crime?

Provided that the fee that you have agreed represents *"adequate consideration"* (within the meaning of s.329(2)&(3) for the service that you are providing you are entitled to accept the payment and represent the client.

In cases where adequate consideration has been provided the funds in possession of the recipient are no longer the proceeds of crime – regardless of whether you know or suspect that they are the proceeds of crime or not: *R. v. Afolabi* [2009] EWCA Crim 2879 (35).

You should note that the *"adequate consideration"* limitation upon the s.329 offence is not included within s.327 (concealing etc.) or s.328 (entering into an arrangement that facilitates money laundering) of POCA. However, such offences would usually require more than the simple receipt of fees for work done, *i.e.* conduct of an activity outwith the services lawfully provided by a

barrister. You should ask yourself whether your instructions relate to the *"ordinary conduct of litigation"* within the meaning of the decision in *Bowman v Fels* [2005] 1 WLR 3083.

7. Does it make any difference if the client wants to pay in cash?

The method of payment is, strictly speaking, irrelevant. The key issue in relation to payment of fees is whether the fee you have agreed represents adequate consideration for the service to be provided, as explained in FAQ 6 above. However, where the Regulations apply and you are undertaking a risk assessment, you may wish to consider the circumstances of your instructions and the method of payment of your fee carefully. In undertaking that consideration you may, for example, want to review your assessment of the level of client risk as part of your initial risk assessment (see FAQ 4, above). Does the method of payment lead you to conclude that the relevant level of risk has increased? An increased assessment of risk may be relevant to any consideration of what steps you need to take other than recording the receipt of monies in payment for services rendered (or to be rendered).

Suspicious Activity Reports

8. If during the ordinary conduct of litigation my lay client makes admissions relating to his possession of the proceeds of crime, am I under a duty to make an SAR to the NCA?

No. You should however bear in mind your wider duties, for example, for practitioners in England and Wales, the duty under the BSB Handbook to ensure that you do not allow the court to be misled (rC3.1 & rC6). Clearly you cannot put forward or allow to be advanced a case that is contrary to the instructions that you have received. For example, in any restraint or future confiscation proceedings you could not be party to a case that suggested on behalf of your client that they did not have any beneficial ownership of any realisable property.

9. If there is no duty for me to make such a disclosure, may I make an SAR to the NCA?

No. You must not make any form of disclosure of the information you have received either to the authorities or any other person outside of the confidential relationship you enjoy with your client. You are bound by and obliged to protect your client's legal professional privilege.

10. Does the position change if the admission causes me to be embarrassed and therefore I can no longer act for the defendant?

The position does not change if you become embarrassed, or your instructions are withdrawn.

11. Would the fact of the admission mean that, because of the crime/fraud exception, the information provided by the client is not protected by LPP?

Not unless the client had a fraudulent intention in making the communication to you, *R. v. Cox & Railton*, 14 QBD 153.

12. When making a SAR, may I disclose information provided by the client that is subject to LPP?

No. You must not disclose any information provided to you by your client that is subject to legal professional privilege.

13. If, after making a SAR, a client enquires about a consequential delay, can I explain that the delay is due to me having made a SAR?

No. You must take care not to reveal the fact of the disclosure to the client. Not keeping the fact of the disclosure confidential could lead to committing the offence of prejudicing an investigation ('tipping off') under POCA s.342.

Civil Disputes: Bribery/Money Laundering

14. If I am instructed in a civil dispute where the underlying transaction with which the dispute is concerned exhibits signs of bribery or money laundering, what should I do?

As you are not being asked to provide advice or representation to another person that falls within the ambit of the Regulations, their requirements in relation to Customer Due Diligence, monitoring and record keeping do not apply to you.

The concern that you may be facilitating the acquisition of criminal property needs to be addressed. By virtue of s.328 of POCA, it is an offence for you to enter into or become concerned in an arrangement that you know or suspect

facilitates, by whatever means, the acquisition, retention, use or control of criminal property by or on behalf of another person.

However, you will not ordinarily be regarded as having entered into or become concerned in such an arrangement simply as the result of being involved in the *"ordinary conduct of litigation"* (*Bowman v. Fels* [2005] 1 WLR 3083). For example, it is probable that representing your client in a dispute for payment of a fee said to be due would not therefore involve any AML issues for you.

You should keep the matter under review as the case, and your involvement in it, develops. It may turn out to be the case that the underlying arrangement between the parties was corrupt.

The meaning of the term the *"ordinary conduct of litigation"* has never been given any definitive judicial explanation. Whilst there has not been a ruling in relation to the point, there is at least the potential that a different view from that in *Bowman v. Fels* is taken of litigation intended to enforce a bribe. A court, asked to decide upon the matter, might consider that litigation for the purpose of enforcing a bribe is not within the meaning of the *"ordinary conduct of litigation"*.

15. Does arbitration come within the *"ordinary conduct of litigation"*?

In *Bowman v. Fels*, the Court of Appeal suggested that the ordinary conduct of litigation covers *"…any step taken by [parties] in litigation from the issue of proceedings..."*.

Given the prevalence of arbitration, it is at least arguable, if not likely, that the Court had arbitration proceedings in mind when it referred to *"proceedings"*. However, even if that is correct, it is not definite that this would also cover all advice given before litigation or arbitration commences. Where the advice directly concerns the prospective claim, is in contemplation of that claim being brought to litigation or arbitration and those 'proceedings' are proximate in time, it would be more likely that it would fall within the ambit of *Bowman v. Fels*, but it is not certain that this is so.

16. What happens if the parties decide to settle that dispute – could the settlement payment itself be a bribe or money laundering?

As noted above, the *"ordinary conduct of litigation to its ordinary conclusion"* (*Bowman v. Fels*, §62) has not been further defined. However, it seems highly unlikely that sham litigation could properly be considered to fall within that

definition. By parity of reasoning, a sham dispute brought by way of arbitration would be likely to be regarded in the same light. If the process has been a sham, you should proceed on the basis that your work does not fall within the scope of the ruling in *Bowman v. Fels*. The money laundering offences within POCA would apply if the elements of the offence were made out.

You should note that the fact that the proceeds of crime were not in existence at the time that you became concerned in the arrangement would not preclude the application of the offence to you. What matters for the operation of the offence is whether the property in question was criminal property at the time that the arrangement operated upon it: *R v. GH* [2015] 1 WLR 2126, SC ([2015] UKSC 24).

Sham Litigation

17. How, if at all, does the fact that my suspicions are based on privileged information affect my actions?

In ordinary circumstances your client's legal professional privilege prevents you from making any disclosure in relation to any communications subject to that privilege. However, engaging a lawyer to participate in sham litigation is an abuse of privilege. Such conduct would take the matter outside the "ordinary run" of cases: *R. v. Snaresbrook Crown Court, ex parte the Director of Public Prosecutions* [1988] QB 532, (537) and the protection from disclosure normally provided by privilege would not exist. So if you have grounds to suspect that you have been engaged in a sham litigation you may be under a duty to make a disclosure.

Real Property

18. If I advise on a property issue such as whether a client company with the benefit of a right of way to land which has always been used for offices would be entitled to use that right of way for commercial deliveries and visits by customers if shops were built on that land in place of the offices, am I required to undertake CDD in relation to the company?

No.

When providing legal services to a client you will only be subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf

of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

In the example given you are instructed to advise in relation to a right of way and not to assist the client in the planning or execution of a transaction or otherwise acting for or on behalf of the client in a transaction.

19. Would it make any difference if I was aware my client was considering selling the site depending on whether the right of way could or could not be so used?

No.

Your role has not changed: you are instructed to provide legal advice in relation to a right of way and not to assist the client in the planning or execution of a transaction.

You are not within the ambit of the Regulations and you do not have to undertake CDD.

20. Would it make any difference if the owner of the land over which the right of way runs had suggested the right of way was limited to use for residential purposes so that it could not be used to serve a retail development?

No.

Again, your role has not changed: you are instructed to provide legal advice in relation to a right of way and not to assist the client in the planning or execution of a transaction.

You are not within the ambit of the Regulations and you do not have to undertake CDD.

21. If planning permission for commercial development of the land had been granted and a sale of it had been agreed subject to contract, but before the contract was executed I was asked to advise one or other of the parties in

relation to whether the right of way would enable the use of the land for commercial deliveries and by customers if the development was carried out, or whether a restrictive covenant that was in place would prevent such use, would I then have to undertake CDD in relation to the client?

No. Although a transaction is in contemplation, you are not instructed to assist the client in the planning or execution of the transaction but to provide legal advice upon the ambit of the right of way and the restrictive covenant You have not been asked to consider whether the transaction should proceed or to be involved in structuring it or anything of that sort, but to give legal advice in relation to the right of way and the restrictive covenant.

Your instructions do not therefore bring you within the ambit of the Regulations and you do not have to undertake CDD.

22. If I am asked by the solicitors for the contracted buyers of a piece of land to advise in relation to a possible misrepresentation by the vendor of the land, is that work to which the Regulations apply and do I need to undertake CDD in relation to them?

No.

When providing legal services to a client you will be subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

In this case, you are being asked to advise in relation to a dispute over a purchase rather than the purchase itself. You are not being asked to provide legal advice in relation to a real property transaction that falls within the ambit of the Regulations as concerning "the buying…of real property". As you are not being asked to give advice in relation to the transaction, or its planning or execution, you are not "acting for or on behalf of a client in the transaction". As such the obligations under the Regulations do not apply. You will not therefore need to undertake CDD.

23. If I am asked by the intended buyers of a piece of land to advise on the enforceability of, and draft, an indemnity clause to be inserted in the contract for the purchase of the land, what do I need to consider in order to decide whether I am required to undertake CDD in relation to them?

When providing legal services to a client you are subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

The provision of legal advice by a barrister or advocate, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.

However, as you are being asked to advise upon and, if required, to prepare a clause of an agreement in relation to, a real property transaction you are going beyond the provision of advice. It is likely therefore that you are undertaking work that falls within the ambit of the Regulations as it concerns "the buying…of real property".

You should consider with care whether a particular piece of work in which you are instructed falls within the scope of the Regulations.

A failure to comply with the Regulations can amount to a criminal offence.

24. Who should be the subject of my CDD enquiries in such a case?

You will need to carry out CDD on your instructing solicitors and the buyers themselves as each of them are your clients (professional and lay respectively) and therefore your customers for the purposes of the Regulations.

25. What level of CDD should be applied? What factors should I consider to evaluate that?

CDD must be applied on a risk-sensitive basis.

As the person instructing you is a solicitor it will be sufficient to satisfy your CDD obligation in relation to them by making a check of the SRA's database, see [134] of the Guidance.

In relation to your lay clients, the level of CDD that you apply will need to be proportionate to your assessment of the risk that the transaction involves money laundering or terrorist finance. The greater that risk, the greater the level of CDD you need to apply.

Corporate Acquisitions

26. If I am instructed to advise on a legal issue arising in connection with a corporate acquisition, do I need to conduct customer due diligence on my lay client? If so, what does that involve?

When providing legal services to a client you are subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

The provision of legal advice by a barrister or advocate, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.

For example, where your involvement in the matter amounts to giving legal advice only in relation to the risk of enforcement action succeeding and the need

for an indemnity against such an action, then you would not generally be considered to be "assisting in the *planning or execution of the transaction*" or "acting for or on behalf of a client *in the transaction*".

You should consider with care whether a particular piece of work in which you are instructed falls within the scope of the Regulations.

A failure to comply with the Regulations can amount to a criminal offence.

However, if you were to go on to draft a term of the agreement there is at least an argument to say that you are "acting for or on behalf of a client in the transaction", and a strong argument to say that you are "you are assisting the client in the planning…of a transaction". In those circumstances you should consider that the obligations under the Regulations apply, and that you need to undertake CDD, to monitor the level of risk that arises in relation to your instructions and to maintain records of the same.

As you are subject to the Regulations you will also fall within the scope of the "Regulated Sector" for the purposes of the Proceeds of Crime Act 2002, and, subject to LPP, the mandatory disclosure obligations of ss.330-334 therein.

You will need to carry out CDD on your instructing solicitors and the lay client as each of them is your client, and therefore your customer for the purposes of the Regulations.

27. If I am suspicious that the property being acquired might be or might include the proceeds of crime, what should I do?

If you are satisfied that LPP does not apply, for example because the fraud exception applies, you are required to make an "authorised disclosure" to the National Crime Agency, by way of a Suspicious Activity Report (an "SAR" or "disclosure"), in accordance with s.338 of POCA.

Section 330 of POCA makes it an offence for a person acting in the course of business in the regulated sector to fail to make a disclosure where they have knowledge of or reasonable grounds to suspect that money laundering is taking place. For these purposes the "regulated sector" is identical in scope to the ambit of provisions of the Regulations: if you subject to the Regulations then you are within the "regulated sector" for the purposes of POCA.

The disclosure should consist of such information that is known to you that identifies the suspected person, gives the whereabouts of the laundered

property, and provides the details of the information on which your knowledge or suspicion is based (s.330(5)).

In making your disclosure you should disclose the required matters and seek consent to continue to act. If you are denied consent you must cease to act.

For assistance in relation to the making of Suspicious Activity Reports and the obtaining of consent, see [174] in the Guidance.

28. How, if at all, does the fact that my suspicions are based on privileged information affect my actions?

The Act contains an express exemption for legal professionals who received the information in "*privileged circumstances*" (s.330(6)(b)). The privilege extends to information that is received from a representative of the client, such as your instructing solicitors, in addition to information received directly from the client.

In the context of common law legal professional privilege, all communications between a solicitor and their client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, where they are directly related to the performance by the solicitor of their professional duty as legal adviser of his client *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)*, [2004] UKHL 48, [2005] 1 A.C. 610. This would include the communications to the solicitor of the suspected criminal activity of Z and X Ltd.

The privilege does not extend to information that is "communicated or given with the intention of furthering a criminal purpose" (s.330(11)). The relevant intention may be that of your lay client (*R. v. Central Criminal Court ex parte Francis & Francis (a firm)* [1988] 2 W.L.R. 627), and you are advised to proceed on that basis.

Wills and Probate

29. Where I am instructed to provide advice in relation to a will is that work to which the Regulations apply?

Potentially, yes. Where your instructions relate to the management of a deceased's estate, this is a regulated activity and therefore work to which the Regulations apply.

The provision of legal advice by a barrister or advocate, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.

For example, where your instructions are limited to providing a legal opinion in relation to a person's estate, and you are not otherwise carrying out or participating in the settlement, then you would not generally be considered to be "assisting in the *planning or execution of the transaction*" or "acting for or on behalf of a client *in the transaction*".

In contrast, where you are instructed to go beyond the giving of legal advice, say to prepare a Deed of Variation, you should consider that you are assisting in *the planning or execution of a transaction* concerning *the managing of client money, securities or other assets* and *the creation, operation or management of a trust*, and you will come within the scope of the Regulations.

You should consider with care whether a particular piece of work in which you are instructed falls within the scope of the Regulations.

A failure to comply with the Regulations can amount to a criminal offence.

If your instructions relate to work that is subject to the Regulations you will also fall within the scope of the "Regulated Sector" for the purposes of POCA and, if LPP does not apply, the disclosure obligations of ss.330-334 may be engaged.

30. Do I need to undertake Customer Due Diligence?

If your work falls within the ambit of the Regulations you will need to carry out CDD on your instructing solicitor and your customer for the purposes of the Regulations.

CDD must be applied on a risk-sensitive basis.

31. What level of Customer Due Diligence should I apply to my clients?

In relation to your lay client, the level of CDD that you apply will need to be proportionate to your assessment of the risk that the transaction involves money laundering or terrorist finance. The greater that risk, the greater the level of CDD you need to apply.

Disclosure in the context of restraint proceedings

32. If a client who you reasonably believe to own certain property is made subject to a restraint order that makes no mention of such property, are you under a duty to disclose the existence of that property to the NCA?

Your instructions relate to criminal litigation, and not a transactional matter. You are not being asked to provide advice or representation to another person that falls within the ambit of the Regulations. The Regulations and their requirements in relation to Customer Due Diligence, monitoring and record keeping therefore do not apply to you.

Annex 3 - Relevant Requirements, Schedule 6

Reg.	Description
18	Risk assessment by a relevant person
19	Policies, controls and procedures
20	Policies, controls and procedures; group level
21	Internal controls
24	Training
25	Directions to a parent organisation from a supervisory authority
26	Acting as a beneficial owner, officer or manager without approval
27	Application of CDD measures
28	Application of CDD measures
30	Timing of verification
31(1)	Requirement to cease transactions where unable to apply CDD measures required by Regulation 28
33(4)-(6)	Obligation to apply enhanced due diligence
35	Enhanced due diligence: politically exposed persons
37	Application of simplified due diligence
39(2) & (4)	Reliance
40(1), (5)-(7)	Record keeping
41	Data protection
43	Corporate bodies: obligations
44	Trustee obligations
45(2) & (9)	Register of beneficial ownership
56(1) & (5)	Requirement to be registered
57(1) & (4)	Applications for registration
66	Power to require information
69(2)	Entry and inspection without a warrant
70(7)	Entry of premises under warrant
77(2) & (6)	Power to impose civil penalties, suspension and removal of authorisation
78(2) & (5)	Prohibitions

Annex 4 - Typologies

The typologies mainly refer to law of UK wide application. However, advocates should note that there are references to law and rules of procedure in England, Wales and Northern Ireland. Due caution should be exercised when they are referred to.

Typology 1 – Public Access

Topics Covered: Crime – "Adequate Consideration" & s.329 of POCA – "Authorised Disclosure" & s.338 of POCA – Litigation – *Bowman v Fels* – LPP

Headline questions

1. **Can I be paid by a direct public access client with money that I suspect to be the proceeds of crime?**

2. **Does it make a difference if the client wishes to pay in cash?**

3. **If, after receiving such payment, the brief is returned, can I simply return the payment to the client?**

4. **If not, what should I do?**

5. **When making a SAR, may I disclose information provided by the client that is subject to LPP?**

6. **If the client asks why the money has not been returned forthwith, can I explain that the delay is due to me having made a SAR?**

Part One: Accepting instructions and receiving payment

You are a criminal practitioner who accepts public access instructions. You are contacted by a prospective client, X, who wishes to instruct you to defend him in relation to criminal charges against him for theft, handling stolen goods, operating as an unlicensed scrap-metal dealer, tax evasion, and money laundering. The allegations relate to a series of car-breakers yards operated by X and his family, a number of whom are also charged with related, like offences.

The trial is expected to last two weeks and is due to be heard in just under four weeks' time. It is proposed that you will be instructed on a private-paying basis. A flat fee of £12,000 has been agreed.

You have been given access to the case papers, including a printout from the PNC which reveals that X has numerous previous convictions for similar offences of dishonesty. It would appear that he is a career criminal, repeatedly engaged in either stealing, fencing or breaking down stolen goods, mainly cars.

X has provided you with a current passport, his driving licence and satisfactory proof of his address. He has agreed to put you in funds before you start work. It is

also agreed that he will make payment directly into your account. You agree to act and X states that if you provide him with your account details he will pay cash into your branch that same day. X also tells you that he is "good" for any further fees, should that be required. He tells you that his brother is holding £50,000 of his in cash, which "the law know nothing about". As far as you can see, X has never done an honest day's work in his life and the only realistic source of the money is his or his family's previous criminal conduct.

Q1 Can I be paid by a direct public access client with money that I suspect to be the proceeds of crime?

Q2 Does it make a difference if the client wishes to pay in cash?

Provided that the fee that you have agreed represents *"adequate consideration"* (within the meaning of s.329(2)I) for the service that you are providing you are entitled to accept the payment and represent the client.
In cases where adequate consideration has been provided the funds in possession of the recipient are no longer the proceeds of crime – regardless of whether you know or suspect that they are the proceeds of crime or not: *R. v. Afolabi* [2009] EWCA Crim 2879 (35).

However, you should note that the *"adequate consideration"* limitation upon the s.329 offence is not included within s.327 (concealing etc.) or s.328 (entering into an arrangement that facilitates money laundering) of POCA. However, such offences would usually require more than the simple receipt of fees for work done, *i.e.* conduct of an activity outwith the services lawfully provided by a barrister.

Your instructions relate to the *"ordinary conduct of litigation"* within the meaning of the decision in *Bowman v Fels* [2005] 1 WLR 3083. Whilst that decision was made in relation to s.328 of POCA, it is apparent that the Court had the provisions of s.327 and s.329 in mind and intended its judgment to be of wider application – see §63 of the ruling. As such, there is at least a good argument to say that you do not fall within the purview of the legislation in any event.

The method of payment is irrelevant to this question. It is however likely to increase suspicion that the money in question is the proceeds of crime, which would be relevant when considering any steps other than the simple receipt of monies in payment for services rendered (or to be rendered).

<u>Part Two: A Conflict of Interest</u>
Shortly after meeting with X you learn that you are in fact conflicted from acting in the case and cannot represent him. You communicate this to X, and you consider that your involvement in this matter is now concluded.

However, without you knowing, X had obtained your bank details from your clerks. Two weeks after your meeting he pays funds equal to the amount of the fee due into your account.

Having considered the matter, the facts of the prosecution case and X's previous convictions lead you to suspect that the funds you are now in possession of are the proceeds of criminal conduct.

Q3 If, after receiving such payment, the brief is returned, can I simply return the payment to the client?

Q4 If not, what should I do?

You have not provided and cannot provide *"adequate consideration"* for those funds, as you are no longer acting for X. You are obliged to return the money.

In these circumstances, the decision in *Bowman v. Fels* does not apply to the situation you now have to consider, i.e. the return of X's funds. You therefore fall within the scope of the offences in POCA.

As you were unable to provide *"adequate consideration"* you are at risk of committing an offence under s.329 of POCA by possessing the proceeds of crime. You cannot retain possession of the monies. However, if you move the funds, including by returning them to X, you may also commit an offence under s.327 of the Act. Moreover, by returning or paying on the funds to a third party you may also commit a s.328 offence of entering into, or being concerned in, an arrangement that facilitates the retention, use or control of criminal property by the defendant. In such circumstances, you must make an *"authorised disclosure"* - a Suspicious Activity Report (a *"SAR"* or *"disclosure"*), in accordance with s.338 of POCA, to the NCA and seek to obtain consent to return the funds to X.

<u>Part Three: Making a SAR</u>

Q5 When making a SAR, may I disclose information provided by the client that is subject to LPP?

Q6 If the client asks why the money has not been returned forthwith, can I explain that the delay is due to me having made a SAR?

You must not disclose any information provided to you by X that is subject to legal professional privilege. The evidence against X in the prosecution case and his list of previous convictions, whilst provided to you in confidential circumstances are not confidential as between you and X: they are known to the prosecution. As such

they are not privileged documents and they do not become privileged by virtue of being provided to you. The payment of the monies into your account occurred outside of the lawyer-client relationship and therefore does not attract legal professional privilege. You can therefore report this to the NCA as providing grounds for suspicion.

However, the additional information provided to you by X, that his brother is holding £50,000 in cash for him, was communicated to you in confidential circumstances and for the dominant purpose of the litigation in which it was intended that you should act. That information is subject to Legal Professional Privilege and as such cannot be disclosed.

The process of making Suspicious Activity Reports is explained further at [174] in the Guidance. Only once consent to the transaction has been obtained from the NCA can a transfer of the funds be made.

In the meantime, you must take care not to reveal the fact of the disclosure to X. Not keeping the fact of the disclosure confidential could lead to committing the offence of prejudicing an investigation ('tipping off') under POCA s.342.

Typology 2 – Tax
Topics Covered: Tax, Advising re Revenue Investigations – "Transactions" – Offshore Accounts – "Tax Advisers"

Headline questions

1. **Where I am instructed in proposed litigation in relation to a tax assessment is that work to which the Regulations apply?**

2. **Do I need to undertake CDD?**

3. **Where I am asked to advise on the strength of my client's case in relation to a tax assessment is that work to which the Regulations apply?**

Part One
You are instructed by X, who is a member of the Chartered Institute of Taxation and a qualified Chartered Tax Adviser. X wishes to instruct you on behalf of Y. Y has received an advanced payment notice from HMRC and wishes to contest it by means of judicial review proceedings. X has instructed you on a number of previous occasions, always in respect of contested matters, although you have never previously advised or represented Y. You are asked to prepare and represent Y in the judicial review proceedings.

1. **Where I am instructed in proposed litigation in relation to a tax assessment is that work to which the Regulations apply?**
2. **Do I need to undertake Customer Due Diligence?**

No.
Your instructions relate to proposed litigation in relation to a tax assessment made against Y and you are not therefore subject to the Regulations.

When providing legal services to a client you are subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

Where you are acting as a "tax adviser" you will also, and separately, be subject to the Regulations. A person who by way of business, whether as a firm or a sole practitioner, directly or indirectly provides material aid, or assistance or advice, in connection with the tax affairs of other persons is, by virtue of Regulation 11(d), a "tax adviser" and as such falls within the scope of the Regulations.
Accordingly, where you are advising in relation to a tax matter you will need to consider and determine whether you are subject to the Regulations.

In this case you are not advising on the lay client's tax affairs but on proposed litigation and, therefore, do not fall within the ambit of the Regulations, and as such you do not have to undertake Customer Due Diligence.

Part Two: Y Seeks Further Advice

In the course of considering Y's papers you realize that Y has a very poor case for judicial review. In reaching this view you have had to consider Y's somewhat complex financial affairs, including an offshore trust structure. It is apparent that the structure fails in its intent, that the Revenue's case is correct and its decision to issue an advanced payment notice is unimpeachable. You explain all this to a disappointed X; who passes the news on to an even more disappointed Y. Y insists on proceeding, but instructs you, via X, to provide an advice as to why the litigation is unlikely to succeed. Time is now very short to provide this advice and complete Y's judicial review papers.

3. **Where I am asked to advise on the strength of my client's case in relation to a tax assessment is that work to which the Regulations apply?**

No.

Your instructions remain in relation to advising upon the bringing of litigation against the Revenue, not in relation to the underlying transaction: you are not "assisting in the *planning or execution of the transaction*" or "acting for or on behalf of a client *in the transaction*", as per Regulation 12(1) (see [21] above).

To the extent that your instructions require you to consider the trust structure you are in any event considering a structure that is already in place, i.e. any transactions have already been carried out and you are not therefore assisting in the transaction or its planning or execution.

In this situation you should go on to consider whether, in providing advice about Y's affairs, and the considering the underlying structure, you have provided advice or assistance in relation to Y's tax affairs rather than the litigation. Where you have done so, you will come within the meaning of a "tax adviser" under Regulation 11(d).

In this example this is not the case. Whilst you have considered the underlying tax arrangements your advice has been in relation to the merits of a judicial review. You would not therefore be subject to the Regulations and would not be under an obligation to undertake Customer Due Diligence.

Typology 3 – Tax

Topics Covered: Tax – "Transactions" – Acting as a "Tax Adviser" – Customer Due Diligence – Enhanced Due Diligence – Reliance – The Risk-Based Approach – LPP – "Adequate Consideration" & s.329 of POCA – "Authorised Disclosure" & s.338 of POCA – "Failure to Disclose" & s.330 of POCA

Headline questions

1. **Where I am instructed to advise in relation to an HMRC investigation into a tax scheme is that work to which the Regulations apply?**

2. **Do I need to undertake CDD?**

3. **Where I am instructed to advise upon the operation of a tax scheme is that work to which the Regulations apply?**

4. **If the Regulations do apply, do I need to undertake CDD?**

5. **What level of CDD should be applied?**

6. **Is my lay client a Politically Exposed Person (PEP)?**

7. **What level of Customer Due Diligence should be applied to PEP?**

8. **Should I make a Suspicious Activity Report to the NCA in respect of my lay client?**

9. **Can I disclose privileged information?**

10. **Can I continue to act?**

11. **If I cannot continue to act what should I do about fees already paid?**

Part One

X, a solicitor whose firm is known to you, but for whom you have never previously worked, approaches you to advise one of its clients. X's client is a well-known provider of aggressive, if not notorious, tax avoidance schemes, "Y Tax Advisers". They require your assistance in relation to A, B and C, all of whom entered into one of their film scheme partnerships: the "Spotlight Studio Revenue Protection Scheme", operated by the "Silver Screen Trust". A tax-evasion investigation has been opened by HMRC into the partnership and all its participants including A, B and C. Pursuant to an agreement with the participants, Y Tax Advisers have the right to conduct their response to any HMRC investigations into the "Spotlight Studio Revenue Protection Scheme" and any subsequent litigation with HMRC.

The scheme participants are the partners in the partnership. You have not met, and have been told that you will not be able to meet, any of A, B and C.
You are asked to advise in relation to the tax-evasion investigation being undertaken by HMRC and how best to deal with them.

8. **Where I am instructed to advise in relation to an HMRC investigation into a tax scheme is that work to which the Regulations apply?**

9. **Do I need to undertake CDD?**

No. You are not acting within the scope of the Regulations and do no need to apply CDD.

Your instructions relate to the tax-evasion investigation conducted by the Revenue and, by inference, potentially contentious proceedings thereafter.

When providing legal services to a client you are subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

Where you are acting as a "tax adviser" you will also, and separately, be subject to the Regulations. A person who by way of business, whether as a firm or a sole practitioner, directly or indirectly provides material aid, or assistance or advice, in connection with the tax affairs of other persons is, by virtue of Regulation 11(d) a "tax adviser" and as such falls within the scope of the Regulations. Accordingly, where you are advising in relation to a tax matter you will need to consider and determine whether you are subject to the Regulations.

In this case you are not advising in relation to the lay client's tax affairs but in relation to a tax-evasion investigation and potential litigation and, therefore, you do not fall within the ambit of the Regulations. As such you do not have to undertake Customer Due Diligence.

Part Two: Further Advice Sought
In due course you are asked by X to advise Y Tax Advisers in relation to the "Spotlight Studio Revenue Protection Scheme" and a proposal to amend the operation of the "Silver Screen Trust" structure and the companies that are owned by it. Y Tax Advisers would like to undertake the change in the structure in order to correct what they suspect is a defect that HMRC may seize upon in their

investigation. Your advice will affect how the scheme is operated in the future and where the funds in the scheme are held.

3. **Where I am instructed to advise upon the operation of a tax scheme is that work to which the Regulations apply?**

4. **If the Regulations do apply, do I need to undertake CDD?**

Yes. You would be considered to be acting as a "tax adviser" within the meaning of the Regulation 11(d). You are therefore within the scope of the Regulations. You will need to undertake customer due diligence, monitor the level of risk that arises in relation to your instructions and maintain records of the same.

You should bear in mind that where you are subject to the Regulations you will also fall within the scope of the "Regulated Sector" for the purposes of the Proceeds of Crime Act 2002, and the disclosure obligations of ss.330-334 therein.

You will need to carry out CDD on your instructing solicitors, Y Tax Advisers and A, B and C as each of them are your clients (professional and lay) and therefore your customer for the purposes of the Regulations.

5. **What level of Customer Due Diligence should be applied?**

CDD must be applied on a risk-sensitive basis.
As the person instructing you is understood to be a solicitor it will be sufficient to satisfy your risk-sensitive CDD obligation in relation to him by making a check of the Law Society's database.

In relation to your lay clients, the level of CDD that you apply will need to be proportionate to your assessment of the risk that the transaction involves money laundering or terrorist finance. The greater that risk, the greater the level of CDD you need to apply.

Assessing Risk
As you are instructed in a matter that brings you within the scope of the Regulations, you must take appropriate steps to identify and assess the risks of money laundering within your instructions (Regulation 18(1)). In deciding what steps are "appropriate" you must consider the size and nature of the matter in which you are instructed (Regulation 18(3)).

You must also consider:

(a) Any information made available to you by your supervisory authority pursuant to reg. 17(9) and 47 in relation to ML/TF risk;
(b) Risk factors specific to your practice including factors relating to:
  (i) your customer;
  (ii) the country or geographic area in which you are practising;
  (iii) the service that you are providing;
  (iv) the relevant transaction; and
  (v) the delivery channels through which your service is being provided (Regulation 18(2) & (3)).
(c) For barristers in England and Wales, the current BSB AML/CTF Risk Assessment, in relation to which see [27] above.

You must keep an up-to-date written record of all steps taken in carrying out the risk assessment, and provide this, together with the risk assessment and any information on which that assessment was based, to your supervisory authority on request (Regulation 18(4) & (6)).

For further assistance in relation to CDD, see the Basic Guide to Customer Due Diligence at Annex 1 to the Guidance.

Application

In this case you may consider that there is a raised level of risk in relation to A, B and C as you have been unable to meet with them in person, and as such conclude that you need to apply an amount of enhanced due diligence.

Whilst the application of enhanced customer due diligence measures should be assessed on a case-by-case basis, the measures required under Regulation 33(1) "include, among other things":

(a) seeking additional independent, reliable sources to verify information provided or made available to you;
(b) taking additional measures to understand better the background, ownership and financial situation of the customer, and other parties to the transaction;
(c) taking further steps to be satisfied that the transaction is consistent with the purpose and intended nature of the business relationship;
(d) increasing the monitoring of the business relationship, including greater scrutiny of transactions (Regulation 33(5)).

You may be able to rely upon the CDD carried out by your instructing solicitors. However, even if they consent to you doing so, you should ensure that you are satisfied that they have applied the appropriate level and degree of due diligence,

including, where it is required or appropriate, an enhanced level of due diligence, for example, if they too have been unable to meet in person with A, B and C.

Relying upon the CDD of your instructing solicitors is not a matter of simply obtaining copies of their CDD material. You must satisfy yourself that you have obtained the necessary information to satisfy the CDD obligations upon you. To do this, you will need to undertake a risk-based review of the CDD materials provided to you. Also, reliance does not absolve you of the obligation to meet your CDD requirements: you remain liable for "any failure to apply such [CDD] measures" (Regulation 39(1)).

You will need to continue to monitor the relationship on a risk-sensitive basis and to keep records of your compliance with your CDD obligations.

Finally, where you are unable to satisfy yourself in relation to your customer due diligence obligations you must cease to act.

Part 3: Further Information, Greater Concern

In the course of carrying out your CDD, you learn from X that Y Tax Advisers, is not – as you had thought – an English law partnership, but is in fact a company that is registered in Panama, and which purports to be managed and controlled there.

From news reports available on the internet you also become aware that A currently lives in the Cayman Islands but that until 6 months ago he lived in a mineral-resource rich African country where he was the chief government adviser on oil and gas mining. He is said to have been highly influential in the choice of to whom to award public contracts within his field. You also learn from your research that A left his post after a high-profile corruption investigation accused him of accepting bribes in return for recommending sites for exploration and drilling. A is currently wanted in that country to face corruption charges and a criminal freezing order, seeking to freeze his assets worldwide, has been obtained in that jurisdiction in relation to his assets.

You have charged a fixed fee for the provision of your initial advice and the payment has been made in advance. You are surprised to find that rather than the payment being made by Y Tax Advisers Limited, the payment has come in three equal tranches from A, B and C. B and C each paid you from their personal bank accounts, held at well-known UK High Street banks. However, A arranged for payment to be made to you from a corporate bank account held in Russia. You suspect that the payment from A has arisen from ill-gotten gains obtained in his previous employment.

Concerned, you ask your instructing solicitors about these matters. X seeks to reassure you that A pays all of his bills from the Russian account, and that was also the source of the funds that he paid into the "Spotlight Studio Revenue Protection Scheme". This does not give you the intended reassurance.

Given the information that you now have in relation to A, you believe that the film scheme may be harbouring his proceeds of criminal conduct.

What do you do?
First, you should re-appraise the level of risk related to your instructions in the light of the matters that you have now learned.

Re-Assessing the Risk
As with your initial risk assessment, you must take appropriate steps to identify and assess the risks of money laundering within your instructions (Regulation 18(1)). You should follow the process as set out in the section "Assessing Risk" above in relation to the new circumstances.

Application
In this case, you may conclude that the geographical risk factors related to its location are likely to lead you to consider applying an enhanced level of due diligence in relation to Y Tax Advisers.

6. **Is my lay client a Politically Exposed Person (PEP)?**

7. **What level of Customer Due Diligence should be applied to PEP?**

You need to consider the effectiveness of the enhanced due diligence that you have previously applied to A. You should consider the level of due diligence applied thus far and ask whether it sufficiently addresses the level of risk that you now consider he presents. You will need to consider whether his role in the mineral-resources rich African country amounted to a "prominent public function" such that he should be considered a politically exposed person. If you determine that A is a Politically Exposed Person (PEP) within the meaning of Regulation 35 you must also apply enhanced customer due diligence measures coupled with enhanced ongoing monitoring in order to manage and mitigate the risks arising from his status and your instructions.

You should also consider the source of the funds that he has paid to you as this may also lead you to consider that there is an enhanced level of risk. If having carried out this risk assessment you conclude that there is a high risk of money laundering then you would also be obliged to apply enhanced customer due

diligence measures coupled with enhanced ongoing monitoring in order to manage and mitigate the risks arising from your instructions (Regulation 33(1)).

Having assessed, and recorded, the appropriate level of risk in relation to each of the lay clients, you should go on to address the steps that any increased level of risks requires.

Thereafter, you should consider whether your CDD obligations have been met. Where you are unable to satisfy yourself that those requirements are met you must cease to act.

8. Should I make a Suspicious Activity Report to the NCA in respect of my lay client?

You conclude that the source of the funds that A has paid into the film scheme, and the fees that he has paid to you, are the proceeds of criminal conduct.

In such circumstances you are required to make an "authorised disclosure" to the National Crime Agency, by way of a Suspicious Activity Report (a "SAR" or "disclosure"), in accordance with s.338 of POCA. Section 330 of POCA makes it an offence for a person acting in the course of business in the regulated sector to fail to make a disclosure where they have knowledge of money laundering taking place or reasonable grounds to suspect that money laundering is taking place. For these purposes the "regulated sector" is identical in scope to the ambit of provisions of the Regulations: if you are subject to the Regulations then you are within the "regulated sector" for the purposes of POCA.

9. Can I disclose privileged information?

The Act contains an express exemption for legal professionals who received the information in "privileged circumstances" (s.330(6)(b)). The privilege extends to information that is received from a representative of the client, such as Y Tax Advisers, in addition to information received directly from the client. However, as it only covers information received in "privileged circumstances" it does not apply to the information that you have obtained from publicly available sources, i.e. the news reports available on the internet. This publicly available information includes A's previous employment being the chief government adviser on oil and gas mining in a mineral-resource rich African country, A having left his post and the country after a corruption investigation accused him of accepting bribes whilst in that post, A having been charged with corruption in that country and the existence of a worldwide criminal freezing order against him.

The privilege also does not extend to information that is "communicated or given with the intention of furthering a criminal purpose" (s.330(11)). The relevant intention may be that of your lay client (*R. v. Central Criminal Court ex parte Francis & Francis (a firm)* [1988] 2 W.L.R. 627), and you are advised to proceed on that basis. In relation to the analogous common law protection of legal professional privilege the Courts have held that, before disclosure will be compelled, there must "*be some prima facie evidence*" that the alleged iniquity "*has some foundation in fact*", *O'Rourke v Darbishire* [1920] AC 581 (604).

Application

Here, you believe, and have information that suggests, that the tax scheme is seeking to facilitate A's retention and use of the proceeds of criminal conduct, a criminal purpose within the meaning of POCA.

Some of that information has come to you in what would otherwise be "privileged circumstances", e.g. that the source of A's funds in the tax scheme have come from a corporate bank account held in Russia. When combined with the publicly available information, this would amount to being in possession of "*some prima facie evidence*" that your belief that A is laundering the proceeds of criminal conduct "*has some foundation in fact*".

In this scenario you would conclude that the communications to you on A's behalf fall within the meaning of "criminal purpose" in s.330(11) and therefore they are not protected by s.330(6)(b). For the same reason they would also not attract the protection of Legal Professional Privilege due to the fraud/crime exception (*R. v. Cox & Railton*, 14 QBD 153).

As such, you are required to make a disclosure to the NCA of such information that is known to you that identifies the suspected person, gives the whereabouts of the laundered property, and provides the details of the information on which your knowledge or suspicion is based (s.330(5)).

10. Can I continue to act?

In your disclosure you should seek consent to continue to act. If you are denied consent you must cease to act.

For assistance in relation to the making of Suspicious Activity Reports and the obtaining of consent, see [174] in the Guidance.

11. If I cannot continue to act what should I do about fees already paid?

If you are unable to complete your due diligence or are denied consent to act you will need to address the fact of the monies in your possession.

As you were unable to provide "adequate consideration" you are at risk of committing an offence under s.329 of POCA by possessing the proceeds of crime. You cannot retain possession of the monies. However, if you move them, including by returning them to A, you may also commit an offence under s.327 of the Act. Moreover, by returning or paying on the funds to a third party you may also commit a s.328 offence of entering into, or being concerned in, an arrangement that facilitates the retention, use or control of criminal property by another person.

In such circumstances, you must make an "authorised disclosure", in accordance with s.338 of POCA, to the NCA and seek to obtain consent to return the funds to A, see the Guidance at [174]. Only once consent to the transaction has been obtained can a transfer of the funds be safely made. You should seek permission to make this transfer by way of an alternative request when you seek consent to act.

In the meantime, you must take care not to reveal the fact of the disclosure to Y Tax Advisers or A. Not keeping the fact of the disclosure confidential could lead to committing the offence of prejudicing an investigation (POCA s.342).

Typology 4 – A Commercial Case

Topics Covered: Commercial Agreements – Litigation/Arbitration – *Bowman v Fels* – LPP – Sham Litigation – "Authorised Disclosure" & s.338 of POCA

Headline Questions

1. **If am instructed in a civil dispute where the underlying transaction with which the dispute is concerned exhibits signs of bribery or money laundering, what should I do?**

2. **What happens if the parties decide to settle that dispute – could the settlement payment itself be a bribe or money laundering?**

3. **What is 'sham' litigation? What should I do if I suspect I may be instructed in a sham claim?**

4. **How, if at all, does the fact that my suspicions are based on privileged information affect my actions?**

Part One: Arbitration

A well-known City firm has instructed you to advise and, in due course, act for X Ltd, a company incorporated in the British Virgin Islands. Your instructions are that X Ltd has a claim for a payment of US$10 million due under a written services agreement with a Chinese energy company in connection with the acquisition of oil exploration licences in the Far East. The law of the services agreement is that of England and Wales and it contains an arbitration clause.

The correspondence between your solicitors and the solicitors acting for the Chinese energy company demonstrates that the claim to the fee is firmly opposed and a vigorous defence to it is being mounted. However, you notice that, when asked by the solicitors for the energy company to give details of the service provided under the claimed agreement, the response on behalf of X Ltd was somewhat vague. You notice references within the documents supporting your client's case to an individual associated with X Ltd who appears to be an official in the energy ministry in one of the Far Eastern countries.

You are concerned that the written services agreement might be a cover for a corrupt payment to X Ltd as the corporate *alter ego* of the official. You suspect that, by acting upon your instructions, you may be helping to facilitate that payment.

Q1 If am instructed in a civil dispute where the underlying transaction with which the dispute is concerned exhibits signs of bribery or money laundering, what should I do?

The Regulations

First, your instructions relate to a contentious contractual dispute, to be resolved by arbitration. You are not being asked to provide advice or representation to another person that falls within the ambit of the Regulations. The Regulations and their requirements in relation to CDD, monitoring and record keeping therefore do not apply to you.

Acting Upon Your Instructions

Your concern that you may be facilitating the acquisition of criminal property needs to be addressed. By virtue of s.328 of POCA, it is an offence for you to enter into or become concerned in an arrangement that you know or suspect facilitates, by whatever means, the acquisition, retention, use or control of criminal property by or on behalf of another person. In this case X Ltd may be in the process of trying to acquire criminal property, *i.e.* a bribe.

Whilst, at present, there is no criminal property in existence, no payment having yet been made, the payment, if your suspicions are correct, will become criminal property once it is received by X Ltd: *R. v. Akhtar* [2011] EWCA Crim. 146.

However, you will not ordinarily be regarded as having entered into or become concerned in such an arrangement simply as the result of being involved in the *"ordinary conduct of litigation"* (*Bowman v. Fels* [2005] 1 WLR 3083). It is probable that representing X Ltd in a dispute for payment of the fee said to be due would not therefore involve any AML issues for you. Note, however, that the meaning of the term the "ordinary conduct of litigation" has never been given any definitive judicial explanation. This applies equally to arbitration as well as court litigation. In *Bowman v. Fels*, the Court of Appeal suggested that the ordinary conduct of litigation covers *"…any step taken by [parties] in litigation from the issue of proceedings..."*. Given the prevalence of arbitration, it is at least arguable, if not likely, that the Court had arbitration proceedings in mind when it referred to *"proceedings"*.

However, even if that is correct, it is not definite that this would also cover all advice given before litigation or arbitration commences. Where the advice directly concerns the prospective claim, is in contemplation of that claim being brought to litigation or arbitration and those 'proceedings' are proximate in time, it would be more likely that it would fall within the ambit of *Bowman v. Fels*, but it is not certain that this is so.

On the facts as known to you at this time, the matter would appear to fall within the scope of the dicta in *Bowman v. Fels*. However, you should keep the matter under review as the case, and your involvement in it, develops. It may turn out to be the case that the arrangement between the parties was corrupt. Whilst there has not been a ruling in relation to the point, there is at least the potential that a different view from that in *Bowman v. Fels* is taken of litigation intended to enforce a bribe. A court, asked to decide upon the matter, might consider that litigation for the purpose of enforcing a bribe is not within the meaning of the *"ordinary conduct of litigation"*.

Part Two: Settlement

As anticipated, the matter proceeds to arbitration. A joint arbitrator has been identified and has agreed to act. The arbitration hearing commences on its scheduled date. Three days into the hearing, and somewhat unexpectedly, the other side informs your solicitors that they no longer intend to contest the proceedings and will settle the claim in full in X Ltd's favour. No reason is provided for this substantial volte-face. You are instructed to prepare the settlement agreement and minute of the decision of the arbitrator. The agreement is to contain a confidentiality clause. Your earlier concerns are now added to; you suspect that the 'dispute' was in fact no more than a sham, designed to add a veneer of commercial reality to an otherwise unlawful payment of the proceeds of corruption and that you have become "concerned" in an arrangement that facilitates the acquisition of sums that you suspect are criminal property, contrary to s.328 of POCA. You wonder whether you can continue to act in such circumstances, without breaking the law.

Q2 What happens if the parties decide to settle that dispute – could the settlement payment itself be a bribe or money laundering?

Q3 What is 'sham' litigation? What should I do if I suspect I may be instructed in a sham claim?

Sham Litigation
As noted above, the *"ordinary conduct of litigation to its ordinary conclusion"* (*Bowman v. Fels*, §62) has not been further defined. However, it seems highly unlikely that sham litigation could properly be considered to fall within that definition. By parity of reasoning, a sham dispute brought by way of arbitration would be likely to be regarded in the same light. If the process has been a sham, you should proceed on the basis that your work does not fall within the scope of the ruling in *Bowman v. Fels*. The money laundering offences within POCA would apply if the elements of the offence were made out.

You should note that the fact that the proceeds of crime were not in existence at the time that you became concerned in the arrangement does not preclude the application of the offence to you. What matters for the operation of the offence is whether the property in question was criminal property at the time that the arrangement operated upon it: *R v. GH* [2015] UKSC 24; [2015] 1 WLR 2126.

Q4 How, if at all, does the fact that my suspicions are based on privileged information affect my actions?

Legal Professional Privilege
In ordinary circumstances your client's legal professional privilege prevents you from making any disclosure in relation to any communications subject to that privilege. As engaging a lawyer unwittingly to participate in the course of sham litigation designed to cover the making of a bribe would amount to an abuse of the privilege, the protection would not arise. Such conduct would take the matter outside the "ordinary run" of cases: *R. v. Snaresbrook Crown Court, ex parte the Director of Public Prosecutions* [1988] QB 532, (537).

Privileged and Non-Privileged Information
The information upon which your suspicions are based came to you in confidential circumstances. However this alone does not make it privileged. Information shared between the parties to a dispute, for example in correspondence, is not confidential as it would be between a client and their lawyer. It is therefore not covered by privilege.

In this case the information that gives rise to your suspicions would appear to be shared between the parties: the nature of the agreement, the vague answers provided by X Ltd in relation to the services provided, the connection between X Ltd and the official in the energy ministry and the resolution of the arbitration in X Ltd's favour. Whilst at best confidential between the parties, it is not subject to legal professional privilege. As such it can form the subject matter of disclosure.

Related questions:

Can a disclosure to the NCA be made in Part Two?
Yes.

Should a disclosure be made?
Whether a disclosure should be made depends whether you have a suspicion that is more than merely fanciful. In this case you do. A disclosure should therefore be made otherwise you will be at risk of committing a money laundering offence under one or more of POCA ss.327-329.

Acting Upon Your Instructions

Before acting upon your instructions to prepare the settlement agreement and minute of the decision of the arbitrator you, must make an *"authorised disclosure"*, known as a Suspicious Activity Report (an "SAR" or "disclosure") to the NCA in accordance with s.338 of POCA, and seek consent to act, referred to by the NCA as a DAML ("defence against money laundering"). For assistance in relation to the making of Suspicious Activity Reports and the obtaining of consent, see [174] in the Guidance.

You will need to receive the consent of the NCA before taking any further step in the case. In the meantime, you must take care not to reveal the fact of the disclosure to anyone. Not keeping the fact of the disclosure confidential could lead to committing the offence of prejudicing an investigation (POCA s.342).

Typology 5 – Crime
Topics Covered: Crime – Litigation – *Bowman v Fels* – LPP

Headline Questions

1. **If during the ordinary conduct of litigation my lay client makes admissions relating to his possession of the proceeds of crime, am I under a duty to make an SAR to the NCA?**

2. **If there is no duty for me to make such a disclosure, may I make an SAR to the NCA?**

3. **Does the position change if the admission causes me to be embarrassed and therefore I can no longer act for the defendant?**

4. **Does the lay client's criminal intention mean that the information he provided to you is not protected by Legal Professional Privilege?**

You are instructed to represent X, who has been charged with one count of conspiring to supply Class A drugs. Between his arrest and the first hearing at the Crown Court, a case conference is held with X at HMP Wandsworth, at which your instructing solicitor, Y, is also present.

During the course of the conference the incautious X informs you that he doesn't care what happens to him. "I've made my money", he says. "It is well hidden and it will be waiting for me when I get out of here". Without prompting he goes on to tell you that through a "complex web" of offshore trusts and Far Eastern proxy companies he owns two substantial country estates in England worth "several mil" each, plus, a hotel in Tanzania and a "great big gaff, right over the Harbour" in Sydney, Australia. None of which, he states, is held in his name and all of which was paid for in cash. There is a moment of silence, which is ended by X insisting that no-one must ever be told about what has just been said and asking Y whether you can be trusted. The conference then ends abruptly as X asks to be brought back to his cell. You have no idea whether X is telling you the truth or not.

A few days later you receive a call from your instructing solicitor, Y. He informs you that X has been served with a POCA restraint order freezing all of his property. However, no mention is made, either in the Order or in the evidence in support of the application for the Order, of the properties referred to by X.

Y suggests that X has "dodged a bullet there". Your response, that X may be a fantasist, is met by Y stating that his client was most definitely telling the truth –

he has been lavishly hosted at one of the UK estates on a number of occasions and taken his family to stay at the "fantastic" property in Sydney. You say you think that you, and Y, might need to take advice.
You think that you are under a duty to disclose these matters to the relevant authorities before acting for X any further.

Q1 If during the ordinary conduct of litigation my lay client makes admissions relating to his possession of the proceeds of crime, am I under a duty to make an SAR to the NCA?

Your instructions relate to criminal litigation, and not a transactional matter. You are not being asked to provide advice or representation to another person that falls within the ambit of the Regulations. The Regulations and their requirements in relation to CDD, monitoring and record keeping therefore do not apply to you.

Q2 If there is no duty for me to make such a disclosure, may I make an SAR to the NCA?

You must not make any form of disclosure of the information you have received either to the authorities or any other person outside of the confidential relationship you enjoy with your client. You must respect your client's legal professional privilege.
You are engaged in *"the ordinary conduct of litigation"* (*Bowman v. Fels* [2005] 1 WLR 3083) and as such the money laundering offences of sections 327, 328 and 329 of POCA do not apply to you. There is therefore no statutory basis for you to make an "authorised disclosure" (known as a "SAR", Guidance at [174]) in accordance with s.338 of POCA, to the NCA, of the information provided to you. If you did, you would be breaching your client's legal professional privilege.

Q3 Does the position change if the admission causes me to be embarrassed and therefore I can no longer act for the defendant?

You should however bear in mind your duty under the Handbook to ensure that you do not allow the court to be misled (rC3.1 & rC6). Clearly you cannot put forward or allow to be advanced a case that is contrary to the instructions that you have received. For example, in any restraint or future confiscation proceedings you could not be party to a case that suggested on behalf of X that he did not have any beneficial ownership of any realisable property.
The position does not change if you become embarrassed, or your instructions are withdrawn.

Q4 Does the lay client's criminal intention mean that the information he provided to you is not protected by Legal Professional Privilege?

No. X did not have a fraudulent intention in making the communication to you, *R. v. Cox & Railton*, 14 QBD 153.

Typology 6 – Real Property
Topics Covered: Real Property – Advice – "Transactions"

Headline questions
Q1 Am I required to undertake CDD in relation to a corporate client in relation to the sale of real property?

Part One: Scope of the Right of Way
X Ltd is the owner of a piece of registered land. It used to be the site of its headquarters, but it has now moved to another location.

X Ltd is thinking of developing the site into residential property. It might develop the site itself (and then sell the flats in due course), but it is more likely to sell the site with planning permission for development. It has not yet decided which to do. Y Ltd has recently bought the adjoining land.

In order to decide what planning permission to apply for, and what difficulties might be encountered with any development of its land (either by itself or by a buyer), X Ltd seeks advice from counsel about a right of way which runs to its property over Y Ltd's land. The right of way was granted several years ago, at a time when neither X Ltd nor Y Ltd owned their respective sites.

X Ltd wants to know the scope of the right of way, e.g. the width of the right of way, what type of vehicles can use it, for what purposes, and whether it can improve it. You are instructed to advise.
Thus far X Ltd has had no contact with Y Ltd.

Q1 Am I required to undertake CDD in relation to a corporate client in relation to the sale of real property?

No.

When providing legal services to a client you are subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

In this example you are instructed to advise in relation to a right of way and not to assist the client in the planning or execution of a transaction or otherwise acting for or on behalf of the client in a transaction.

The provision of legal advice by a barrister or advocate, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.

Here you are instructed to give legal advice in relation to the scope of a right of way and not in relation to "the *planning or execution of the transaction*" or "acting for or on behalf of a client *in the transaction*".

Your instructions do not therefore bring you within the ambit of the Regulations and you do not have to undertake CDD.

You should consider with care whether a particular piece of work in which you are instructed falls within the scope of the Regulations.

A failure to comply with the Regulations can amount to a criminal offence.

Part Two: Informal Discussions

In informal discussions between X Ltd and Y Ltd about possible development plans, Y Ltd has suggested that X Ltd's right of way will prevent it from developing its land as it might want to.

Are you now required to undertake CDD in relation to X Ltd?
No.

Your role has not changed: you are instructed to provide legal advice in relation to a right of way and not to assist the client in the planning or execution of a transaction.

You are not within the ambit of the Regulations and you do not have to undertake CDD.

Part Three: A Contemplated Transaction

Draft Heads of Terms for the sale of X Ltd's land to Y Ltd are prepared. You have not been asked to advise in relation to those.

Before the Heads of Terms are finalised, a further issue arises over a restrictive covenant on X Ltd's land which benefits another neighbouring land-owner and which requires the land to be used for commercial purposes.

You are asked to advise X Ltd as to:

(i) Whether the covenant is enforceable, and whether it would prevent residential development, and

(ii) X Ltd's risk of exposure to liability, and what that liability might be, if it were to agree to indemnify Y Ltd against any breach of the restrictive covenant.

You are not provided with the draft Heads of Terms.

Are you now required to undertake CDD in relation to X Ltd?
No.

Whilst a transaction is in contemplation, you are not instructed to assist the client in the planning or execution of a transaction but to provide legal advice upon the potential liability of X Ltd should it proceed with its proposals. You have not been provided with the draft Heads of Terms and would not appear to have been asked to consider how the matters that you are advising in relation to might affect the transaction.

Your instructions do not therefore bring you within the ambit of the Regulations and you do not have to undertake CDD.

Typology 7 – Real Property
Topics Covered: Real Property – Advice – "Transactions"

Headline questions
I am asked by the contracted buyers of a piece of land to advise in relation to a possible misrepresentation by the vendor of the land.

Q1 Is work in which I am asked to advise in relation to possible misrepresentations by a vendor activity to which the Regulations apply?
Q2 Do I need to undertake CDD?

A Representation in Relation to a Residential Property Purchase
You are asked to advise the buyers of a piece of land, who are said to be Mr. and Mrs. X who have already entered into a contract to buy the land, but the completion date has not yet arrived.

Mr. X has just discovered something that makes him believe that the seller may have made a misrepresentation about one aspect of the suitability of the land. The couple seek advice as to what their remedies may be, and as to what liabilities might arise should they refuse to complete the contract.
The solicitors who have instructed you are a medium-sized provincial firm who are known to you to undertake a broad base of contentious and non-contentious work.

Q1 Is that work to which the Regulations apply?
No. When providing legal services to a client you are subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

In this case, you are being asked to advise in relation to a dispute over a purchase rather than the purchase itself. You are not being asked to provide legal advice in relation to a real property transaction that falls within the ambit of the Regulations as concerning "the buying…of real property". As you are not being asked to give advice in relation to the transaction, or its planning or execution, and are not otherwise carrying out or participating in the transaction, you are not "acting for or on behalf of a client in the transaction" and are not within the scope of the Regulations.

Q2 Are you required to undertake CDD?
As the Regulations do not apply (for reasons given above) you will not need to undertake CDD.

Typology 8 – Real Property
Topics Covered: Real Property – Advice – "Transactions" – CDD – Reliance – The Risk-Based Approach

Headline questions:
I am asked by the intended buyers of a piece of land to advise on the enforceability of, and draft, an indemnity clause to be inserted in the contract for the purchase of the land.

Q1 Am I required to undertake CDD in relation to the intended buyers of a piece of land whom I have advised in relation to an indemnity clause in the purchase contract?
Q2 What do I need to consider in order to make a decision as to that?
Q3 Who should be the subject of the CDD enquiries?
Q4 What level of CDD is appropriate in such a case? What factors should I consider to evaluate that?

A Contractual Issue in a Residential Property Purchase
You are instructed to advise the buyers of a piece of land, who are said to be Mr and Mrs X. Mr X is a recently retired Chartered accountant and Mrs X is the headmistress of a local preparatory school. Mr and Mrs X are proposing to enter into a contract to buy the land, and the contract for sale is being prepared. Your instructing solicitor instructs you that it is proposed that the contract should contain a clause providing the Mr and Mrs X with an indemnity against certain types of third-party claims. No claims are known to exist at the moment, but you are told that Mr X spoke to a friend, Y, who warned him that he had been unable to enforce a similar undertaking when he had sought to rely upon it a few years ago. They are worried about this, and their solicitors have instructed you to advise on the proper construction of such a clause and, if required, to draft the required terms.

Q1 Am I required to undertake CDD in relation to my clients?

Q2 What do I need to consider in order to make a decision as to that?

Potentially, yes.

When providing legal services to a client you are subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

In this case you are being asked to:

(a) Advise Mr and Mrs X as to the terms of the sale and purchase contract, and

(b) Provide further legal advice upon and, if required, to prepare a clause of an agreement in relation to a real property transaction that falls within the ambit of the Regulations as it concerns "the buying…of real property".

The provision of legal advice by a barrister or advocate, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.

You should consider with care whether a particular piece of work in which you are instructed falls within the scope of the Regulations.

A failure to comply with the Regulations can amount to a criminal offence.

Application

If your involvement in the matter amounts to only giving legal advice in relation to the operation of the indemnity clause, you are unlikely to be considered to be "assisting in the *planning or execution of the transaction*" or "acting for or on behalf of a client *in the transaction*".

However, if as per your instructions, you go on to draft a term of the agreement there is at least an argument to say that you are "acting for or on behalf of a client in the transaction", and a strong argument to say that you are "you are assisting the client in the *planning…of a transaction*". In those circumstances you should consider that the obligations under the Regulations apply, and that you need to undertake CDD, to monitor the level of risk that arises in relation to your instructions and to maintain records of the same.

Q3 Who should be the subject of the CDD enquiries?

You will need to carry out CDD on your instructing solicitors and Mr and Mrs X as each of them are your clients (professional and lay) and therefore your customer for the purposes of the Regulations.

Q4 What level of CDD should be applied? What factors should I consider to evaluate that?

CDD must be applied on a risk-sensitive basis.

As the person instructing you is understood to be a solicitor it will be sufficient to satisfy your CDD obligation in relation to them by making a check of the SRA Solicitor's Register database, see [134] of the Guidance.
In relation to your lay clients, the level of CDD that you apply will need to be proportionate to your assessment of the risk that the transaction involves money laundering or terrorist finance. The greater that risk, the greater the level of CDD you need to apply.

Assessing Risk
As you are instructed in a matter that brings you within the scope of the Regulations, you must take appropriate steps to identify and assess the risks of money laundering within your instructions (Regulation 18(1)). In deciding what steps are "appropriate" you must consider the size and nature of the matter in which you are instructed (Regulation 18(3)).

You must also consider:

(a) Any information made available to you by your supervisory authority pursuant to reg. 17(9) and 47 in relation to ML/TF risk;

(b) Risk factors specific to your practice including factors relating to:
  (i) your customer;
  (ii) the country or geographic area in which you are practising;
  (iii) the service that you are providing;
  (iv) the relevant transaction; and
  (v) the delivery channels through which your service is being provided (Regulation 18(2) & (3)).

(c) For barristers in England and Wales, the current BSB AML/CTF Risk Assessment, in relation to which see [27] above.

You must keep an up-to-date written record of all steps taken in carrying out the risk assessment, and provide this, together with the risk assessment and any information on which that assessment was based, to your supervisory authority on request (Regulation 18(4) & (6)).

For further assistance in relation to CDD, see the Basic Guide to Customer Due Diligence at Annex 1 to the Guidance.

Application
In this case, and without further information, you would be likely to assess the risk as low and accordingly apply a standard level of due diligence in relation to Mr and Mrs X.

You may be able to rely upon the CDD carried out by your instructing solicitors. However, even if they consent to you doing so, you should ensure that you are satisfied that they have applied the appropriate level and degree of due diligence.

Simply obtaining copies of the CDD material obtained by the person instructing you does *not* meet the 'Reliance' requirements of Regulation 39. You must satisfy yourself that you have obtained the necessary information to meet your CDD obligations. To do this, you will need to undertake a risk-based review of the CDD materials provided to you.

Even where you do rely upon the CDD of the person who instructs you, you remain liable for "any failure to apply such [CDD] measures" (Regulation 39(1)).

You will need to continue to monitor the relationship on a risk-sensitive basis and to keep records of your compliance with your CDD obligations.
Finally, where you are unable to satisfy yourself in relation to your CDD obligations you must cease to act.

Typology 9 – Family
Topics Covered: Litigation – Contemplated Litigation – Disclosure – CDD

Headline questions

1. **Where I am instructed in relation to proposed divorce and financial remedy proceedings is that work to which the Regulations apply?**

2. **Do I need to undertake CDD?**

3. **Can I continue to act if I suspect that my client has benefitted from a fraud or am I committing a money laundering offence if do so?**

4. **Should I make a Suspicious Activity Report to the NCA in respect of my lay client?**

5. **Can I disclose privileged information?**

6. **Am I entitled to retain the fees that have been paid?**

7. **Does the consensual settlement of the contemplated proceedings bring me within the scope of the Regulations?**

<u>Part One: Undeclared Income</u>

You are instructed by a wife in contemplated divorce and financial remedy proceedings. Your instructions include the following facts:

1. The husband owns and operates a jewellery business in which the wife used to assist but is now a full-time homemaker;

2. The wife knows that much of the husband's jewellery business has always involved cash transactions and that he does not declare those to HMRC;

3. The family home was purchased many years ago in joint names (with the aid of a mortgage, which was redeemed last year), from one of the husband's business associates and the wife recalls that the deposit was paid by the husband entirely in cash;

4. The wife left the family home with the parties' children one month ago and on the day she left she emptied the safe in the attic of the family home, taking her

jewellery (which was created in the business and gifted to her by the husband) and £50,000 in cash;

5. The wife wants the following: the family home to be transferred to her, ongoing maintenance (on the basis of the husband's 'true' income and not just his declared income) and to keep her jewellery.

You are instructed to advise in writing as to how best to pursue the wife's case and the prospects of success. Thereafter you are asked to see the client in conference to discuss that advice and, once proceedings have been issued, to attend the first appointment.

1. **Where I am instructed in relation to proposed divorce and financial remedy proceedings is that work to which the Regulations apply?**

2. **Do I need to undertake CDD?**

No.
Your instructions relate to proposed *litigation* in relation to a matrimonial dispute between a husband and a wife and you are not therefore subject to the Regulations. You are not being asked to provide advice or representation to another person that falls within the ambit of the Regulations. The Regulations and their requirements in relation to Customer Due Diligence, monitoring and record keeping therefore do not apply to you.

<u>Part Two: Further Instructions in Relation to the Cash that was in the Attic</u>

During the course of the conference the wife reveals that she has been using the £50,000 she removed from the safe to meet her and the children's living expenses since leaving the family home. In addition, the wife states, she has also been using it to meet her legal expenses, including your fees. Your fees have been paid up to date. After the conference is over your instructing solicitor confirms that what the wife has said is correct.

You are concerned that the husband would appear to have defrauded the Revenue and that your client has benefitted from this. You are also concerned that you may now be in receipt of the proceeds of that fraud.

You consider that you and may be committing a money laundering offence by either assisting the wife in retaining her property or by possessing the funds paid to you.

You think that you are under a duty to disclose these matters to the relevant authorities before acting for the wife any further.

3. **Can I continue to act if I suspect that my client has benefitted from a fraud or am I committing a money laundering offence if do so?**

4. **Should I make a Suspicious Activity Report to the NCA in respect of my lay client?**

5. **Can I disclose privileged information?**

You must not make any form of disclosure of the information you have received either to the authorities or any other person outside of the confidential relationship you enjoy with your client. You must respect your client's legal professional privilege.

You are engaged in "*the ordinary conduct of litigation*" (*Bowman v Fels* [2005] 1 WLR 3083) and as such the money laundering offences of sections 327, 328 and 329 of POCA do not apply to you. There is therefore no statutory basis for you to make an "authorised disclosure", in accordance with s.338 of POCA, of the information provided to you. If you did, you would be breaching your client's legal professional privilege and doing so without lawful justification.

It does not matter that the proceedings have not yet been issued. The Court in *Bowman v Fels* made clear that its ruling applied to steps taken in the furtherance of litigation and in the furtherance of contemplated litigation.

6. **Am I entitled to retain the fees that have been paid?**

Provided that the fee that you have agreed represents "adequate consideration" (within the meaning of s.329(2)(c)) for the service that you are providing you are entitled to accept the payment and represent the client.

In cases where adequate consideration has been provided the funds in possession of the recipient are no longer the proceeds of crime – regardless of whether you know or suspect that they are the proceeds of crime or not, see *R v Afolabi* [2009] EWCA Crim 2879 (35).

However, you should note that the "adequate consideration" limitation upon the s.329 offence is not included within s.327 (concealing etc.) or s.328 (entering into an arrangement that facilitates money laundering) of POCA. Such offences would usually require more than the simple receipt of fees for work done, i.e. conduct of an activity outwith the services lawfully provided by a barrister.

Other matters

You should however bear in mind your duty to ensure that you do not allow the court to be misled (BSB Handbook rC3.1 & rC6). Clearly you cannot put forward or allow to be advanced a case that is contrary to the instructions that you have received. For example, in any future trial of the issues you could not be party to a case that suggested on behalf of the wife that she was not aware of, or did not benefit from, the cash side of the husband's jewellery business.

Part Three: Settlement without Proceedings

Prior to proceedings having been issued, discussions are entered into between the parties with a view to achieving a settlement. The discussions are successful and an acceptable settlement is achieved. It is agreed that the family home will be transferred into the wife's sole name, the husband will pay to the wife a material sum in ongoing maintenance (greater than that which would be justified by his declared income) and that the wife may keep the remaining cash in her possession and the jewellery.

You are asked to prepare the terms of the settlement agreement between the parties.

It is agreed that, for now, no matrimonial proceedings will be issued.

7. **Does the consensual settlement of the contemplated proceedings bring me within the scope of the Regulations?**

No. Even the consensual settlement of contemplated proceedings remains within the *Bowman v Fels* [2005] 1 WLR 3083 exemption. Your instructions therefore do not give rise to the s.330 POCA duty to report suspicions of money laundering generated in the course of that work. By parity of reasoning the Regulations do not apply to this situation. The factual scenario is the consensual resolution of contemplated matrimonial proceedings, a matter that the Court of Appeal has recognised as being the "*ordinary conduct of litigation*". Accordingly, you would not be required to carry out CDD in relation to your client.

Typology 10 – Trusts, Beneficiary Dispute
Topics Covered: Litigation – CDD – Legal Advice – TCSP

Headline Questions

1. **Where I am instructed to provide advice in relation to the tax liabilities of a trust is that work to which the Regulations apply?**

2. **Do I need to undertake Customer Due Diligence?**

3. **What level of Customer Due Diligence should I apply to my clients?**

4. **Can I rely upon the Customer Due Diligence of my instructing lawyers?**

5. **Where I am instructed in relation to a trust, does that mean that I am acting as a Trust or Company Services Provider (a "TCSP") and therefore need to disclose that to my supervisory authority, e.g. the BSB?**

You are instructed by a firm of German lawyers to advise a UK resident beneficiary of a foreign trust in respect of a bitter family dispute involving interests under the trust.

In the course of so advising you to become aware that the tax liabilities of the trust have not been addressed. Tax liabilities have arisen which, if not met, by the trustees will fall on the shoulders of any beneficiary so far as in receipt of benefits. You advise him accordingly.

1. **Where I am instructed to provide advice in relation to the tax liabilities of a trust is that work to which the Regulations apply?**

Yes.

Your instructions relate to a dispute between the beneficiaries of a trust settlement and you are not therefore subject to the Regulations by virtue of acting as a legal adviser.

However, as you are providing advice in relation to the tax liabilities of the trust you are acting as a "tax adviser" within the meaning of the Regulation 11(d) and are therefore subject to the Regulations. As such the obligation under the Regulations apply, and you will need to undertake customer due diligence ("CDD"), to monitor the level of risk that arises in relation to your instructions and to maintain records of the same.

You should bear in mind that where you are subject to the Regulations you will also fall within the scope of the "Regulated Sector" for the purposes of the Proceeds of Crime Act 2002, and the disclosure obligations of ss.330-334 therein.

2. Do I need to undertake Customer Due Diligence?

You will need to carry out CDD on your instructing attorneys and the UK resident beneficiary of the trust as each of them are your clients (professional and lay) and therefore your customer for the purposes of the Regulations.
CDD must be applied on a risk-sensitive basis.

3. What level of Customer Due Diligence should I apply to my clients?

In relation to both of your clients, the level of CDD that you apply will need to be proportionate to your assessment of the risk that the transaction involves money laundering or terrorist finance. The greater that risk, the greater the level of CDD you need to apply.

Assessing Risk
As you are instructed in a matter that brings you within the scope of the Regulations, you must take appropriate steps to identify and assess the risks of money laundering within your instructions (Regulation 18(1)). In deciding what steps are "appropriate" you must consider the size and nature of the matter in which you are instructed (Regulation 18(3)).

You must also consider:

(a) Any information made available to you by your supervisory authority pursuant to reg. 17(9) and 47 in relation to ML/TF risk;
(b) Risk factors specific to your practice including factors relating to:
    (i) your customer;
    (ii) the country or geographic area in which you are practising;
    (iii) the service that you are providing;
    (iv) the relevant transaction; and
    (v) the delivery channels through which your service is being provided (Regulation 18(2) & (3)).
(c) For barristers in England and Wales, the current BSB AML/CTF Risk Assessment, in relation to which see [27] above.

You must keep an up-to-date written record of all steps taken in carrying out the risk assessment, and provide this, together with the risk assessment and any information on which that assessment was based, to your supervisory authority on request (Regulation 18(4) & (6)).

For further assistance in relation to CDD see the Basic Guide to Customer Due Diligence at Annex 1 to the Guidance.

Application

In this case you may need to apply an amount of enhanced due diligence in relation to either your professional or lay client if for any reason you are unable to meet with them in person.

Whilst the application of enhanced customer due diligence measures should be assessed on a case-by-case basis, the measures required under Regulation 33(1) "include, among other things":

(a) seeking additional independent, reliable sources to verify information provided or made available to you;

(b) taking additional measures to understand better the background, ownership and financial situation of the customer, and other parties to the transaction;

(c) taking further steps to be satisfied that the transaction is consistent with the purpose and intended nature of the business relationship;

(d) increasing the monitoring of the business relationship, including greater scrutiny of transactions (Regulation 33(5)).

4. Can I rely upon the Customer Due Diligence of my instructing lawyers?

You may be able to rely upon the CDD carried out by your instructing German lawyers. You may rely upon the CDD checks of a person in a third country, other than a high-risk third country (see [111] above), if they are:

(i) subject to requirements in relation to CDD and record keeping which are equivalent to those laid down in the Fourth Money Laundering Directive; and

(ii) supervised for compliance with those requirements in a manner equivalent to section 2 of Chapter VI of the Fourth Money Laundering Directive (reg. 39(3)).

However, even if they consent to you doing so, you should ensure that you are satisfied that they have applied the appropriate level and degree of due diligence, including, where it is required or appropriate, an enhanced level of due diligence, for example, if they too have been unable to meet in person with the lay client.

Simply obtaining copies of the CDD material obtained by the person instructing you does *not* meet the 'Reliance' requirements of Regulation 39. You must satisfy yourself that you have obtained the necessary information to meet your CDD obligations. To do this, you will need to undertake a risk-based review of the CDD

materials provided to you. Even where you do rely upon the CDD of the person who instructs you, you remain liable for "any failure to apply such [CDD] measures" (Regulation 39(1)).

You will need to continue to monitor the relationship on a risk-sensitive basis and to keep records of your compliance with your CDD obligations.

Finally, where you are unable to satisfy yourself in relation to your customer due diligence obligations, you must cease to act.

5. Where I am instructed in relation to a trust, does that mean that I am acting as a Trust or Company Services Provider (a "TCSP") and therefore need to disclose that to my supervisory authority, e.g. the BSB?

Being instructed to act or advise in relation to a trust does not of itself mean that you are acting as a TCSP within the meaning of the Regulations. The two are distinct.

Regulation 12(2) provides that a "trust or company service provider" is a firm or sole practitioner who by way of business provides trust and company services to other persons (see [FAQ 2] above).

Unless you are undertaking, by way of business, one or more of the activities listed above then you are not acting as a TCSP within the meaning of the Regulations. Where you are acting in relation to a trust, but not acting as a TCSP, then you do not need to disclose that fact to your supervisory authority.

Where you are acting as a TCSP then your work, in that respect, falls within the scope of the Regulations.

However, this does not mean that all of the work you undertake within your practice, i.e. non TCSP work, automatically is also within the scope of the Regulations.

In each instance you will have to separately consider whether the work you have been asked to undertake falls within the scope of reg. 12(1) or (2) of the Regulations.

You must not act as a TCSP unless you have registered with HMRC (reg. 56). Barristers and advocates who act as a TCSP must also inform their supervisory authority of that fact. In England and Wales, Unregistered barristers must register directly with HMRC. Practising barristers and BSB entities do not need to register directly with HMRC but must inform the BSB that they are acting as a TSCP, in which case the BSB will place their details on the HMRC register.

Typology 11 – Trusts, Standard Form Wills
Topics Covered: Drafting Transactional Documents – CDD – Legal Advice – TCSP

Headline Questions

1. **Where I am instructed to provide standard form wills and settlements is that work to which the Regulations apply?**

2. **Do I need to undertake Customer Due Diligence?**

3. **Where I am instructed in relation to a trust, does that mean that I am acting as a Trust or Company Services Provider (a "TCSP") and therefore need to disclose that to my supervisory authority, e.g. the BSB?**

You are asked by a Swiss firm of lawyers, known by you to have a specific practice in wealth management, to draft standard form wills and settlements.

1. **Where I am instructed to provide standard form wills and settlements is that work to which the Regulations apply?**

No.

Your instructions relate to the preparation of model documents and you are not therefore subject to the Regulations.

When providing legal services to a client you are subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

In this case you are not advising on a transactional matter in relation to the creation, operation or management of a trust. The documents that you are preparing may, later, be the models upon which such a transaction is carried out, but this is distinct from acting in *the planning or execution of a transaction* or otherwise *acting for or on behalf of a client in a transaction*. As far as you are aware there is no actual transaction in operation or contemplation. You do not know if the standard form documents that you prepare will ever be used in a transaction.

2. **Do I need to undertake Customer Due Diligence?**

As you do not come within the scope of the Regulations, you do not have to undertake Customer Due Diligence.

By drafting a standard form will, as opposed to say providing assistance in relation to a particular will or settlement, you would not be said to be providing material aid, or assistance or advice, in connection with the tax affairs of other persons, such as to bring you within the meaning of a "tax adviser" in Regulation 11(d).

However, you should consider the issue if your instructions alter or develop you may find that you are giving advice or assistance in relation to the tax affairs of other persons within the meaning of Regulation 11(d). For example, if you were drafting a particular provision in relation to the structure of a trust settlement in order to maximise a particular tax relief or to avoid incurring a particular liability.

3. Where I am instructed in relation to a trust, does that mean that I am acting as a Trust or Company Services Provider (a "TCSP") and therefore need to disclose that to my supervisory authority, e.g. the BSB?

Being instructed to act or advise in relation to a trust does not of itself mean that you are acting as a TCSP within the meaning of the Regulations. The two are distinct.

Regulation 12(2) provides that a "trust or company service provider" is a firm or sole practitioner who by way of business provides trust and company services to other persons (see [FAQ 2] above).

Unless you are undertaking, by way of business, one or more of the activities listed above then you are not acting as a TCSP within the meaning of the Regulations. Where you are acting in relation to a trust, but not acting as a TCSP, then you do not need to disclose that fact to your supervisory authority.

Where you are acting as a TCSP then your work, in that respect, falls within the scope of the Regulations. However, this does not mean that all of the work you undertake within your practice, i.e. non TCSP work, automatically is also within the scope of the Regulations.

In each instance you will have to separately consider whether the work you have been asked to undertake falls within the scope of reg. 12(1) or (2) of the Regulations.

You must not act as a TCSP unless you have registered with HMRC (reg. 56). Barristers and advocates who act as a TCSP must also inform their supervisory authority of that fact. In England and Wales, Unregistered barristers must register directly with HMRC. Practising barristers and BSB entities do not need to register directly with HMRC but must inform the BSB that they are acting as a TSCP, in which case the BSB will place their details on the HMRC register.

Typology 12 – Trusts, Advice Upon a Will
Topics Covered: Regulations – CDD – Legal Advice – TCSP – Disclosure – Fees

Headline Questions

1. **Where I am instructed to provide advice in relation to a will is that work to which the Regulations apply?**

2. **Do I need to undertake Customer Due Diligence?**

3. **What level of Customer Due Diligence should I apply to my clients?**

4. **Can I rely upon the Customer Due Diligence of my instructing lawyers?**

5. **Where I am instructed in relation to a trust, does that mean that I am acting as a Trust or Company Services Provider (a "TCSP") and therefore need to disclose that to my supervisory authority, e.g. the BSB?**

6. **Should I make a Suspicious Activity Report to the NCA in respect of my lay client?**

7. **Am I entitled to retain the fees that have been paid?**

You are instructed by X, an experienced high street solicitor for whom you, and other members of chambers, have worked on many occasions over a number of years. X has instructed you to advise on all aspects of the will of their late client, Y. Unfortunately, X has not been appointed executor, instead, Y's adult children, the beneficiaries of the will, have been.

You have no reason to suspect that disputes will arise in relation to the Will. You have every reason to suppose that inheritance tax issues will be of concern to the experienced X, but you are <u>not</u> asked to advise on this aspect of his duties.

After your initial advice X mentions to you a "long-held" reservation that Y was engaged in of some form of tax avoidance, if not tax evasion. X wonders whether Y's estate consists, at least in part, of those funds. X seeks your further advice in relation to that matter and in relation to further aspects of the will.

Given the comments by X you are concerned that you and X may be lending yourselves to a scheme whereby the benefits of Y's criminality are being passed to Y's children. You are also concerned as to whether you are entitled to accept payment from Y's estate for the work that you have done. Accordingly, you discuss the matter further with X to understand fully the basis of the suspicions.

When, in conference, you question X about the matter, X states that it was just an impression X had formed about Y in general.

1. **Where I am instructed to provide advice in relation to a will is that work to which the Regulations apply?**

Potentially, yes, although given the precise scope of your instructions this is unlikely.

Your instructions relate to the management of a deceased's estate and this is a regulated activity.

When providing legal services to a client you are subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

The provision of legal advice by a barrister or advocate, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.

You should consider with care whether a particular piece of work in which you are instructed falls within the scope of the Regulations.

A failure to comply with the Regulations can amount to a criminal offence.

As you are instructed to provide *legal advice* to X in relation to the estate of Y only, you are unlikely to be considered to be "assisting in the *planning or execution of the transaction*" or "acting for or on behalf of a client *in the transaction*".

However, if you are instructed to go beyond the giving of legal advice, say to prepare a Deed of Variation, you may consider that you are assisting in *the planning or execution of a transaction* concerning *the managing of client money, securities or other assets* and *the creation, operation or management of a trust*, and you may come within the scope of the Regulations.

You should also be alert to any change of instructions that require you to advise or assist in relation to the tax implications of the will. A person who by way of

business, whether as a firm or a sole practitioner, directly or indirectly provides material aid, or assistance or advice, in connection with the tax affairs of other persons is, by virtue of Regulation 11(d) a "tax adviser".

Where you provide such advice or assistance you will come within the meaning of a "tax adviser" under Regulation 11(d) and as such fall within the scope of the Regulations.

As you are subject to the Regulations you will also fall within the scope of the "Regulated Sector" for the purposes of the Proceeds of Crime Act 2002, and the mandatory disclosure obligations of ss.330-334 therein.

2. Do I need to undertake Customer Due Diligence?

If you are instructed to go beyond the giving of legal advice, say to prepare a Deed of Variation, then you will be acting within the scope of the Regulations.

As such, you will need to carry out CDD on your instructing solicitor and the executors of Y's estate as each of them is your client (professional and lay), and therefore your customer for the purposes of the Regulations.

CDD must be applied on a risk-sensitive basis.

As the person instructing you is understood to be a solicitor it will be sufficient to satisfy your CDD obligation in relation to them by making a check of the SRA Solicitor's Register, see [134] of the Guidance.

3. What level of Customer Due Diligence should I apply to my clients?

In relation to your lay client, the level of CDD that you apply will need to be proportionate to your assessment of the risk that the transaction involves money laundering or terrorist finance. The greater that risk, the greater the level of CDD you need to apply.

Assessing Risk

As you are instructed in a matter that brings you within the scope of the Regulations, you must take appropriate steps to identify and assess the risks of money laundering within your instructions (Regulation 18(1)). In deciding what steps are "appropriate" you must consider the size and nature of the matter in which you are instructed (Regulation 18(3)).

You must also consider:

(a) Any information made available to you by your supervisory authority pursuant to reg. 17(9) and 47 in relation to ML/TF risk;
(b) Risk factors specific to your practice including factors relating to:
  (i) your customer;
  (ii) the country or geographic area in which you are practising;
  (iii) the service that you are providing;
  (iv) the relevant transaction; and
  (v) the delivery channels through which your service is being provided (Regulation 18(2) & (3)).
(c) For barristers in England and Wales, the current BSB AML/CTF Risk Assessment, in relation to which see [27] above.

You must keep an up-to-date written record of all steps taken in carrying out the risk assessment, and provide this, together with the risk assessment and any information on which that assessment was based, to the BSB on request (Regulation 18(4) & (6)).

For further assistance in relation to CDD see the Basic Guide to Customer Due Diligence at Annex 1 to the Guidance.

Application
In this case, and without further information, you would be likely to assess the risk as medium to low and accordingly apply a standard level of due diligence in relation to Y's executors.

4. Can I rely upon the Customer Due Diligence of my instructing lawyers?

You may be able to rely upon the CDD carried out by your instructing solicitor in relation to Y's executors. However, even if he consents to you so doing, you should ensure that you are satisfied that he has applied the appropriate level and degree of due diligence.

Simply obtaining copies of the CDD material obtained by the person instructing you does *not* meet the 'Reliance' requirements of Regulation 39. You must satisfy yourself that you have obtained the necessary information to meet your CDD obligations. To do this, you will need to undertake a risk-based review of the CDD materials provided to you.

Even where you do rely upon the CDD of the person who instructs you, you remain liable for "any failure to apply such [CDD] measures" (Regulation 39(1)).

You will need to continue to monitor the relationship on a risk-sensitive basis and to keep records of your compliance with your CDD obligations.

Where you are unable to satisfy yourself in relation to your CDD obligations, you must cease to act.

5. Where I am instructed in relation to a trust, does that mean that I am acting as a Trust or Company Services Provider (a "TCSP") and therefore need to disclose that to the BSB?

Being instructed to act or advise in relation to a trust does not of itself mean that you are acting as a TCSP within the meaning of the Regulations. The two are distinct.

Regulation 12(2) provides that a "trust or company service provider" is a firm or sole practitioner who by way of business provides trust and company services to other persons (see [FAQ 2] above).

Unless you are undertaking, by way of business, one or more of the activities listed above then you are not acting as a TCSP within the meaning of the Regulations. Where you are acting in relation to a trust, but not acting as a TCSP, then you do not need to disclose that fact to your supervisory authority.

Where you are acting as a TCSP then your work, in that respect, falls within the scope of the Regulations.

However, this does not mean that all of the work you undertake within your practice, i.e. non TCSP work, automatically is also within the scope of the Regulations.

In each instance you will have to separately consider whether the work you have been asked to undertake falls within the scope of reg. 12(1) or (2) of the Regulations.

You must not act as a TCSP unless you have registered with HMRC (reg. 56). Barristers and advocates who act as a TCSP must also inform their supervisory authority of that fact. In England and Wales, Unregistered barristers must register directly with HMRC. Practising barristers and BSB entities do not need to register directly with HMRC but must inform the BSB that they are acting as a TSCP, in which case the BSB will place their details on the HMRC register.

6. Should I make a Suspicious Activity Report to the NCA in respect of my lay client?

Given what you have been informed by X about Y, you suspect that the source of the funds that form his estate may be, at least in part, the proceeds of criminal conduct. You are concerned that the assistance that you and X provide in relation to the settling of his estate will assist in the transfer of those proceeds.

Section 330 of POCA makes it an offence for a person acting in the course of business in the regulated sector to fail to make a disclosure where they have knowledge of or reasonable grounds to suspect that money laundering is taking place. For these purposes the "regulated sector" is identical in scope to the ambit of provisions of the Regulations: if you subject to the Regulations then you are within the "regulated sector" for the purposes of POCA.

Privileged Circumstances

The Act contains an express exemption for legal professionals who received the information in "privileged circumstances" (s.330(6)(b)). The privilege extends to information that is received from a representative of the client, such as your solicitors, in addition to information received directly from the client.

The privilege does not extend to information that is "communicated or given with the intention of furthering a criminal purpose" (s.330(11)). The relevant intention may be that of your lay client (*R. v. Central Criminal Court ex parte Francis & Francis (a firm)* [1988] 2 W.L.R. 627), and you are advised to proceed on that basis.

However, in relation to the analogous common law protection of legal professional privilege the Courts have held that, before disclosure will be compelled, there must "*be some prima facie evidence*" that the alleged iniquity "*has some foundation in fact*", *O'Rourke v Darbishire* [1920] AC 581 (604). Whilst you suspect that the settling of Y's estate will result in the proceeds of crime being transferred to Y's children, you do not have any information, beyond the suspicions of X, that this is the case. There is not something that would create a presumption of criminality or fraud that would require rebuttal on behalf of Y.

In these circumstances there is not a "*foundation in fact*" to satisfy the requirement of "*prima facie evidence*". in this scenario there is not sufficient evidence to justify the application of s.330(11).

For the same reason the communications to you on behalf of Y's executors are not subject to the fraud/crime exception and as a result attract the protection of legal professional privilege (*R. v. Cox & Railton*, 14 QBD 153).

In such circumstances you would be not required to make an "authorised disclosure" to the National Crime Agency in accordance with s.338 of POCA and no such disclosure should be made.

7. Am I entitled to retain the fees that have been paid?

Provided that the fee that you have agreed represents "adequate consideration" (within the meaning of s.329(2)(c)) for the service that you are providing you are entitled to accept the payment and represent the client.

In cases where adequate consideration has been provided the funds in possession of the recipient are no longer the proceeds of crime – regardless of whether you know or suspect that they are the proceeds of crime or not, see *R v Afolabi* [2009] EWCA Crim 2879 (35).

However, you should note that the "adequate consideration" limitation upon the s.329 offence is not included within s.327 (concealing etc.) or s.328 (entering into an arrangement that facilitates money laundering) of POCA. Such offences would usually require more than the simple receipt of fees for work done, i.e. conduct of an activity outwith the services lawfully provided by a barrister.

You should consider and determine whether you have given, or will give, "adequate consideration" for the fees to be paid to you. You should undertake this enquiry yourself, regardless of whether the client considers that the fee is due.

Typology 13 – Company
Topics Covered: Company Purchase – Regulations – CDD – Disclosure

Headline Questions

Q1 If I am instructed to advise on a legal issue arising in connection with a corporate acquisition, do I need to conduct CDD on my lay client? If so, what does that involve?

Q2 If I am suspicious that the property being acquired might be or include the proceeds of crime, what should I do? Does it matter whether or not I have reason to believe that my client is complicit?

Q3 How, if at all, does the fact that my suspicions are based on privileged information affect my actions?

The Purchase of Y Ltd

You receive instructions from one of your regular solicitors to advise an investment company, X Ltd, for whom you have acted for on a number of previous occasions. X Ltd is proposing to purchase all of the shares in an English company, Y Ltd. Y Ltd is a subsidiary of Z Ltd, a company registered in Panama.

You are provided with a copy of Heads of Terms agreed between X and Y. These say that they are confidential to X, Y, and Z, to several representatives of each company, and to X's 13 shareholders.

You are told that Y's business is investment in commercial property in England and Wales.

One of Y's properties is a valuable Grade II listed building, Rotten Row House, in a prime area of central London. Your instructing solicitors have discovered that the local planning authority have threatened to take enforcement action for various alleged unlawful alterations to the building. You are told that the deal is 'off market', and that X Ltd is concerned that the planning issues are the reason why the deal is so "keenly priced".

Your instructions also include some email exchanges that indicate that, since the Heads of Terms were agreed, one of X Ltd's shareholders has come across a report on a website claiming that Y Ltd is the front for an Eastern European crime family. A further report claims that the first report is a scandalous lie and an attempt to improperly do down Y Ltd by a disgruntled former employer. Neither website is known to you and you have no further information that would permit you to assess the credibility of the claim and counterclaim.

The emails record that this has been raised with both Z and Y, and that both have denied this (through their respective solicitors) and have asserted that the building is occupied by Y Ltd as the base for its property investment operations.

Your advice is sought as to the risk of enforcement action succeeding, whether X Ltd needs to indemnify itself against liability for any such action and if so, to prepare the necessary terms for the draft agreement.

Having considered the reports you conclude that you cannot rule out that the original allegation may be true and so you retain a suspicion that Rotten Row House might have been purchased with the proceeds of crime. You do not suspect your lay client, X Ltd, of being involved in any criminal conduct.

Q1 Do I need to conduct CDD on my lay client? If so, what does that involve?
Potentially, yes.

When providing legal services to a client you are subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

The provision of legal advice by a barrister or advocate, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.

You should consider with care whether a particular piece of work in which you are instructed falls within the scope of the Regulations.

A failure to comply with the Regulations can amount to a criminal offence.

In this case, you are being asked to provide legal advice to X Ltd, at least in part, in relation to the terms of the sale and purchase contract for Y Ltd. If your involvement in the matter amounts to no more than giving legal advice in relation to the risk of enforcement action succeeding and the need for an indemnity against such an action, then you would be unlikely to be considered to be "assisting in the *planning or execution of the transaction*" or "acting for or on behalf of a client *in the transaction*".

However, if as per your instructions, you go on to draft a term of the agreement there is at least an argument to say that you are "acting for or on behalf of a client

in the transaction", and a strong argument to say that you are "you are assisting the client in the planning…of a transaction". In those circumstances you should consider that the obligations under the Regulations apply, and that you need to undertake CDD, to monitor the level of risk that arises in relation to your instructions and to maintain records of the same.

You should also be alert to any instructions that require you to advise or assist in relation to the tax implications of the transaction. A person who by way of business, whether as a firm or a sole practitioner, directly or indirectly provides material aid, or assistance or advice, in connection with the tax affairs of other persons is, by virtue of Regulation 11(d) a "tax adviser"

Where you provide such advice or assistance you will come within the meaning of a "tax adviser" under Regulation 11(d) and as such fall within the scope of the Regulations.

As you are subject to the Regulations you will also fall within the scope of the "Regulated Sector" for the purposes of the *Proceeds of Crime Act* 2002, and the mandatory disclosure obligations of ss.330-334 therein.

Customer Due Diligence

You will need to carry out CDD on your instructing solicitors and X Ltd as each of them is your client (professional and lay), and therefore your customer for the purposes of the Regulations.

CDD must be applied on a risk-sensitive basis.

As the person instructing you is understood to be a solicitor it will be sufficient to satisfy your CDD obligation in relation to them by making a check of the Law Society's database, see [134] of the Guidance.

In relation to your lay client, the level of CDD that you apply will need to be proportionate to your assessment of the risk that the transaction involves money laundering or terrorist finance. The greater that risk, the greater the level of CDD you need to apply.

Assessing Risk

As you are instructed in a matter that brings you within the scope of the Regulations, you must take appropriate steps to identify and assess the risks of money laundering within your instructions (Regulation 18(1)). In deciding what steps are "appropriate" you must consider the size and nature of the matter in which you are instructed (Regulation 18(3)).

You must also consider:

(a) Any information made available to you by your supervisory authority pursuant to reg. 17(9) and 47 in relation to ML/TF risk;
(b) Risk factors specific to your practice including factors relating to:
    (i) your customer;
    (ii) the country or geographic area in which you are practising;
    (iii) the service that you are providing;
    (iv) the relevant transaction; and
    (v) the delivery channels through which your service is being provided (Regulation 18(2) & (3)).
(c) For barristers in England and Wales, the current BSB AML/CTF Risk Assessment, in relation to which see [27] above.

You must keep an up-to-date written record of all steps taken in carrying out the risk assessment, and provide this, together with the risk assessment and any information on which that assessment was based, to the BSB on request (Regulation 18(4) & (6)).

For further assistance in relation to CDD see FAQ 4.

Application
In this case, and without further information, you would be likely to assess the risk as medium and accordingly apply a standard level of due diligence in relation to Y.

You may be able to rely upon the CDD carried out by your instructing solicitors' in relation to Y. However, even if they consent to you so doing, you should ensure that you are satisfied that they have applied the appropriate level and degree of due diligence.

Relying upon the CDD of your instructing solicitors is not a matter of simply obtaining copies of their CDD material. You must satisfy yourself that you have obtained the necessary information to satisfy the CDD obligations upon you. To do this, you will need to undertake a risk-based review of the CDD materials provided to you. Also, reliance does not absolve you of the obligation to meet your CDD requirements: you remain liable for "any failure to apply such [CDD] measures" (Regulation 39(1)).

You will need to continue to monitor the relationship on a risk-sensitive basis and to keep records of your compliance with your CDD obligations.
Finally, where you are unable to satisfy yourself in relation to your CDD obligations you must cease to act.

Q2 If I am suspicious that the property being acquired might be or include the proceeds of crime, what should I do? Does it matter whether or not I have reason to believe that my client is complicit?

You suspect that Y Ltd may have purchased Rotten Row House using the proceeds of criminal conduct and are concerned that the purchase by your lay client X Ltd would assist in the realisation of such proceeds.
Section 330 of POCA makes it an offence for a person acting in the course of business in the regulated sector to fail to make a disclosure where they have knowledge of or reasonable grounds to suspect that money laundering is taking place. For these purposes the "regulated sector" is identical in scope to the ambit of provisions of the Regulations: if you are subject to the Regulations then you are within the "regulated sector" for the purposes of POCA.

Q3 How, if at all, does the fact that my suspicions are based on privileged information affect my actions?

The Act contains an express exemption for legal professionals who received the information in "privileged circumstances" (s.330(6)(b)). The privilege extends to information that is received from a representative of the client, such as your solicitors, in addition to information received directly from the client.

In the context of common law legal professional privilege, all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, where they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)*, [2004] UKHL 48, [2005] 1 A.C. 610. This would include the communications to the solicitor of the suspected criminal activity of Z and Y Ltd.

The privilege does not extend to information that is "communicated or given with the intention of furthering a criminal purpose" (s.330(11)). The relevant intention may be that of your lay client (*R. v. Central Criminal Court ex parte Francis & Francis (a firm)* [1988] 2 W.L.R. 627), and you are advised to proceed on that basis. Here the information that gives rise to your suspicion does not appear to have been "communicated or given with the intention of furthering a criminal purpose", but rather to alert you to your solicitor's concerns as to the bona fides of Z and Y Ltd. Section 330(11) therefore does not apply.

However, as the statutory exemption only covers information received in "privileged circumstances" it does not apply to information that is from publicly

available sources, *i.e.* the report on the website of the respected investigative journalist that is the source of your suspicion. This material is not privileged and can be the subject of a disclosure to the National Crime Agency.

You suspect that the purchase of Y Ltd will result in the proceeds of crime being realised by Z and the people behind it. The saving for information received in privileged circumstances does not apply to the information that gives rise to that suspicion and as such, you are required to make an "authorised disclosure" to the National Crime Agency, by way of a Suspicious Activity Report (a "SAR" or "disclosure"), in accordance with s.338 of POCA.

The disclosure should consist of such information that is known to you that identifies the suspected person, gives the whereabouts of the laundered property, and provides the details of the information on which your knowledge or suspicion is based (s.330(5)).

In making your disclosure you should disclose the required matters and seek consent to continue to act. If you are denied consent you must cease to act.

For assistance in relation to the making of Suspicious Activity Reports and the obtaining of consent, see [174] in the Guidance.