



Money Laundering and Terrorist Financing

Purpose:	To draw barristers' attention 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 self-employed barristers
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EXECUTIVE SUMMARY

Introduction

1. This guidance has been prepared by the Bar Council for self-employed barristers practising at the Bar of England and Wales. It addresses the issues raised for such barristers by Part 7 of the *Proceeds of Crime Act 2002*, as amended, ("POCA"), the *Terrorism Act 2000* (as amended by the *Anti-Terrorism, Crime and Security Act 2001*, the *Terrorism Act 2006*, the *Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007* and Schedules 3 & 9 of the *Counter-Terrorism Act 2008*) ("TACT") and the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* ("the Regulations"). It does not currently have the status of having been approved by HM Treasury.

2. Money laundering is commonly regarded as the process whereby the proceeds of crime are changed or disguised so to hide their unlawful origin. However, in English law money laundering is any activity in relation to the proceeds of crime, even passive activity such as mere possession.

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

Essential Matters

4. It is the duty of every barrister to understand the principles of money laundering and terrorist financing and how to recognise them. The essential principles are set out in this document, and some warning signs that help to spot risks of money laundering and terrorist financing are set out in Annex 2.

5. Every barrister owes an obligation not to become involved in conduct that involves money laundering or terrorist financing. These concepts are broadly defined. There is Court of Appeal authority that involvement in the “*ordinary conduct of litigation*” does not count, which will mean that most of the things that you do as a barrister 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.

6. Barristers who advise on financial or real property transactions or who provide tax advice have additional obligations under the Regulations, including an obligation to undertake Customer Due Diligence before acting, to keep a record of their compliance with the Regulations and to make disclosure of 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.

7. While the risk of a barrister becoming involved in conduct that involves money laundering or terrorist financing is relatively low (in particular because barristers are not permitted to handle client money) 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.

8. You must act in compliance with the anti-money laundering and counter-terrorist financing requirements of the Bar Standards Board (the BSB) and the BSB Handbook.

9. 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 Case Studies, carefully and be alert to the dangers.

POCA and Terrorism Act Offences

POCA

10. The money laundering offences are:
 - 10.1. Concealing, disguising, converting or transferring the proceeds of crime or removing the proceeds of crime from the jurisdiction (s.327);
 - 10.2. Entering into or becoming concerned in an arrangement that facilitates the acquisition, retention, use or control of criminal property (s.328);
 - 10.3. The acquisition, use and possession of criminal property (s.329); and
 - 10.4. 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

11. The terrorist financing offences are:
 - 11.1. Fund-raising for terrorism (s.15);
 - 11.2. Use or possession of property for terrorism (s.16);
 - 11.3. Entering into or becoming concerned in an arrangement that makes property available for the purposes of terrorism (s.17);
 - 11.4. Entering into or becoming concerned in an arrangement that facilitates the retention or control of terrorist property (s.18); and
 - 11.5. 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

12. The provisions of POCA and TACT do not override a client's Legal Professional Privilege. You must not make any form of disclosure to the authorities of information protected by Legal Professional Privilege.
13. Legal Professional Privilege does not protect communications made in furtherance of a crime.

The Litigation Exemption

14. 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 in the “ordinary conduct of litigation” or its consensual resolution.

15. The Court of Appeal’s reasoning in relation to the lawyer-client relationship is of application to each of the money laundering offences within POCA.

The Money Laundering Regulations

A. Legal Services

16. 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.

B. Tax Advice

17. If you are acting as a tax advisor in relation to **the provision of tax advice**, then **you are within the scope of the Regulations.**

18. If the work that you are undertaking is not transactional and not providing tax advice then you are not subject to the Regulations.

Obligations under the Regulations

19. You must have in place policies, controls and procedures that address the risk of money laundering or terrorist financing in your practice.
20. You must carry out a risk assessment in relation to work within the scope of the Regulations.
21. You must undertake Customer Due Diligence.
22. You must keep a record of the Customer Due Diligence that you carry out.
23. You must monitor your relationship with your customer.

How to Address those Obligations

24. 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.
25. 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

26. 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.
27. 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.

Enhanced Due Diligence

28. 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 enhanced level of Customer Due Diligence, 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. In those circumstances you will need to apply greater due diligence to mitigate the increased level of risk.

Reliance

29. Where you act upon the instructions of a professional client such as a solicitor you may be able to rely on their Customer Due Diligence. However, if you do, you remain legally responsible for those checks and thus for any failings in them.

Other Obligations Under the Regulations

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

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

30.2. 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).

31. Like offences exist in relation to terrorist financing within TACT (ss.21A and 21D).

Making a Disclosure

32. 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 to the NCA. Such reports should be made electronically via the NCA's [website](#).

Public and Licensed Access

33. Where you undertake public access work the requirements of the Regulations fall upon you directly, e.g. the Customer Due Diligence obligations. If you are instructed on a licensed access basis by a suitable professional on behalf of a lay client, you may be able to rely on due diligence checks carried out by that professional, but will otherwise be in a similar position to those acting on a public access basis.

Entities

34. This guidance has been prepared primarily for the assistance of and use by self-employed barristers in chambers. It does cover BSB-authorised entities, and entities and those who work within them may find the information in this guidance of assistance, however it is not a comprehensive guide to entity money laundering and terrorist finance compliance.

Important Notice

35. 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 A1, I6.4.

36. 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 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 refer to the professional practice and ethics section of the Bar Council's website [here](#).

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

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THE LEGAL FRAMEWORK

38. 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")

39. 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.

The EU Money Laundering Directives

40. 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*.

41. 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*.

42. 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) replace and repeal the *Money Laundering Regulations 2003*.

43. The Fourth Money Laundering Directive (2013/0025 (COD)) took effect from 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* ("the Regulations") which came into force on 26 June 2017. This guidance reflects the law as enacted in the Regulations.

The Proceeds of Crime Act 2002

44. The *Proceeds of Crime Act 2002* (as amended by, inter alia, the *Serious Organised Crime and Police Act 2005*, the *Serious Crime Act 2007*, the *Crime and Courts Act 2013* and the *Criminal Finances Act 2017*) came into force on 24th 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.

The Terrorism Act 2000

45. The *Terrorism Act 2000* (as amended by the *Anti-Terrorism, Crime and Security Act 2001*, the *Terrorism Act 2006*, the *Terrorism Act 2000 and the Proceeds of Crime Act 2002 (Amendment) Regulations 2007*, Schedules 3 & 9 of the *Counter-Terrorism Act 2008* and the *Criminal Finances Act 2017*) came into force, on a rolling basis, on 19 February 2001.

46. This guidance focuses on the responsibilities imposed on barristers pursuant to POCA, TACT and the Regulations.

THE SUBSTANTIVE MONEY LAUNDERING AND TERRORIST FINANCE OFFENCES

The Proceeds of Crime Act 2002, Part 7

47. As a practising barrister you need to be aware of the offences set out in Part 7 of POCA.

Section 327: Concealing, etc.

48. A person commits an offence if they conceal, disguise, convert, transfer or remove “criminal property” from England and Wales, Scotland, or Northern Ireland.

49. By virtue of s.327(3) the act of concealing or disguising includes concealing or disguising its “nature, source, location, disposition, movement or ownership or any rights with respect to it”.

50. “Criminal property” is a concept central to the money laundering offences. Property is broadly defined to include “things in action and intangible property” so can include for example rights under a contract (s.340(9)).

51. Section 340(3) provides that property is criminal property if:

51.1. it constitutes a person's benefit from criminal conduct (as defined by s.340(2)) or represents such benefit (in whole or part and whether directly or indirectly), and

51.2. the alleged offender knows or suspects that it constitutes or represents such a benefit.

52. You should note that liability under the offence attaches to the lower *mens rea* threshold of suspicion; the offence is made out if the alleged offender knew or suspected that the property was criminal property. It is, however, necessary that the alleged offender either knew or suspected that property was the product of “conduct which amounted to a crime”, not just an irregularity such as a breach of duty (*Holt v. HM Attorney General for the Isle of Man* [2014] UKPC 4).

53. The offence applies to any person's criminal property, not just that of the alleged launderer.

Limitations of the offence

54. Section 327(2) provides limitations on the scope of the offence. These limitations have often been referred to as ‘defences’. The statute does not use such language when it could clearly have done so, rather it states that ‘a person does not commit an offence’

if the subsection applies. This is in contrast with the position under the *Proceeds of Crime Act's* predecessor legislation, the *Criminal Justice Act 1988* and the *Drug Trafficking Act 1994*, which expressly referred to 'a defence'. Authority in relation to the nature of the burden on the defendant is limited but such as there is indicates that the legislation imposes only an evidential and not a legal burden upon him (*Hogan v. DPP* [2007] 1 W.L.R. 2944).

55. The limitations are:

55.1. 'Appropriate Consent'. Section 327(2)(a) provides that a person does not commit a s.327 offence if they make an "Authorised Disclosure" (see [\[83\]](#) below) under section 338 and (if the disclosure is made before they carry out the act in question) obtains the "appropriate consent".

55.2. 'Reasonable Excuse'. By virtue of section of 327(2)(b) a person does not commit a s.327 offence if they intended to make an "Authorised Disclosure" under section 338 but have a reasonable excuse for not doing so.

55.3. 'Overseas Conduct'. Section 327(2A) provides that a person does not commit a s.327 offence if:

55.3.1. They know, or believe on reasonable grounds, that the relevant criminal conduct occurred in a particular country or territory outside the United Kingdom, and

55.3.2. The relevant criminal conduct:

55.3.2.1. was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and

55.3.2.2. is not of a description prescribed by an order made by the Secretary of State.

56. You should, however, note that this limitation does not apply to overseas conduct that, if it occurred in the United Kingdom, would constitute an offence punishable by imprisonment for a maximum term in excess of 12 months (*Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order*, SI No. 2006/1070).

57. See further the guidance below (from [\[297\]](#) onwards) in relation to the making of Suspicious Activity Reports and the obtaining of consent.

Section 328: Arrangements

58. By section 328(1), a person commits a criminal offence if they enter into or become concerned in an arrangement which they know or suspect facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

59. The offence will only be established, if, at the time of being concerned in the arrangement, the alleged offender also knows or suspects that:

59.1. the property in question is or represents a person's benefit from criminal conduct, and that

59.2. the arrangement facilitates the acquisition, retention, use or control of that property (see *Holt*, above).

60. The Act does not define what constitutes becoming "concerned in an arrangement" for the purposes of section 328. What would appear to be required is that the arrangement has the effect of facilitating the acquisition, retention, use or control of "criminal property" by or on behalf of another person. Whilst such an expression is apt to include participation in the planning and execution of such facilitation, there is no requirement that the person in question participated in the whole of the "arrangement" from commencement until completion.

61. In *Fitzpatrick v. Commissioner of Police of the Metropolis* [2012] EWHC 12 (Admin), Globe J cited with approval the following excerpt from the Law Society's Anti-Money Laundering Guidance as in effect at that time:

"3.6 The operative phrase in s.328 – "enters into or becomes concerned in an arrangement" – needs to be considered as a whole. To enter into such an arrangement is to become a party to it; to become concerned in an arrangement suggest some wider degree of practical involvement in an existing arrangement such as taking steps to execute or put into effect an arrangement. Both 'enters into' and 'become concerned in' describe doing an act that is the starting point of an involvement in an existing arrangement."

62. The gravamen of the offence is therefore the act of entering into the arrangement. A person does not have to *deal with* any property which in whole or in part represents the proceeds of criminal conduct to have committed the offence: he merely has to *enter into or be concerned in an arrangement* whereby the retention or control of such proceeds is facilitated.

63. Property acquired legitimately may nevertheless be the proceeds of criminal conduct if (in whole or in part, and whether directly or indirectly) it *represents* a

person's proceeds of criminal conduct. Thus, where criminal A obtained property as a result of or in connection with a crime committed by him and B, but dissipated the property before giving B his share, and used legitimate assets (e.g. shares) to settle his debt to B instead, the proceeds of sale of the shares were capable of representing A's proceeds of criminal conduct; and where A passed the proceeds of sale of the shares to C to transfer to B, provided C had the requisite *mens rea* he was rightly convicted of a money laundering offence: *R. v. Keith & Ors* [2010] EWCA Crim. 477.

64. Property is '*criminal property*' for the purposes of s.328 even if the relevant criminal conduct is carried out at a point in time after the benefit is obtained, e.g. an advance payment on a contract killing. However, the definition of criminal property in s.340(3) does not embrace property that the accused *intends* to acquire by criminal conduct. Property is not criminal property because the wrongdoer intends that it should be so; the arrangement must facilitate the acquisition of *criminal property*, and not the *criminal acquisition* of property: *R. v. Akhtar* [2011] EWCA Crim. 146.

65. However, in answering the question as to whether the property that was acquired was criminal property, what matters, as far as the *actus reus* is concerned, is whether the property in question was criminal property at the time that the arrangement operated upon it. Accordingly, it was irrelevant whether criminal property was in existence or not when the arrangement was first entered into.

66. Thus, money paid by the victims of a fraud, committed by a third person, was lawful money in the victims' hands when they paid it into the money launderer's bank accounts. However, once it was in the launderer's accounts its character changed and it became criminal property. The transferred funds being the proceeds of the fraud carried out by the launderer's criminal associate, the money launderer was properly regarded as participating in an arrangement to retain criminal property for the benefit of the fraudster: *R. v. GH* [2015] 1 W.L.R. 2126, SC ([2015] UKSC 24).

The Ordinary Conduct of Litigation

67. In *Bowman v. Fels* [2005] 1 W.L.R. 3083 the Court of Appeal considered the applicability of s.328 to the conduct of litigation. The court held that section 328 was not intended to cover or affect the involvement of a barrister in the "*ordinary conduct of litigation*"¹ or its consensual resolution, and even if it did, the section would be subject to a full saving for common law legal professional privilege notwithstanding the absence of any express statutory saving for legal professional privilege in that section.

¹ The phrase and concept of "*ordinary conduct of litigation*" is used in this document in the same way as it was used in *Bowman v. Fels* [2005] 1 W.L.R. 3083. It is not used in the technical sense of 'the conduct of litigation' under the *Legal Services Act 2007* (pursuant to §4 of Schedule 2 to that Act) or under the Handbook.

68. *Bowman v Fels* was decided in relation to s.328 'arrangements'. However, the reasoning of the ruling in relation to the lawyer-client relationship can be seen to be of application to each of the money laundering offences within POCA. Accordingly, the Bar Council takes the view that the payment of an appropriate amount of fees to counsel is part of the "ordinary conduct of litigation"; accepting an appropriate amount of fees does not amount to money laundering in and of itself.

69. In the light of the decision in *Bowman v. Fels* you will not fall within the ambit of section 328 where you are only involved in the ordinary conduct of litigation.

70. Although the Court did not set out what should be considered outwith the ordinary conduct of litigation, the court did expand, to a limited degree, upon what it regarded as falling within it. It included:

"...any step taken by [parties] in litigation from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by judgment, ... legal proceedings are a state-provided mechanism for the resolution of issues according to law ... proceedings or steps taken by lawyers in order to determine or secure legal rights and remedies for their clients should [not] involve them in "becoming concerned in an arrangement which ... facilitates the acquisition, retention, use or control of criminal property", even if they suspected that the outcome of such proceedings might have such an effect." (*per* Brooke LJ at [83]- [84])

71. In its submissions to the Court, the Bar Council put forward an example of bogus or sham litigation, where the barrister instructed came to suspect that there was no genuine dispute between the parties, but rather a dispute concocted as a cover for the transfer of criminal property. Such cases are likely to be rare. However, if and when they do occur (e.g., where you suspect the litigation is a sham, or you are being asked to provide advice which you foresee may be used for money laundering purposes), then you must consider carefully whether you are at risk of being concerned in an arrangement and thus committing the s.328 offence. You would therefore also need to consider the need to make an authorised disclosure of your suspicions to the NCA.

72. Sham litigation is further considered at Annex 2, "Warning Signs/Red Flags", below.

73. Section 328(2) & (3) sets out the same limitations to this offence as those that limit the s.327 'concealing' offence at s.327(2) & (2A), i.e. 'Appropriate Consent', 'Reasonable Excuse' and 'Overseas Conduct' (with 'Overseas Conduct' subject to the same exception) see [\[54\]](#) above.

Section 329: Acquisition, Use and Possession

74. Section 329(1) provides that a person commits a criminal offence if they acquire criminal property, use criminal property or have possession of criminal property.

75. As the offence relates to “criminal property” as defined by s.340(3), the property in question is only “criminal property” (and the offence is only committed) where the alleged offender *knows or suspects* that the property constitutes or represents someone’s benefit from criminal conduct (see *Holt*, above).

76. The offence is widely drawn and includes property which is not itself the proceeds of crime, provided that it represents another’s benefit (in whole or in part and whether directly or indirectly); but for it to be criminal property, the person in question must know or suspect it to be so.

77. As with the s.327 ‘concealing’ and s.328 ‘arrangement’ offences, the s.329 offence is subject to the ‘*Appropriate Consent*’ (s.329(2)(a)), ‘*Reasonable Excuse*’ (s.329(2)(b)) and ‘*Overseas Conduct*’ (s.329(2A) (b)(i)), limitations (with ‘*Overseas Conduct*’ subject to the same exception) see [\[54\]](#) above.

78. In addition, a s.329 offence will not be committed where “*adequate consideration*” was given for the acquisition, use or possession of the criminal property (s.329(2)(c)). 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 or not the recipient knows or suspects that they are the proceeds of crime, *R v Afolabi* [2009] EWCA Crim 2879 (35).

79. The “*adequate consideration*” exemption is unique to the s.329 offence. The following three principles apply to it:

79.1. A person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property,

79.2. A person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or possession, and

79.3. The provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration (s.329(3)(c)). This means that a fee paid to a criminal associate cannot be consideration.

80. The practical application of the adequate consideration defence to the payment of lawyers (and other professional advisers) is helpfully explained by the Crown Prosecution Service in its guidance on the POCA Money Laundering Offences:

“This defence will also apply where professional advisors (such as solicitors or accountants) receive money for or on account of costs (whether from the client or from another person on the client’s behalf). This defence would not be available to a professional where the value of the work carried out or intended to be carried out on behalf of the client was significantly less than the money received for or on account of costs.”

81. Where you need to consider whether you have given “adequate consideration” for the fees paid to you, you should undertake this enquiry yourself, regardless of whether the client considers that the fee is due. In reaching that decision you should consider the basis on which the fee was agreed – for example was it a fixed fee or were you paid on the basis of an hourly rate with payment in advance for work anticipated to be done? If it was the latter was any of the work undertaken? If so, how much? You should consider the amount of work carried out on the matter and its relationship to the fee that you have been paid. You should ensure that you consider the full basis on which the fee had been agreed. Did it require you to block out your diary or decline other work? Were you obliged to not hold yourself out as being available to accept instructions for a period of time? In other words, did the agreed fee take into consideration more than just the work that needed to be done in relation to this client’s case. Such matters should be included in your enquiry as to the amount of consideration that has been given by you for the fee received and whether it was “adequate”.

82. The “adequate consideration” limitation is unique to the s.329 offence and does not apply to the s.327 or s.328 money laundering offences. So, for example, providing good consideration would not, on its own, amount to a defence to the charge of being concerned in a money laundering arrangement. However, with regard to the receipt of your fees, please note the limitation upon the application of the legislation to the “ordinary conduct of litigation” in *Bowman v Fels* (see [\[67\]](#) above).

Authorised disclosures

83. The offences at ss.327-329 of POCA contain exemptions for those who have made a disclosure and have obtained consent to undertake an activity or enter into an arrangement, and for those who intended to make such a disclosure but had a reasonable excuse for not doing so. In order for a disclosure to result in a person (“D”) being exempt from liability for carrying out the prohibited acts within ss.327-329, the disclosure must be an ‘authorised disclosure’ by D within s.338 of POCA:

83.1. It must be a disclosure by D to a constable, customs officer or a nominated officer of the NCA that property is suspected of being criminal property, and

83.2. One of three conditions has to be satisfied:

83.2.1. Condition One: the disclosure was made before the transaction was carried out.

83.2.2. Condition Two: the disclosure was made whilst D was doing the prohibited act; he began to do the act at a time when the act was not prohibited because he did not have the requisite knowledge or suspicion that the property in question was or represented a person's benefit from criminal conduct; and the disclosure was made upon his own initiative and as soon as practicable after he became aware of the need to disclose.

83.2.3. Condition Three: where the disclosure was made after the transaction was carried out, D has a reasonable excuse for his failure to make the disclosure before the transaction was carried out and the disclosure was made upon his own initiative and as soon as practicable after he became aware of the need to disclose.

84. By way of an express statutory exemption, authorised disclosures do not breach any contractual or other restriction on the disclosure of confidential information (s.338(4)).

Appropriate Consent, the Notice Period and the Moratorium Period

85. The person making the authorised disclosure will be treated as having the "appropriate consent" if, have made an authorised disclosure either:

85.1. before the end of the notice period of seven "working days"² consent is not refused (s.335(3) & (5), or

85.2. where consent is refused, the moratorium period, being 31 days starting on the day that notice of the refusal is received, has expired (s.335(4) & (6)).

86. Sections 336A-D of POCA (as inserted by s.10 of the *Criminal Finances Act 2017* ("CFACT")) grant the Crown Court the power, upon an application by a senior officer

² A "working day" is a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the *Banking and Financial Dealings Act 1971* (c. 80) in the part of the United Kingdom in which the person is when he makes the disclosure. (s.335(7) POCA)

(for example a police officer of at least the rank of inspector), to extend the moratorium period up to a maximum of 6 months.

87. The power to extend the moratorium period applies only in relation to a relevant disclosure made on or after 31st October 2017 (para. 3(1), *The Criminal Finances Act 2017 (Commencement No. 2 and Transitional Provisions) Regulations 2017* (2017, No. 991)).

Disclosure, Legal, Professional, Privilege and “Privileged Circumstances”

Legal Professional Privilege

88. Legal professional privilege is the common law protection from disclosure of confidential communications between a legal advisor and their client.

89. The protections afforded by legal professional privilege are absolute and are not overridden by the disclosure requirements of POCA. You must not make any form of disclosure of information or material covered by legal professional privilege either to the authorities or any other person outside of the confidential relationship you enjoy with your client. You must at all times respect your client’s legal professional privilege.

90. Legal professional privilege is recognised as arising in two circumstances:

90.1. Advice Privilege – this applies to confidential communications between a lawyer and their client for the purpose of giving or obtaining legal advice. Communications between a lawyer and their client relating to a transaction in which the lawyer has been instructed for the purpose of obtaining legal advice are within the ambit of advice privilege provided that they are directly related to the performance by the lawyer of his professional duty as legal adviser of their 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.

90.2. Litigation Privilege – this applies to confidential communications between a lawyer and their client, or a lawyer and a third party, or the client and a third party, made for the dominant purpose of litigation. In each case the communication must have come into existence after litigation was reasonably contemplated or had already commenced and be made for the purpose of such proceedings.

The essential elements of Legal Professional Privilege

91. For legal professional privilege to apply to a communication, four requirements must be met:

91.1. The communication must be made confidentially;

91.2. It must be made by or to a client;

91.3. It must be made by or to a lawyer acting in his or her professional capacity; and

91.4. It must be made for the purpose of giving or securing legal advice or litigation (either in existence or in reasonable contemplation).

92. The absence of any one of these requirements will indicate that the communication in question is not legally privileged (*Passmore on Privilege*, Sweet & Maxwell, 3rd Edn, 2013, 1-002).

The conduct of litigation

93. As set out at [\[67\]](#) onwards above, the Court of Appeal in *Bowman v. Fels* considered the applicability of the offence in s.328 of POCA to legal advisors undertaking litigation. The Court held that the section was not intended to cover, and did not apply to, the ordinary conduct of litigation. The Court went on to state that even if the offence were applicable to the ordinary conduct of litigation it would be subject to a full saving for the protection of legal professional privilege.

94. The European Court of Justice considered the application of the 2001 Second Money Laundering Directive in *Ordre des Barreaux Francophones et Germanophones v. Conseil des Ministres (Conseil des Barreaux de l'Union Européenne and Ordre des Avocats du Barreau de Liège, interveners)* (Case C-305/05) [2007] 3 C.M.L.R. 28, [2007] All E.R. (EC) 953. There, the Court held that legal professional privilege was expressly preserved by Art 6(3) of the First Directive (91/308/EEC) which exempts lawyers from the obligation to disclose facts indicative of money laundering where information is received from the client in connection with instituting, defending or avoiding judicial proceedings. It does not, however, apply in relation to other activities identified in the directive in respect of which a legal adviser has an obligation to report suspicious activity, for example in transactional matters.

95. Equally, the decision in *Bowman v. Fels* applies only to material and matters coming to your attention as a legal adviser in the ordinary course of litigation. Where you are engaged in non-litigation based or transactional activities and you suspect that money laundering is occurring you may fall within the scope of the money laundering offences under POCA. You should not proceed with your instructions without considering whether to make an Authorised Disclosure (see [\[83\]](#) above). Even where you are required to make such a disclosure you must not disclose information or material that is the subject of legal professional privilege.

Limitations of Legal Professional Privilege

96. Legal professional privilege does not extend to communications made with the intention of furthering a criminal or fraudulent purpose, what has been called the “crime/fraud exemption”.

97. Accordingly, legal professional privilege does not attach to documents which themselves form part of a criminal or fraudulent act, or communications which take place in order to obtain advice with the intention of carrying out an offence, *R. v. Cox*

& Railton, 14 QBD 153, and information communicated to you in those circumstances will be susceptible to disclosure, including pursuant to the provisions of POCA.

The crime/fraud ‘exemption’

98. The first thing to note is that this is not an exemption to legal professional privilege. Where privilege applies it is absolute and inviolable, *Three Rivers DC v Bank of England* (No. 6) [2004] UKHL 48, [2005] 1 AC 610, Lord Scott (25). What the crime/fraud ‘exemption’ refers to is the existence within the lawyer client relationship of an iniquity that prevents legal professional privilege from arising in the first place. This will occur either because the client is deceiving the lawyer, and therefore confidence does not exist, or because the lawyer is complicit in the improper conduct and therefore not providing professional legal services within the scope of the privilege. In *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm), [2014] 2 CLC 263, Popplewell J set out the basis of the ‘exemption’:

“93. ...the touchstone is whether the communication is made for the purposes of giving or receiving legal advice, or for the purposes of the conduct of actual or contemplated litigation, which is advice or conduct in which the solicitor is acting in the ordinary course of the professional engagement of a solicitor. If the iniquity puts the advice or conduct outside the normal scope of such professional engagement, or renders it an abuse of the relationship which properly falls within the ordinary course of such an engagement, a communication for such purpose cannot attract legal professional privilege...where in civil proceedings there is deception of the solicitors in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege. The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates the privilege.”

99. It does not matter that the lawyer may not be aware of the client’s unlawful intent, legal professional privilege will not arise. At common law, a client’s fraudulent intention is sufficient to prevent privilege arising, even if the legal adviser is unaware of that intention, *R. v. Cox & Railton (supra.)*. The relevant intention may be that of your lay client and does not need to be that of your instructing solicitor, *R. v. Central Criminal Court ex parte Francis & Francis (a firm)* [1988] 2 W.L.R. 627.

Conduct amounting to fraud/crime

100. This was explained by Munby J in *C v C* [2006] EWHC 336 (Fam); [2008] 1 F.L.R. 115:

“35. It is clear that the ‘fraud’ exception is not confined to cases of criminal fraud or cases of civil fraud in the narrow sense. As Schiemann LJ said in *Barclays Bank PLC and others v Eustice and others* [1995] 1 WLR 1238 at page 1249:

“The case law refers to “crime or fraud” (*Reg v. Cox and Railton* (1884) 14 QBD 153, 165), “criminal or unlawful” (*Bullivant v Attorney-General for Victoria* [1901] AC 196, 201), and “all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances” (*Crescent Farm (Sidcup) Sports Ltd v. Sterling Offices Ltd* [1972] Ch 553, 565). The case law indicates that “fraud” is in this context used in a relatively wide sense.”

36. In *Gamlen Chemical Co (UK) Ltd v. Rochem Ltd* (Court of Appeal (Civil Division) Transcript No 777 of 1979 — the case is not reported but the relevant passages are conveniently set out in *Barclays Bank PLC and others v Eustice and others* [1995] 1 WLR 1238 at page 1249) Goff LJ said:

“the court must in every case, of course, be satisfied that what is prima facie proved really is dishonest, and not merely disreputable or a failure to maintain good ethical standards and must bear in mind that legal professional privilege is a very necessary thing and is not lightly to be overthrown, but on the other hand, the interests of victims of fraud must not be overlooked. Each case depends on its own facts.”

The required level of proof

101. The assertion of criminal or fraudulent conduct is by itself insufficient to compel the disclosure of otherwise LPP material: as a minimum there must be prima facie proof, Munby J in *C v C*, (*supra*):

“44. The mere assertion of conduct which would bring the exception into play is not, of course, enough. In *Bullivant v A-G for Victoria* [1901] AC 196 at page 201, the Earl of Halsbury LC made it clear that “mere surmise or conjecture” was not enough; there had to be “some definite charge”. In *O’Rourke v Darbishire* [1920] AC 581 at page 604 Lord Finlay said:

“The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact.”

Lord Wrenbury in the same case said at page 632:

“the plaintiff must ... go at any rate so far as to satisfy the Court that his allegations of fraud are not merely the bold assertions of a reckless pleader, but are such as to be regarded seriously as constituting prima facie a case of fraud resting on solid grounds.”

102. In *C v C*, Munby J found that the wife's application, in ancillary relief proceedings, to inspect the conveyancing file of solicitors involved in the sale of matrimonial property was not based upon a prima facie case, but only upon "...speculation, assumption, rumour [and] suspicion...", and accordingly failed:

"62 Be that as it may, the wife, in my judgment, has in any event failed to make good the "prima facie case ... resting on solid grounds" to which Lord Wrenbury referred. There is suspicion and assumption. There is surmise and conjecture, some of it founded on mere rumour. But there is not, at least at present, the strong evidence for which Lord Denning MR called. There is not, in my judgment, sufficiently compelling evidence, either that the anstalt is the husband's alter ego or creature or that the transaction is one caught by section 37, to justify going behind the anstalt's privilege on the ground of 'fraud'. On the contrary, there is uncertainty. The wife, in my judgment, has failed to satisfy the heavy burden which rests upon anyone who in a case such as this seeks to go behind privilege on the ground of 'fraud'."

Where fraud is in issue in the underlying litigation

103. Where fraud or dishonesty is in issue in the action the required standard of proof is higher: a "*strong prima facie case*" must be shown, *Kuwait Airways Corp v Iraqi Airways* (No 6) [2005] 1 WLR 2734, CA, per Longmore LJ (42).

Interlocutory applications

104. The fraud/crime 'exemption' can be applied by the Court at the interlocutory stage but only in "*very exceptional circumstances*". The test is a high one, as shown by the Court's decision that to hold that a case for disclosure, "must always be founded on an admission or supported by affidavit evidence or that the court must carry out the preliminary exercise of deciding on the material before it whether the plaintiff's case will probably succeed" would be "too restrictive", *Derby & Co v Weldon* (No 7) [1990] 1 WLR 1156, Ch D (1173).

An exceptional step

105. In the context of litigation, the fraud/crime exemption does not apply to the "*ordinary run*" of cases. The practitioner must draw a distinction between ordinary cases in which a client puts forward what is, or what is found to be, an untrue case (to which privilege applies) and cases where there has been an abuse of the lawyer/client relationship such as to vitiate legal professional privilege. The distinction was considered in *R v Snaresbrook Crown Court, ex parte the Director of Public Prosecutions* [1988] QB 532, (537) per Glidewell LJ:

“Obviously, not infrequently persons allege that accidents have happened in ways other than the ways in which they in fact happened, or that they were on the correct side of the road when driving while actually they were on the wrong side of the road, and matters of that sort. Again, litigants in civil litigation may not be believed when their cases come to trial, but that is not to say that the statements they had made to their solicitors pending the trial, much less the applications which they made if they applied for legal aid, are not subject to legal privilege. The principle to be derived from *R v Cox and Railton* applies in my view to circumstances which do not cover the ordinary run of cases such as this is.”

106. This was most recently re-affirmed by Popplewell J in *JSC BTA Bank v Ablyazov* (*supra.*):

“93. ...the touchstone is whether the communication is made for the purposes of giving or receiving legal advice, or for the purposes of the conduct of actual or contemplated litigation, which is advice or conduct in which the solicitor is acting in the ordinary course of the professional engagement of a solicitor...In the ‘ordinary run’ of criminal cases the solicitor will be acting in the ordinary course of professional engagement, and the client doing no more than using him to provide the services inherent in the proper fulfilment of such engagement, even where in denying the crime the defendant puts forward what the jury finds to be a bogus defence.”

107. In the context of considering s.330(11) of POCA, the Court of Appeal in *Bowman v. Fels* expressed some sympathy with the view that, unless a barrister was actually aware of the intention to further a criminal purpose, the information would be protected from disclosure and no offence would be committed (see §93 & 94 of the judgment).

108. Given the serious penal consequence of the statute for you if you do not make a relevant disclosure, the Bar Council considers that the views tentatively expressed by the Court of Appeal in *Bowman v. Fels* are correct. It is only where you are aware of *prima facie* evidence that the intention of the person who has made the relevant communication to you is to make use of your services in the furtherance of iniquity, you are required to make an authorised disclosure. The Bar Council notes that this position accords with the guidance offered to solicitors by the Law Society. Whether such *prima facie* evidence exists will need to be determined by you based on all of the facts known to you.

Privileged circumstances

109. In addition to, and separately from, the protections of legal professional privilege, s.330(6) of POCA provides a defence to the s.330 offence of failing to make a required disclosure, where the relevant information or other matter came to a legal advisor in what it refers to as “privileged circumstances”.

110. POCA defines information or other matter being communicated in “privileged circumstances” where it is communicated to a professional legal advisor,

110.1. by (or by a representative of) a client of his in connection with the giving by the adviser of legal advice to the client,

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

110.3. by a person in connection with legal proceedings or contemplated legal proceedings.

111. Whilst this exception to the disclosure requirement is analogous legal professional privilege, it should not be regarded as identical to it. On the wording of the statute, it is no more than an exemption from certain suspicion-reporting provisions of the Act. Given the close proximity of the two concepts it may be the case that the communication in question will enjoy the protection of legal professional privilege, however this may not necessarily be the case in all circumstances.

112. Like provisions exist within TACT, see ss.19 and 21A.

113. You should note the circumstances in which the statutory exemption is expressly abrogated. Section 330(11) states that any information or other matter that is communicated or given with the intention of furthering a criminal purpose is not communicated in “privileged circumstances”. Whilst POCA does not state who must have the relevant intention, the Court of Appeal in *obiter* comments in *Bowman v. Fels* expressed the view that the relevant intention was that of the person making the communication to the lawyer (§94 of the judgment).

The Terrorism Act 2000

114. You need to be aware of the offences set out in Part 3 of TACT. Sections 15 to 18 of TACT make it an offence to:

114.1. Fundraise, receive, or provide funds for the purpose of terrorism (s.15),

114.2. Use or possess funds for the purposes of terrorism (s.16),

114.3. Enter into or become involved in an arrangement to make funds available for the purposes of terrorism (s.17), or

114.4. Facilitate the laundering of terrorist property (s.18).

115. The Terrorism Act defines “terrorist property” as –

115.1. any property which is likely to be used for the purposes of terrorism (whether by a proscribed organisation or not),

115.2. proceeds of the commission of acts of terrorism, and

115.3. proceeds of acts carried out for the purposes of terrorism.

116. As with the money laundering offences under POCA, property is widely defined and includes:

116.1. any property which wholly or partly, and directly or indirectly, represents the proceeds of the terrorist act (including payments or other rewards in connection with its commission), and

116.2. any money or other property which is applied or made available, or is to be applied or made available, for use by the terrorist organisation.

Section 15: fundraising

117. A person commits an offence if they:

117.1. Invite another to provide money or other property,

117.2. Receive money or other property, or

117.3. Provide money or other property towards the purposes of terrorism, provided that the person intends or has reasonable cause to suspect that the money or other property raised may be used for terrorist purposes.

118. The offence is made out regardless of whether the property is being given, lent or otherwise made available, and whether or not for it is for consideration.

Section 16: use and possession

119. A person commits an offence if they use money or other property for the purposes of terrorism.

120. A person also commits an offence if they possess money or other property and intend that it should be used, or have reasonable cause to suspect that it may be used, for the purposes of terrorism.

Section 17: funding arrangements

121. A person commits an offence if they enter into or become concerned in an arrangement that they know or have reasonable cause to suspect will make available money or other property for the purposes of terrorism.

Section 18: laundering the proceeds of terrorism

122. A person commits an offence if they enter into or become concerned in an arrangement which facilitates the retention or control of terrorist property in any way, including by concealment, removal from the jurisdiction or transfer to nominees, provided that the person either knew or had reasonable cause to suspect that the arrangement related to terrorist property.

123. There are limitations upon the breadth of the offences, and statutory defences:

123.1. A person does not commit an offence if they made a 'disclosure' (in accordance with sections 19 and 20 of the Act) to a constable or the NCA prior to involvement in a transaction or arrangement relating to money or other property and did the act with the consent of a constable or the NCA (s.21(1) & (ZA)).

123.2. A person does not commit an offence if having already become involved in a transaction or arrangement relating to money or other property:

123.2.1. they then, upon their own initiative and as soon as is reasonably practicable, make a disclosure, and

123.2.2. they are not forbidden from continuing with the act, and

123.2.3. there is a reasonable excuse for their failure to make the disclosure before becoming involved in the transaction or arrangement (s.21(2) & (ZB)).

123.3. It is a defence to a charge under ss.15(2), 15(3) and 16 to 18 for the person to prove that they had intended, but failed, to make a disclosure either before or during the offending activity, but had a "reasonable excuse" for that failure (s.21(5) & (ZC)).

Sections 19 and 21A: failure to disclose

124. Section 19 creates an offence of failing to disclose knowledge or suspicion of an offence under ss.15-18 of the Act where that information is obtained in the course of a trade, profession or business, or employment. The section has extra-territorial effect: provided that the act to which the knowledge or suspicion applies would have

constituted an offence in the United Kingdom at the time, that act will be regarded as if it were an offence regardless of where it occurred (s.19(7)).

125. By virtue of s.19(3), a defence of “reasonable excuse” is available to the accused person.

126. The Act expressly exempts a professional legal advisor from the duty to make a disclosure of:

126.1. information which he obtains in privileged circumstances, or

126.2. a belief or suspicion based on information which he obtains in privileged circumstances (s.19(5)).

127. Information is obtained by a professional legal advisor in “privileged circumstances” if it comes to him, otherwise than with a view to furthering a criminal purpose–

127.1. from a client or a client's representative, in connection with the provision of legal advice by the adviser to the client,

127.2. from a person seeking legal advice from the adviser, or from the person's representative, or

127.3. from any person, for the purpose of actual or contemplated legal proceedings.

128. Section 21A creates a like offence of failing to disclose in the regulated sector. It contains an equivalent defence of “reasonable excuse” (s.21A(5)(a)). It also contains an exemption from disclosure for a professional legal advisor of information which he obtained in privileged circumstances (s.21A(5)(b)).

129. The Terrorism Act also creates offences within the regulated sector of ‘tipping off’ (s.21D (1)) (i.e. ‘leaking’ the making of a disclosure) and the wider offence of prejudicing an investigation (s.21D (3)).

Section 17A: insurance contracts – ransom payments

130. Section 42(1) of the *Counter-Terrorism and Security Act 2015* introduced a further offence at section 17A of TACT that came into force on 12 February 2015. Section 17A provides that an insurer commits an offence if it makes a payment under an insurance contract for money or property handed over in response to a demand made wholly or partly for the purposes of terrorism, when the insurer knows or has reasonable cause to suspect that the money or property has been handed over for that purpose.

131. The offence is not retrospective but does apply to any payment made by an insurer on or after the day on which the offence came into force, even if made under a contract entered into before that day, or in respect of money or other property handed over for a terrorist purpose after 27 November 2014.

THE MONEY LAUNDERING REGULATIONS 2017

Introduction

132. The *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (“the Regulations”) came into force on 26 June 2017 and bring into effect the requirements of the Fourth Money Laundering Directive (2013/0025 (COD)). The Regulations replace and revoke their predecessor, the 2007 Money Laundering Regulations.

133. The primary purposes of the Fourth Directive are to further enshrine the risk-based approach to AML/CTF procedures and to extend the ambit of regulated activity to previously uncovered areas. 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.

134. The Regulations are important to all self-employed barristers³ who undertake transactional and tax 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 upon tax affairs.

Supervision

135. For the purposes of the Regulations the supervisory body for all barristers in England and Wales is the Bar Council (Regulation 7(1)(b) and Schedule 1). As with its other regulatory functions this role has been delegated to the Bar Standards Board.

Meaning of a Business Relationship

136. Where you enter into a professional relationship with a client (“customer”) that arises out of your practice and is expected by you, at the time when contact with the client is established, to have an element of duration, you will have entered in to a “business relationship” within the meaning of the Regulations (Regulation 4(1)).

The “Relevant Person”

137. 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 Regulation 12 and tax advisers within the meaning of Regulation 11(d). A reference to a ‘barrister’ in this

³ This will particularly be the case in relation to work done on a public access basis, and to work done on a licensed access basis where the instructions do not come from a professional intermediary.

section of the Guidance is a reference to a barrister who, by virtue of the Regulations, is a 'relevant person'.

138. By Regulation 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"):

- 138.1. credit institutions,
- 138.2. financial institutions,
- 138.3. auditors, insolvency practitioners, external accountants and tax advisers,
- 138.4. independent legal professionals,
- 138.5. trust company service providers,
- 138.6. estate agents,
- 138.7. high value dealers, and
- 138.8. casinos.

Independent legal professionals

139. 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:

- 139.1. the buying and selling of real property or business entities,
- 139.2. the managing of client money, security or other assets,
- 139.3. the opening or management of bank, savings or securities accounts,
- 139.4. the organisation of contributions necessary for the creation, operation or management of companies, or
- 139.5. 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 (Regulation 12(1)).

140. The European Court of Justice ("the ECJ"), in the *Ordre des Barreaux Francophones et Germanophones v. Conseil des Ministres* case (see [\[94\]](#) above), 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.

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.”

141. You should note that, in approving the Legal Sector Affinity Group’s Anti Money Laundering Guidance for the Legal Sector (the “LSAG Guidance”) HM Treasury confirmed that the “provision of legal advice” would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. Whilst the approved guidance does not change the wording of the Regulations it is of particular import. By virtue of Regulation 76(6) the BSB, when deciding whether a barrister has breached the Regulations, must consider whether, at the time of the claimed breach, the barrister followed any relevant guidance that was at the time issued by an appropriate body and approved by the Treasury. In addition, a criminal court, when deciding whether a person has committed an offence under the Regulations, must, pursuant to Regulation 86(2), also decide whether that person followed any relevant HM Treasury approved guidance.

142. The Bar Council takes the view that, in accordance with the approved LSAG Guidance, in relation to a transaction, the provision of legal advice by counsel would not, without more, amount to counsel participating in a transaction whether by

assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction. However, you should note that this is a matter that has not been tested before the courts and accordingly it cannot be definitively said that where your involvement in a financial transaction is limited to the provision of advice in relation to that matter you would not fall within the scope of the Regulations. The Bar Council suggests that 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 and a considerable amount of trust, company, corporate and matrimonial work may engage the Regulations. It is a criminal offence to fail to comply with the Regulations.

Policies, Controls and Procedures

143. 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 (Regulation 19(1)).

144. 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 (Regulation 19(2)(a)). In making that determination you may take into account the LSAG Guidance (Regulation 19(5)). The Bar Council takes the view that in considering the “nature” of your practice you are also entitled, pursuant to Regulation 19(1) to take into account the current BSB AML/CTF Risk Assessment, dated 25 April 2017, and its assessment that the overall risk level of the Bar is “low”.

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

145.1. Risk management practices;

145.2. Internal controls;

145.3. Customer due diligence (“CDD”), i.e. the means by which you check and verify your customer’s identity (see §XX [\[187\]](#) et seq below);

145.4. Reporting and record keeping;

145.5. The monitoring and management of compliance with, and the internal communication of, such policies and procedures (Regulation 19(3)).

146. The policies, controls and procedures must also:

146.1. Provide for the identification and scrutiny of any case where a transaction is complex and unusually large, or where there is an unusual pattern of transactions, and 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 (Regulation 19(4)(a));

146.2. 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 (Regulation 19(4)(b));

146.3. Ensure that when you adopt new technology, you take appropriate measures to assess and if necessary mitigate any money laundering or terrorist financing risks this may cause (Regulation 19(4)(c));

146.4. Ensure that anyone employed by you or your chambers 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 TACT or with Part 7 of POCA (Regulation 19(4)(d)).

Systems and Procedures for a Politically Exposed Person

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

147.1. a Politically Exposed Person (a “PEP”); or

147.2. 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 customer (Regulation 35(1)).

148. In determining what risk-management systems and procedures are “appropriate” under the Regulations you must take account of:

148.1. the risk assessment you carried out in respect of your practice;

148.2. the level of risk of money laundering and terrorist financing inherent in your practice;

148.3. 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

148.4. any relevant information identified by the BSB’s Risk Assessment and any information made available to you by the BSB in relation to the risks of money laundering and terrorist financing (pursuant to Regulations 17(9) and 47) (Regulation 35(2)).

BSB-regulated entities

149. In addition to the above, BSB-regulated 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 (Regulation 19(6)).

150. BSB-regulated entities should also consider whether the obligations under Regulation 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 (Regulation 20(1)(b)), apply to them.

Internal Controls: Responding to Investigations

151. 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 Regulation 4, with any person, and if so, the nature of that relationship (Regulation 21(8) & (9)).

Additional Internal Controls

152. 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 (Regulation 21(6)).

153. Where you are practising as a self-employed barrister and you do not *directly* employ your clerk, or any other employee or agent that falls within the definition of Regulation 21(2)(b), the “internal controls” requirements of Regulation 21 are unlikely to be of application to your practice (Regulation 21(6)). However, you will need to make your own assessment of the situation and the requirement 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.

154. Where the internal control requirements *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 (Regulation 21(1)(b)).

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

155.1. Relevant to your compliance with any requirement under the Regulations, or

155.2. Otherwise capable of contributing to the

155.2.1. Identification or mitigation of the risks of money laundering and terrorist financing within your practice, or

155.2.2. Prevention or detection of money laundering and terrorist financing in relation to your practice.

Chiefly this will mean your clerks.

156. “Screening” is defined by Regulation 21(2)(a) as an assessment of,

156.1. the skills, knowledge and expertise of the individual to carry out their functions effectively;

156.2. the conduct and integrity of the individual.

157. Where appropriate with regard to the size and nature of your practice, you must also establish an independent audit function with the responsibility –

157.1. to examine and evaluate the adequacy and effectiveness of your AML/CTF policies, controls and procedures;

157.2. to make recommendations in relation to those policies, controls and procedures, and

157.3. to monitor your compliance with those recommendations (Regulation 21(1)(c)).

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

158.1. You *must* take into account your risk assessment under Regulation 18(1); and

158.2. 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. the LSAG Guidance. The Bar Council takes the view that in considering the “nature” of your practice you are also entitled, pursuant to Regulation 21(10) (a) and 18(1) to take into account the current BSB AML/CTF

Risk Assessment, dated 25 April 2017, and its assessment that the overall risk level of the Bar is “low”.

BSB-regulated entities

159. In addition to the above, BSB-regulated entities, where appropriate with regard to the size and nature of their business, should appoint:

159.1. 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 entities compliance with the Regulations (Regulation 21(1)(a)), and

159.2. a nominated officer (Regulation 21(3));

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

Duty of the Nominated Officer Upon Receipt of a Disclosure

160. Where a disclosure is made to the nominated officer, 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.

161. Regulation 21(3) requires a nominated officer to be appointed within a professional organisation to receive disclosures made pursuant to POCA and TACT. However, Regulation 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.

162. Self-employed barristers are individually responsible for their own professional practices (see each of the Core Duties, gC2, and rC20) and chambers staff provide administrative support only (as opposed to being fee-earners). As such the Bar Council takes the view that the employment of clerks does not fall within Regulation 20(3). 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.

Employees: Awareness and Training

163. Where you are subject to the Regulations you must take “appropriate” measures to ensure that your relevant employees 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 (Regulation 24(1)).

164. 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 (Regulation 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. the LSAG Guidance (Regulation 24(3)(b)). The Bar Council takes the view that in considering the “nature” of your practice, you are also entitled to take into account the current BSB AML/CTF Risk Assessment, dated 25 April 2017, and its assessment that the overall risk level of the Bar is “low”.

165. A “relevant employee or agent” is an employee or agent whose work is defined by Regulation 24(2) as:

165.1. Relevant to your compliance with any requirement under the Regulations, or

165.2. Otherwise capable of contributing to the

165.2.1. Identification or mitigation of the risks of money laundering and terrorist financing within your practice, or

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

166. Clerks and any other staff must be regularly 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.

167. 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.

168. Equally, should suspected money laundering or terrorist financing be reported to you by an employee or agent, you must personally make an assessment of 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.

Record-keeping

169. Regulation 40 requires you to keep records of any CDD material and evidence in support in respect of any matter in which you are instructed and to which the Regulations apply.

170. You should therefore ensure that your records system is capable of keeping, recording the existence of and retrieving such records as well as documenting for how long such records should be kept.

CDD material

171. Copies of CDD material should be kept for a period of five years beginning on the date on which you know, or have reasonable grounds to believe:

171.1. For records relating to an occasional transaction, that the transaction in which you were instructed is complete;

or

171.2. For records relating to—

171.2.1. Any transaction which occurs as part of a business relationship,
or

171.2.2. CDD measures taken in connection with that relationship.

that the business relationship has come to an end.

172. However, by virtue of Regulation 40(4) you are not required to keep the records for more than 10 years.

173. Once the retention period has expired, you must delete any personal data obtained for the purposes of the Regulations unless:

173.1. You are required to retain records containing personal data:

173.1.1. By or under any enactment, or

173.1.2. For the purposes of any court proceedings;

173.2. The data subject has given consent to the retention of that data; or

173.3. You have reasonable grounds for believing that records containing the personal data need to be retained for the purpose of legal proceedings.

174. You may wish to consider retaining the CDD material in both hard copy and an electronic form on a secure database. Where you retain copies they should be accompanied by a statement, where applicable, that you have seen the original.

Reliance

175. Where you have permitted another person to rely upon your CDD pursuant to Regulation 39, you are required to keep the relevant documents for five years from the date on which you were relied upon.

Risk Assessments

176. Risk assessments must be recorded in writing (Regulation 18(6)). You must also keep the information on which the risk assessment was based and an up-to-date written record of all steps taken in carrying out the assessment (Regulation 18(4) & (6)).

177. You should also keep a written record of the decision taken upon the carrying out of a risk assessment. Such a note should state the risk-level you attributed to your practice and the determination that you made about the completion of CDD.

Data Protection

178. Any personal data obtained by you for the purposes of the Regulations may only be processed for the purposes of preventing money laundering or terrorist financing (Regulation 41(1)).

179. You cannot use personal information that you have obtained for the purposes of the Regulations for any other purpose unless:

179.1. You are authorised to do so under another enactment or

179.2. You have obtained the consent of the data subject to the proposed use of the data (Regulation 41(3)).

180. You are also obliged to provide new clients with:

180.1. The registrable particulars of your practice within the meaning of section 16 of the *Data Protection Act 1998* and

180.2. A statement that any personal data received from the client will only be processed for the purposes of preventing money laundering or terrorist financing, a purpose permitted by another enactment and any other purposes to which they have consented.

181. Pursuant to s.29 of the *Data Protection Act 1998* you are not required to provide information in response to a subject access request for the disclosure of personal data where it would be likely to prejudice the prevention or detection of crime, or the

apprehension or prosecution of offenders, and this includes actions that would amount to the offence of 'tipping off' under s.333A of POCA.

182. The Regulations do not authorise or require a disclosure, in contravention of any provisions of the *Data Protection Act 1998*, of personal data which are not exempt from those provisions.

Risk Assessment

183. 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 (Regulation 18). In deciding what steps are "*appropriate*" you must take into account the size and nature of your practice (Regulation 18(3)).

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

184.1. Information made available to you by the BSB pursuant to Regulations 17(9) and 47 in relation to ML/TF risk (Regulation 18(2)(a)). This will include the current BSB AML/CTF Risk Assessment of 25 April 2017 and its assessment that the overall risk level of the Bar is "*low*".

184.2. Risk factors specific to your practice (Regulation 18(2)(b)) including factors relating to:

184.2.1. Your customer;

184.2.2. The country or geographic area in which you are practising;

184.2.3. The service that you are providing;

184.2.4. The relevant transaction; and

184.2.5. The delivery channels through which your service is being provided (Regulation 18(3));

185. 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)).

186. For further assistance in assessing the relevant AML/CTF risk factors please see the Guide to Assessing AML/CTF Risk at Annex 1 to the Guidance.

Customer Due Diligence

187. Where you are instructed to act in relation to a matter to which the Regulations apply you are required to undertake Customer Due Diligence (“CDD”) in relation to your client. Your obligations in relation to CDD are set out in Regulations 27 to 31 of Part 3 of the Regulations.

The requirements of Customer Due Diligence

188. Where you are required to apply CDD measures, and where your customer’s identity is not already known to and verified by you, you must:

188.1. Identify the customer;

188.2. Verify their identity from reliable and independent source (Regulation 28(2)); and

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

189. Here, (and in relation to corporate and beneficially owned customer) “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 (Regulation 28(18)).

190. 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*” (Regulation 28(12)).

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

191.1. The purpose of an account, transaction or business relationship;

191.2. The level of assets to be deposited by a customer or the size of the transactions undertaken by the customer;

191.3. The regularity and duration of the business relationship (Regulation 28(13)).

192. 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. 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

193. 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. For further assistance in relation to assessing the risk of money laundering or terrorist financing see the Guide to Assessing AML/CTF Risk at Annex 1 to the Guidance.

CDD Practicalities

194. You must **identify** and **verify** your customer'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.

195. 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 his identity documents be taken and authorised in the British Consulate in the country in which he is? Can you verify his identity by other independent means, for example if the client is a company registered on the London Stock Exchange or similar institution in an EEA country?

196. "A Basic Guide to Customer Due Diligence", to assist you in relation to the requirements of identification and verification, can be found at Annex 3 to this guidance. It should be noted that Annex 3 contains suggestions only, it is not an exhaustive list.

CDD Requirements for Corporations

Corporations Listed on a Regulated Market

197. Where your customer 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 –

197.1. Its name;

197.2. Its company number or other registration number;

197.3. The address of its registered office, and if different, its principal place of business (Regulation 28(3)(a)).

Additional Requirements for Corporations Not Listed on a Regulated Market

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

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

198.2. 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 (Regulation 28(3)(b) & (5)).

Beneficially Owned Clients Not Listed on a Regulated Market

199. Where your customer 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:

199.1. identify the beneficial owner;

199.2. 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

199.3. 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 (Regulation 28(4) & (5)).

Inability to Identify the Beneficial Owner

200. Where your customer 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 (Regulation 28(6)). Where this is the case you must keep written records of all the actions you have taken to identify the beneficial owner of the body corporate (Regulation 28(8)).

201. You will only be regarded as having “exhausted all possible means” of identifying the beneficial owner where:

201.1. you have not succeeded in doing so, or

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

Use of Public Registers

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

202.1. Contained in—

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

202.1.2. The register of people with significant control kept by a limited liability partnership under section 790M of the *Companies Act 2006*; or

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

202.2. 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 (Regulation 28(9)).

Agents

203. Where a person (“A”) purports to act on behalf of the customer, you must:

203.1. Verify that A is authorised to act on the customer’s behalf;

203.2. Identify A; and

203.3. 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 customer.

When must CDD be undertaken?

204. Where you are subject to the Regulations, Regulation 27 states that you must apply CDD when you:

204.1. Establish a business relationship,

204.2. Carry out an occasional transaction that amounts to a transfer of funds above €1,000;

204.3. Suspect money laundering or terrorist financing, or

204.4. Doubt the veracity or adequacy of documents, data or information previously obtained for the purpose of identification or verification (Regulation 27).

205. CDD measures must also be applied to existing customers at “appropriate times” as assessed by applying a risk based approach (Regulation. 27(8)).

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

206.1. Any indication that the identity of the customer, or of the customer’s beneficial owner, has changed;

206.2. Any transactions which are not reasonably consistent with your knowledge of the customer;

206.3. Any change in the purpose or intended nature of your relationship with the customer;

206.4. Any other matter which might affect your assessment of the money laundering or terrorist financing risk in relation to the customer (Regulation 27(9)).

207. Note that, where you become aware that the circumstances of an existing customer have changed in a way relevant to your risk assessment of them you are obliged to re-apply CDD (Regulation 27(8)(b)).

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

209. Save for where the reapplication of CDD is mandatory (Regulation 27(8)(b)), the decision as to when CDD should be applied to an existing customer must be fact specific and risk based (Regulation 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 wishes, on behalf of the same firm, to further instruct you again in relation to a low-risk matter on behalf of the same client.

210. 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.

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

Completing CDD

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

213. 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:

213.1. It is necessary not to interrupt the normal conduct of business, and

213.2. It is adjudged that there is little risk of money laundering or terrorist financing occurring (Regulation 30(3)).

214. The assessment of risk must be fact-specific. The exception in regulation 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 regulation 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.

215. Where you are unable to comply with your CDD obligations, Regulation 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.

216. Regulation 31(3) provides that the obligation in 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”.

217. However, as this exception only applies to litigation and not the transactional work that is the subject of the Regulations it is of little practical application or assistance to you in meeting your obligations.

Ongoing monitoring

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

218.1. 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 customer, their business and their risk profile;

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

219. 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.

220. 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.

221. 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:

221.1. The shareholders for whom you hold CDD documentation are no longer shareholders of the client company,

221.2. The directors for whom you hold CDD documentation are no longer directors of the client company,

221.3. The partners for whom you hold CDD documentation are no longer part of the client partnership or LLP, or

221.4. 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.

222. 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:

222.1. What is the commercial rationale for the transaction and does it make sense?

222.2. Are the client's funds coming from a legitimate source?

222.3. Does the documentation make sense?

222.4. Have there been any unexpected developments or occurrences on the transaction?

222.5. Do the instructions make sense in relation to what you already know about your client?

223. Where your ongoing monitoring leads 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 (see [\[297\]](#) below).

CDD and Suspicious Activity Reports

224. Where you have:

224.1. Undertaken CDD measures in relation to your customer;

224.2. Made an SAR (whether pursuant to Part 3 of TACT, or Part 7 of POCA), and

224.3. Continuing to apply CDD in relation to that customer would result in the commission of the offence of tipping off in the regulated by you (whether pursuant to s.21D of TACT or s.333A of POCA),

you are not required to continue to apply CDD (Regulation 28(13) & (14)).

BSB Inspection

225. You must be able to demonstrate to the BSB 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:

225.1. Identified in the risk assessment carried out by you in relation to your practice (pursuant to Regulation 18(1));

225.2. Identified by the BSB's Risk Assessment and any information made available to you by the BSB in relation to the risks of money laundering and terrorist financing (pursuant to Regulations 17(9) and 47) (Regulation 28(16)).

Simplified Due Diligence

Application of Simplified Due Diligence

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

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

226.2. 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 (Regulation 37(1)).

When Simplified Due Diligence May be Applied

227. 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:

227.1. The risk assessment you carried out in respect of your practice under Regulation 18(1); and

227.2. Any relevant information identified by the BSB's Risk Assessment and any information made available to you by the BSB in relation to the risks of money laundering and terrorist financing (pursuant to Regulations 17(9) and 47) (Regulation 37(1)).

Low Risk Situations: Mandatory Risk Factors

228. 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:

228.1. Customer risk factors, for example whether the customer is a public body or an individual resident in a geographical area of lower risk;

228.2. 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;

228.3. Geographical risk factors, for example whether the country where the customer is resident is an EEA state or a third country which has effective systems to counter money laundering and terrorist financing;

228.4. You should refer to Regulation 37(3) for the full list of mandatory risk factors.

229. In making the assessment referred to in Regulation 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 (Regulation 37(4)).

When Simplified Customer Due Diligence May No Longer be Applied

230. 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 Regulation 33(1) (the obligation to apply enhanced due diligence) apply (Regulation 37(8)).

Enhanced Due Diligence

231. 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

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

232.1. In any case identified as one where there is a high risk of money laundering or terrorist financing either:

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

232.1.2. In information made available to you by the BSB (pursuant to regulations 17(9) and 47);

232.2. In any business relationship or transaction with a person established in a high-risk third country;

232.3. In relation to correspondent relationships with a credit institution or a financial institution (in accordance with regulation 34);

232.4. If you have determined that a customer or potential customer is a Politically Exposed Person (a “PEP”), or a family member or known close associate of a PEP (in accordance with Regulation 35);

232.5. In any case where you discover that a customer has provided false or stolen identification documentation or information and you propose to continue to deal with that customer;

232.6. In any case where—

232.6.1. A transaction is complex and unusually large, or there is an unusual pattern of transactions, and

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

and

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

High Risk Situations: Mandatory Risk Factors

233. The Regulations require you to identify where there is a high risk of money laundering or terrorist financing (Regulation 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, Regulation 33(6) states that you *must* take account of risk factors including, among other things:

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

233.2. Product, service, transaction or delivery channel risk factors, for example where the product involves private banking or where the situation involves non-face-to-face business relationships or transactions, without certain safeguards, such as electronic signatures;

233.3. Geographical risk factors, for example a country that does not have effective systems to counter money laundering or terrorist financing or has significant levels of corruption or other criminal activity, such as terrorism, money laundering, and the production and supply of illicit drugs;

233.4. You should refer to Regulation 33(6) for the full list of mandatory risk factors.

234. In making the assessment referred to in Regulation 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 (Regulation 33(7)).

High Risk Third Countries

235. For the purposes of Regulation 33(1)(b), a “high-risk third country” means a country that has been identified by the European Commission in delegated acts adopted under Article 9.2 of the Fourth Money Laundering Directive as a high-risk third country (Regulation 33(3)).

High Risk Third Countries, Exemptions

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

236.1. The entity is—

236.1.1. Subject to the requirements in national legislation implementing the Fourth Money Laundering Directive as an obliged entity (within the meaning of that Directive), and

236.1.2. Supervised for compliance with those requirements in accordance with section 2 of Chapter VI of the Fourth Money Laundering Directive;

236.2. The branch or subsidiary complies fully with procedures and policies established for the group under Article 45 of the Fourth Money Laundering Directive; and

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

Enhanced Customer Due Diligence Measures

237. Whilst the application of enhanced CDD measures should be assessed on a case-by-case basis, the Regulations state that the measures required under Regulation 33(1) “may also include, among other things”:

237.1. Seeking additional independent, reliable sources to verify information provided or made available to you;

237.2. Taking additional measures to understand better the background, ownership and financial situation of the customer, and other parties to the transaction;

237.3. Taking further steps to be satisfied that the transaction is consistent with the purpose and intended nature of the business relationship;

237.4. Increasing the monitoring of the business relationship, including greater scrutiny of transactions (Regulation 33(5)).

238. In addition to the above measures the enhanced CDD measures that you are required to take for the purpose of Regulation 33(1)(f) (complex and unusual transactions that have no apparent economic or legal purpose) “*must include*”:

238.1. As far as reasonably possible, examining the background and purpose of the transaction, and

238.2. 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 (Regulation 33(4)).

Politically Exposed Persons

239. A Politically Exposed Person (“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 (Regulation 35(12) (a)).

240. Those with a “prominent public function” *include*:

240.1. Heads of state, heads of government, ministers and deputy or assistant ministers;

240.2. Members of parliament or of similar legislative bodies;

240.3. Members of the governing bodies of political parties;

240.4. 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;

240.5. Members of courts of auditors or of the boards of central banks;

240.6. Ambassadors, charges d’affaires and high-ranking officers in the armed forces;

240.7. Members of the administrative, management or supervisory bodies of State- owned enterprises;

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

241. PEPs also include:

241.1. Family members of a PEP – spouse, civil partner, children and their spouses or civil partners and parents (Regulation 35(12) (b)), and

241.2. 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 (Regulation 35(12) (c)).

242. 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 (Regulation 35(15)).

Risk Assessment of a PEP

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

243.1. The level of risk associated with that customer, and

243.2. The extent of the enhanced CDD measures to be applied in relation to that customer (Regulation 35(3)).

The Application of Enhanced Due Diligence to a PEP

244. 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 the BSB in relation to the risks of money laundering and terrorist financing (pursuant to Regulations 17(9) and 47) (Regulation 35(4)). This will include the current BSB AML/CTF Risk Assessment of 25 April 2017 and its assessment that the overall risk level of the Bar is “low”.

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

245.1. Issued by the FCA; or

245.2. Issued by any other supervisory authority or appropriate body and approved by the Treasury, e.g. the LSAG Guidance (Regulation 35(4)).

246. In addition to the enhanced due diligence measures required by Regulation 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:

246.1. Have approval from senior management for establishing or continuing the business relationship with that person⁴;

246.2. 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

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

Persons Who Cease to be a PEP: ongoing monitoring

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

247.1. For a period of at least 12 months after the date on which that person ceased to be entrusted with that public function; or

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

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

248.1. Was not a politically exposed person within the meaning of Regulation 14(5) of the Money Laundering Regulations 2007, when those Regulations were in force (a non-foreign PEP); and

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

249. 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 Regulations 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 Regulation 35(9) has expired (Regulation 35(11))).

⁴ Not applicable to self-employed barristers.

Clients Who are PEPs

250. The exercise of discovering whether someone is a PEP may well present a challenge to you as a practising barristers. Your instructing solicitors may be able to assist you. They may have access to databases to which most 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. You will also be able to conduct your own 'open source' searches, for example on the internet.

251. Barristers accepting 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.

252. 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 Regulation 35(4). You must carefully consider the PEP's source of wealth or 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 [\[297\]](#) below re making a Suspicious Activity Report).

Applying Customer Due Diligence – Lay Clients, Professional Clients, and Other Intermediaries

253. 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 and is expected by you at the time when contact is established, to have an element of duration"; in other words, your client(s).

254. As a barrister, you will commonly have two categories of client: lay and professional. The Regulations do not distinguish between the two, so you should, where it is required, undertake due diligence in relation to both. The scope of the obligations in relation to each category of client are the same, but in practice, where your professional client (as defined in the Handbook) is a lawyer practising in England

and Wales, the satisfaction of your CDD obligations in respect of your professional client will usually be more straightforward and readily met.

255. In public and licensed access cases, you 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

256. Solicitors are subject to the Regulations and regulated by the SRA. You may have regard to your instructing solicitors' regulatory position as part of your risk-based approach to CDD. 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 (the SRA).

257. The Joint Money Laundering Steering Group⁵ advises that in relation to partnerships such as law firms the necessary enquiries should be met by confirming the solicitors' regulated status through "reference to the current membership directory of the relevant professional association (for example, law society or accountancy body)" (JMLSG Guidance, para.5.3.119). The Bar Council considers that 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 Law Society's database of organisations and people providing legal services in England and Wales who are regulated by the SRA (see [here](#)).

258. 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 them 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.

259. 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 Regulation 33. Whilst such occasions are likely to be rare, circumstances may arise where steps are required to confirm the identity of those

⁵ The Joint Money Laundering Steering Group is made up of the leading UK Trade Associations in the Financial Services Industry. Its aim is to promulgate good practice in countering money laundering and to give practical assistance in interpreting the UK Money Laundering Regulations. This is primarily achieved by the publication of industry guidance, which can be found [here](#).

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 Law Society. 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.

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

261. Where you are unable to complete CDD satisfactorily, you cannot accept or proceed with your instructions (Regulation 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 Suspicious Activity Report.

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

263. 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.

264. In considering the identity of the person who seeks to instruct you, you should also bear in mind that 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.

265. 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.

266. 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 Suspicious Activity Report to the NCA.

Licensed and Public Access Cases

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

Licensed Access Cases

268. 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.

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

270. 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

271. In Public Access cases, the usual situation is that the lay client is instructing you directly, whether with or without the assistance of an intermediary. The default position under the BSB Handbook is that any intermediary between you and the lay client is only an agent of the client, and not a client in his own right. Accordingly there will, in most cases, be no requirement to apply CDD to the intermediary.

272. If, for some reason, the intermediary were to be a client (as in the licensed access intermediary situation described above), then your risk-based CDD obligations will extend to the intermediary too, as in licensed access cases.

273. 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.

274. 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

275. 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 Regulation 39(3) and must also agree to you relying on his or her CDD measures.

276. 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

277. 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:

277.1. Financial institutions as defined by Regulation 10;

277.2. Auditors, insolvency practitioners, external accountants or tax advisers (Regulation 11);

277.3. Independent legal professionals (Regulation 12);

277.4. Trust or company service providers (Regulation 12(2));

277.5. Estate agents (Regulation 13);

277.6. High Value Dealers (Regulation 14);

277.7. Casinos (Regulation 14(2)).

278. You can only rely upon a person in an EEA state if they are:

278.1. subject to requirements in national legislation implementing the Fourth Money Laundering Directive; and

278.2. supervised for compliance with the requirements laid down in the Fourth Money Laundering Directive in accordance with section 2 of Chapter VI of that Directive.

279. You can only rely on a person who carries on business in a third country, other than a high-risk third country, if they are:

279.1. Subject to requirements in relation to CDD and record keeping equivalent to those laid down in the Fourth Money Laundering Directive; and

279.2. Supervised for compliance with those requirements in a manner equivalent to section 2 of Chapter VI of the Fourth Money Laundering Directive.

280. You cannot rely on a third person established in a country that has been designated by the European Commission as high-risk third country (under Article 9.2 of the Fourth Money Laundering Directive), unless:

280.1. The third person is a branch or majority owned subsidiary of a person established in an EEA state who is subject to the Fourth Money Laundering Directive; and

280.2. The branch or majority owned subsidiary complies fully with the procedures and policies established for the group under Article 45 of the Fourth Money Laundering Directive.

Reliance on a Third Party

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

281.1. 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) (Regulation 39(2)(a));

281.2. Enter into arrangements with the other person, which

281.2.1. 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 customer or its beneficial owner; and

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

282. You should enquire of the third party what steps it has taken to satisfy its CDD obligations. You should review and check any CDD information provided to you, and you should consider whether the steps taken are sufficient to meet the requirements of the Regulations.

283. Despite the apparent overlap it would appear that *both* Regulation 39(2)(a) and (b) are required to be complied with; however the position presently remains undetermined.

284. You must also consider whether you are required to undertake CDD upon the third party upon whom you are seeking reliance. For example, where the third party is your instructing solicitor then you should also conduct CDD upon them (see [\[256\]](#) above). You should in any event confirm that the third party is someone who can grant reliance under the Regulations and keep a written record of having done so.

285. 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.

286. Regulation 39(2)(a) requires you to immediately obtain all the information needed to satisfy the requirement to apply CDD in accordance with Regulation 28. Accordingly, whether you are seeking to obtain documents to conduct your own CDD or seeking to obtain documents in order to rely upon another person's CDD, you will be looking to obtain the same documents. As such, there may be many cases in which it may be more practical to obtain the documents and carry out your own CDD, rather than try to persuade your solicitor to comply with the requirements of Regulation 39 and permit you to rely upon their CDD.

Responding to a Request for Reliance

287. Whilst it is unlikely, there may be circumstances where another relevant person seeks to rely upon any CDD measures that you as a barrister have carried out. If such a request is made of you, 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.

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

288.1. 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

288.2. You can make the requested CDD identification and verification information available immediately on request.

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

290. 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

291. Nothing in Regulation 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.

292. Whatever approach you take, liability for carrying out the required CDD remains with you, the barrister, 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.

293. As noted above, many large law firms use a variety of outsourcing companies, and also have access to their own databases of information. If such a firm instructs you then you may feel sufficiently comfortable to be willing to rely on their CDD – where they are willing to agree to this and to enable you to comply with the requirements identified in [\[281\]](#) above.

Public and Licensed Access

294. 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. 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, the Bar Council suggests that 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. Bear in mind that, if the intermediary is in effect fulfilling the role of your professional client (see [\[267\]](#) onwards above), then you will also need to undertake CDD upon them.

Reporting Suspicion

295. 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 [\[363\]](#) onwards), the essential elements are that:

295.1. The information must be received in the course of conducting business in the regulated sector; and

295.2. The regulated person must know or suspect, or have reasonable grounds for knowing or suspecting, that another person is engaged in money laundering;

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

Suspicious Activity Reports

297. A Suspicious Activity Report ("SAR") is made to the NCA. The NCA is the UK's Financial Intelligence Unit ("UKFIU") and is the successor to the now defunct Serious Organised Crime Agency ("SOCA").

298. 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.

299. 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.

Making a SAR

300. The NCA web page "Making a NCA Regulated Sector Suspicious Activity Report (SAR)" 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.

Electronic reporting

301. 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](#).

302. 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](#)).

303. Where “SAR Online” does not suit the needs of the reporting person, but the person wishes to report using electronic means, he is advised to call the NCA on +44 207 238 8282.

Hard copy reporting

304. 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.

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

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

What information should an SAR contain?

307. 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.

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

309. A number of fields within the computer-generated template can be completed by selecting options from dropdown menus. The guidance notes explain what information is required in the standard form template, and are to be read in conjunction with the form itself.

310. 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.

311. 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.

312. Additional information can also be submitted.

313. 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).

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

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

316. If the Report is a request for consent (see [\[55.1\]](#), [\[73\]](#) and [\[77\]](#) above), 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.

317. 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

318. 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 *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'

319. 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)).

320. Sections 336A-D of POCA (as inserted by s.10 of CFACT) grant the Crown Court the power, in relation to relevant disclosures made on or after 31st October 2017, upon an application by a senior officer (for example a police officer of at least the rank of inspector), to extend the moratorium period up to a maximum of 6 months.

321. The NCA is under an obligation to keep a refusal of consent under review. The Court of Appeal in *R. (on the application of UMB Online Ltd) v. Serious Organised Crime Agency* [2007] Bus. L.R. 1317 confirmed, in relation to 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. Furthermore, consent must be kept under review, and granted as soon as there is no longer any good reason for withholding it.

322. For considerations of LPP and disclosure obligations see the guidance set out above in [\[88\]](#) onwards.

Sharing Information in the Regulated Sector

Criminal Property

323. Sections 339ZB-339ZG of POCA (as inserted by s.11 of CFACT) 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.

324. As at 31st October 2017 the only relevant persons specified within CFACT 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)).

Further Information Orders

325. Sections 339ZH-339ZK of POCA (as inserted by s.12 of CFACT) grants the magistrates' court 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 conditions are met (s.339ZH (1)).

326. A further information order is an order requiring the respondent to provide the information specified or described in the application for the order, or such other information as the court making the order thinks appropriate, so far as the information is in the possession, or under the control, of the respondent (s.339ZH (3)).

327. Information provided in pursuance of a further information order is not to be taken to breach any restriction on the disclosure of information (however imposed) (s.339ZK (3)). However, material subject to LPP ("privileged information") is expressly excluded from the ambit of further information orders (s.339ZK (1) & (2)).

328. The conditions that are required to be met before the order can be made are:

"(4) Condition 1 for the making of a further information order is met if—

(a) the information required to be given under the order would relate to a matter arising from a disclosure made under this Part,

(b) the respondent is the person who made the disclosure or is otherwise carrying on a business in the regulated sector,

(c) the information would assist in investigating whether a person is engaged in money laundering or in determining whether an investigation of that kind should be started, and

(d) it is reasonable in all the circumstances for the information to be provided.

(5) Condition 2 for the making of a further information order is met if—

(a) the information required to be given under the order would relate to a matter arising from a disclosure made under a corresponding disclosure requirement,

(b) an external request has been made to the National Crime Agency for the provision of information in connection with that disclosure,

(c) the respondent is carrying on a business in the regulated sector,

(d) the information is likely to be of substantial value to the authority that made the external request in determining any matter in connection with the disclosure, and

(e) it is reasonable in all the circumstances for the information to be provided."

329. An "external request" means a request made by an authority of a foreign country which has responsibility in that country for carrying out investigations into whether a corresponding money laundering offence has been committed (s.339ZH (6)).

330. The order is enforceable by way of a fine upon conviction by the magistrates' court up to a maximum of £5,000 (s.339ZH (8) & (9)).

331. Section 339ZK provides that a statement, made by a person in response to a further information order, may not be used in evidence against that person in criminal proceedings save for, (a) on a prosecution for perjury, or (b) on a prosecution for some other offence where, in giving evidence, the person makes a statement inconsistent with the statement made in response to the further information order (s.339ZI (1) & (2)).

332. An appeal against a decision of the magistrates' court on an application for a further information order, by any party to the application, lies to the Crown Court (s.339ZJ (1) -(3)). On appeal, the relevant court may make, discharge or vary the further information order (s.339ZJ (4)).

333. 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 31st October 2017 (§3(2), *The Criminal Finances Act 2017 (Commencement No. 2 and Transitional Provisions) Regulations 2017* (2017, No. 991)).

Terrorist Property

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

335. The power to make a further information under s.22B (1) of the TACT 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 31st October 2017 (§3(3), *The Criminal Finances Act 2017 (Commencement No. 2 and Transitional Provisions) Regulations 2017* (2017, No. 991)).

Supervision and Enforcement

336. The Bar Council 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. Accordingly, the BSB 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 (Regulation 46(1)). In doing so it must adopt a “risk-based approach to the exercise of its supervisory functions” (Regulation 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.

337. The obligations upon the BSB also require it to:

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

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

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

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

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

338. When, in compliance with Regulation 47(1), the BSB updates the Bar as to money laundering and terrorist financing the information it provides must include:

(a) information on the money laundering and terrorist financing practices the BSB considers apply to practice at the Bar;

(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 BSB considers that there is a high risk of money laundering or terrorist financing (Regulation 47(2)).

Information and Investigation

339. To assist the BSB 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 BSB with a series of powers to enable it to perform those functions, they include:

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

339.2. The power to retain documents taken under Regulation 66 or 70 (Regulation 71);

339.3. The power to request the assistance of overseas authorities (Regulation 68)

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

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

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

341. In exercising the power under Regulation 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:

341.1. enter the premises;

341.2. inspect the premises;

341.3. observe the carrying on of business or professional activities by the barrister;

341.4. inspect any documents or other information found on the premises;

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

341.6. inspect any cash found on the premises;

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

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

342.1. enter the premises specified in the warrant;

342.2. 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;

342.3. inspect any cash found on the premises;

342.4. take copies of, or extracts from, any documents or information appearing to be of the relevant kind;

342.5. 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

342.6. to use such force as may be reasonably necessary.

Limitations: Excluded Material and Legal Professional Privilege

The powers under Regulations 66, 69 or 70 may not be used to require you to:

342.7. produce "excluded material"⁶, or

342.8. to provide information, produce documents or answer questions which you would be entitled to refuse to provide, produce or answer on grounds of legal professional privilege in proceedings in the High Court.

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

Civil Penalties and Notices

344. The Regulations also provide the FCA and HMRC with powers to:

344.1. impose a financial penalty (Regulation 76(2)(a));

⁶ See Definitions at Annex XX.

344.2. publish a statement of censure (Regulation 76(2)(b));

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

344.4. 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 (Regulation 77(2)(b));

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

344.6. seek injunctions restraining the contravention of a relevant requirement under the Regulations (Regulation 80).

Compliance with Professional AML/CTF Guidance

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

345.1. any relevant guidelines issued by the European Supervisory Authorities;

345.2. 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 LSAG Guidance (Regulation 76(6)).

346. 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.

Criminal Offences and Penalties

347. By virtue of Regulation 86 breaches of specified “relevant requirements” of the Regulations have been designated criminal offences.

348. 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

349. The “relevant requirements” that breaches of which amount to criminal offences, 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 below, but you should refer to Schedule 6 for the full list.

Regulation	Description
18	Risk assessment by a relevant person
19	Policies, controls and procedures
20	Policies, controls and procedures; group level
21	Internal controls
23	Requirement on authorised persons to inform the FCA
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(1) &	
(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

Compliance with Professional AML/CTF Guidance

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

350.1. any guidelines issued by the European Supervisory Authorities;

350.2. 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 LSAG Guidance (Regulation 86(6)).

351. 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

352. 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:

352.1. makes a disclosure which is likely to prejudice the investigation; or

352.2. 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.

353. The person will not have committed the offence if:

353.1. The person did not know or suspect that the disclosure is likely to prejudice the investigation;

353.2. The disclosure is made in the exercise of a function under, or in compliance with a requirement imposed by the Regulations, TACT, POCA or an Act relating to criminal conduct or benefit from criminal conduct; or

353.3. 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 Regulation 87(6).

354. Offences under Regulation 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

355. Pursuant to Regulation 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:

355.1. Knows that the information is false or misleading; or

355.2. Is reckless as to whether the information is false or misleading.

356. Offences under Regulation 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.

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

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

358.1. That the disclosure was lawful; or

358.2. That the information had already and lawfully been made available to the public (Regulation 88(4)).

359. Offences under Regulation 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.

The Proceeds of Crime Act Disclosure Offences

360. Sections 330-332 and 333A make provision for offences committed by those working in the regulated sector. Self-employed barristers, and in particular those undertaking public access work, will principally be concerned with offences under sections 330 and 333A.

Schedule 9 of POCA

361. The “regulated sector” is defined in Schedule 9 of POCA (as inserted by *Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2007* (S.I. 2007 No. 3287). In so far as it applies to ‘legal professionals’ it is essentially the same definition as that for “relevant persons” in the Regulations: see [\[137\]](#) 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”.

Section 330: failure to disclose in the regulated sector

362. 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.

363. The offence is made out when each of the following four conditions are satisfied:

363.1. The person knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering (see s.340(11));

363.2. The information or other matter giving rise to the knowledge, suspicion or reasonable grounds for knowing or suspecting came to the person in the course of a business in the regulated sector;

363.3. The person can identify the money launderer or the whereabouts of the laundered property, or they believe (or it is reasonable to expect them to believe) that the information they hold will or may assist in identifying the launderer or the whereabouts of the laundered property; and

363.4. The person does not make a required disclosure to a nominated officer or an authorised person, as soon as practicable after the information came to them.

364. 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) or an officer authorised by the Director General of the NCA.

365. “Money laundering” is defined in section 340(11) as an act which:

365.1. Constitutes an offence under section 327, 328 or 329,

365.2. Constitutes an attempt, conspiracy or incitement to commit an offence under

365.3. Constitutes aiding, abetting, counselling or procuring the commission of an offence under sections 327-329, or

365.4. Would constitute an offence under any of the above if done in the United Kingdom.

366. It should be noted that in the Scottish case of *Ahmad v HM Advocate* [2009] HCJAC 60 the Appeal Court held that a section 330 offence would be made out even if the act of money laundering had not taken place.

367. In order to comply, a disclosure must:

367.1. give the identity of the suspected person, if known;

367.2. the whereabouts of the laundered property, so far as it is known;

367.3. 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)).

368. 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)).

369. Self-employed barristers are unlikely to have a Money Laundering Reporting Officer to report to, nor may some BSB-authorized entities (see [\[159\]](#) above). If you do not have a Money Laundering Reporting Officer 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 [\[297\]](#) above).

370. 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)).

371. 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.

372. Equally, there is a statutory exemption for legal professionals who received the information in “privileged circumstances” (s.330(6)(b)) (see further at [\[111\]](#) above). 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)).

373. 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:

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

373.2. By (or by a representative of) a person seeking legal advice from the adviser, or

373.3. By a person in connection with legal proceedings or contemplated legal proceedings.

374. Practitioners should note that s.330(11) states that sub-section 10 does not apply to information which is “communicated or given with the intention of furthering a criminal purpose” (see further at [\[113\]](#) above).

375. The concept of “privileged circumstances” is one created and defined by POCA. It is distinct from the common law protection of legal professional privilege that applies to specific circumstances in relation to litigation and the giving of legal advice.

See [88] onwards for further guidance in relation to Legal Profession Privilege and “privileged circumstances”.

Section 333A: tipping-off in the regulated sector

376. 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 Money Laundering Reporting Officer or an authorised NCA officer, or that a money laundering investigation is being, or may be, carried out.

377. 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

378. A person commits an offence if he knows or suspects 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:

378.1. Makes a disclosure which is likely to prejudice the investigation; or

378.2. 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.

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

379.1. He did not know or suspect that the disclosure was likely to be prejudicial to that putative investigation; and/or

379.2. 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

379.3. 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

379.4. 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 Guide to Assessing AML/CTF Risk

1. Pursuant to Regulation 18 where you undertake work within the scope of the Regulations you are required by Regulation 18 to undertake and maintain a risk assessment of your practice in order to adjudge the level of risk of money laundering or terrorist financing within your practice.

Assessing Risk

2. In carrying out your risk assessment 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, including the mandatory matters under Regulation 18(2).

3. Your assessment must be case-specific but should include the following factors:

3.1. Client Risk (Regulation 18(2)(b)(i)). What is the risk profile of your clients? Consider what you know of them. 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 FATF non-compliant country)? 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 or being evasive as to an aspect of their identity?

3.2. Geographic Risk (Regulation 18(2)(b)(ii)). Does the country or geographic area in which you are being asked to operate represent or indicate a risk of money laundering or terrorist financing? 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.

3.3. Sector Risk (Regulation 18(2)(b)(iii)). Legal Services are regarded, by law enforcement, as a sector, one that provides, *inter alia*, high-risk services: [HM Treasury and Home Office 2017 National Risk Assessment](#), 26 October 2017 ("NRA 2017").⁷ Whilst the services regarded as highest risk are not provided by

⁷ NRA 2017 highlights the specific services at highest risk of exploitation by money launderers. They are (i) trust or company formation (§7.6), (ii) conveyancing (§7.7), and (iii) misuse of client accounts

the Bar, the use of legal services is assessed as remaining attractive to would-be money launderers. You should be aware of, and take into account, the view of the investigative authorities: the provision of certain legal services within the regulated sector contains an inherently high risk of money laundering. Note that, by way of contrast, in relation to terrorist financing NRA 2017 found that *“Legal services are not judged to be attractive for terrorist financing, and there is no specific evidence of these services being abused by terrorists, so the terrorist financing risk associated with the sector is assessed to be low.”* (§7.3)

3.4. 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?

3.5. 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.

3.6. 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?

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

Assessing the Overall Risk

4. 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

(§7.8). NRA 2017 notes that *“Solicitors may offer any or all of these services and are therefore at greatest risk, while other legal professionals including barristers, legal executives and notaries are assessed to be exposed to lower risks”* (§7.4). It further notes that *“Barristers in each jurisdiction are prohibited from executing transactions, conducting conveyancing and offering client account services. These factors are also judged to mitigate the risks involved”* (Footnote 2).

5. 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 have come to the conclusion 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

6. 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

7. 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 the BSB if requested.

Report

8. If necessary in a specific case, make an authorised disclosure within the meaning of s.338 of POCA (see [\[297\]](#) of the Guidance re making a Suspicious Activity Report).

Monitor

9. 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.

10. 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.

Annex 2

Warning Signs / Red Flags

1. This part of the guidance sets out a few examples of things that should cause you to be concerned about your instructions.
2. It is important to note that you are not obliged to accept instructions if you reach the conclusion that they require you to act other than in accordance with law or with the provisions of the Handbook: rC21.6. Even if you do not accept the instructions, however, you may still be under an obligation to make a disclosure if relevant information came to you in the regulated sector: see POCA s.330, discussed above.
3. The matters set out below are for illustrative purposes only and are not intended to be comprehensive.

Secretive clients

4. Whilst it is not always necessary to meet a client in person, a secretive or obstructive client may be a cause for concern.
5. The following examples could give rise to suspicion:
 - 5.1. The client is reluctant to meet you and/or is using an agent or intermediary without good reason.
 - 5.2. The client does not want to talk about their business.
 - 5.3. A corporate client is reluctant to disclose its ownership structure or unwilling to produce client identity documents.
 - 5.4. The client has asked for undue levels of secrecy with the transaction.

High risk country clients and transactions

6. Clients and/or transactions with a substantial connection to a higher risk country pose a higher risk of money laundering and/or terrorist financing.
7. Higher risk countries include:
 - 7.1. Countries identified by credible sources, such as FATF public statements, as not having effective anti-money laundering/counter terrorist financing systems;

- 7.2. Countries identified by credible sources as having significant levels of corruption or other criminal activity;
- 7.3. Countries subject to sanctions, embargoes or similar measures issued by, for example the United Nations;
- 7.4. Countries providing funding or support for terrorist activities, or that have designated terrorist organisations operating within their country.

Unusual instructions

8. Instructions that are by their nature unusual, or that are unusual for your practice/chambers or the client, may be considered grounds for concern.
9. Consider the following:
 - 9.1. The client has asked you to take a position or pursue an argument which makes no apparent sense.
 - 9.2. The client is engaged in activities which are outside its usual professional or business activities;
 - 9.3. The client has asked you to advise on transactions which are outside your usual area of expertise;
 - 9.4. The transactions you are being asked to advise on are unusual in their size, frequency or manner of execution.
 - 9.5. The transactions you are being asked to advise on include involvement with multiple jurisdictions which the client otherwise has no connection and there is no apparent business case for the transaction to involve those jurisdictions.
 - 9.6. The transactions you are being asked to advise on are connected with countries which are high risk countries, without apparent sense.
 - 9.7. The client instructs you to pay some money to a third party or into court without providing any reasonable explanation for the payment which links that payment to the case or transaction you are dealing with.
 - 9.8. The client has asked you to advise only in relation to a discrete aspect of a wider transaction, when you know that other counsel have been instructed by the client on separate aspects of that transaction, and the client is reluctant to tell you about what the other lawyers are doing, or on what aspects they are advising.

Changing instructions

10. Instructions or cases that change unexpectedly might give rise to suspicions, particularly where there is no logical reason for the changes.

Sham litigation

11. The primary money laundering offences in POCA apply regardless of whether or not you fall within the definition of a 'relevant person' and are thus working within the regulated sector.

12. As set out above the effect of *Bowman v. Fels* is that if litigation is genuine, money laundering offences are not committed as a result of your being involved in it as counsel, and this exception includes the receipt of your fees.

13. Sham litigation created for the purposes of money laundering will, however, be within the scope of s.328. Sham litigation occurs where the proceeds of criminal conduct are generated and settlement negotiations or litigation are then deliberately fabricated to launder those proceeds of crime. The Law Society has notified solicitors that its practice advice service has received a marked increase in the number of reports from law firms about suspected sham litigation.

14. How do criminals establish sham litigation? An example is as follows: they set up a cash-intensive business, create documents to suggest a legitimate debt, and then approach a solicitor/counsel to recover it. When the fake debtor makes a payment, the funds can appear clean, particularly as the usual course for a money launderer would be to pay them through the solicitor's client account.

15. What are the sham litigation warning signs? Below are a number of warning signs to which you should be alert; but you should note that this list is not comprehensive:

15.1. You have not met the client, who is often a considerable distance from you/chambers.

15.2. The "debtor" might also be a considerable distance away.

15.3. There is little paperwork supporting the alleged debt, or the paperwork that has been produced does not seem to make sense.

15.4. The debt is settled very quickly, sometimes even before the first letter of demand.

- 15.5. The client is willing to pay you substantial fees, even though you have done very little work on the matter.
- 15.6. Fees are overpaid, and/or paid in advance.
- 15.7. The client requests the funds recovered or the overpaid part of the fees to be paid to a third party.
16. One warning sign, or a combination of them, can be enough to lead you to form a suspicion that the dispute about which you are advising is not genuine. Where you have a suspicion that the subject matter of the 'dispute' might be a sham, you should consider very seriously whether to make a suspicious activity report.

Annex 3

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 either:
 - a. 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 customer's full name and either 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 (such as reference to an electronic database).

Nature of business

Determine and record the purpose and intended nature of the business relationship.

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 exercise 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 3rd 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 corporate 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 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

- a. Any individual who has control over the trust.
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.

Annex 4

Definitions

Appropriate consent (§ 85) – Consent from a nominated officer (i.e. of the NCA), police officer or officer of Revenue and Customs to the doing of an otherwise prohibited act (i.e. to undertake an activity or enter into an arrangement), (s.335 of the *Proceeds of Crime Act 2002* (“POCA”)).

Arrangement (§58) – “The operative phrase in s.328 – “enters into or becomes concerned in an arrangement” – needs to be considered as a whole. To enter into such an arrangement is to become a party to it; to become concerned in an arrangement suggest some wider degree of practical involvement in an existing arrangement such as taking steps to execute or put into effect an arrangement. Both ‘enters into’ and ‘become concerned in’ describe doing an act that is the starting point of an involvement in an existing arrangement...”: *Fitzpatrick v. Commissioner of Police of the Metropolis* [2012] EWHC 12 (Admin) per Globe J at [96], approving guidance issued by the Law Society.

Authorised disclosure (§83) – Disclosure within the meaning of s.338 POCA.

Beneficial Owners

Bodies Corporate and UK Limited Liability Partnerships

In relation to a body corporate whose securities are *not* listed on a regulated market or a UK limited liability partnership, Regulation 5(1) defines a beneficial owner as any individual who:

1. exercises ultimate control over the management of the body corporate;
2. directly or indirectly, ultimately owns or controls more than 25% of the shares or voting rights in the body corporate; or
3. an individual who “controls” the body corporate.

Control

A person will be considered to have “control” of a body corporate if:

1. The body corporate is a company or a limited liability partnership and that individual satisfies one or more of the conditions set out in Part 1 of Schedule 1A to the *Companies Act 2006* (people with significant control over a company), or

2. The body corporate would be a subsidiary undertaking of the individual (if the individual was an undertaking) under section 1162 (parent and subsidiary undertakings) and Schedule 7 of the *Companies Act 2006* (Regulation 5(2)).

Other Partnerships

In respect of a partnership that is *not* a limited liability partnership a beneficial owner is any individual who:

1. Directly or indirectly ultimately is entitled to or controls more than 25% share of the capital or profits of the partnership or more than 25% of the voting rights in the partnership; or
2. Satisfies one or more the conditions set out in Part 1 of Schedule 1 to the *Scottish Partnerships (Register of People with Significant Control) Regulations 2017*; or
3. Otherwise exercises ultimate control over the management of the partnership (Regulation 5(3)).

Trusts and Similar Arrangements

In relation to a trust, foundation or similar legal arrangement, Regulation 6(1) defines a beneficial owner as each of:

1. The settlor;
2. The trustees;
3. The beneficiaries;
4. Where the individuals (or some of the individuals) benefiting from the trust have not been determined, the class of persons in whose main interest the trust is set up, or operates; and
5. Any individual who has “control” over the trust.

Control

Regulation 6(2) defines a person as having “control” where they have the power (whether exercisable alone, jointly with another person or with the consent of another person) under the trust instrument or by law to—

1. Dispose of, advance, lend, invest, pay or apply trust property;
2. Vary or terminate the trust;

3. Add or remove a person as a beneficiary or to or from a class of beneficiaries;
4. Appoint or remove trustees or give another individual control over the trust;
5. Direct, withhold consent to or veto the exercise of a power mentioned in subparagraphs (a) to (d).

An individual who, via a body corporate, holds a “specified interest” in the capital of a trust or whose control over a trust is pursuant to Regulation 6(4)(a) treated as being entitled to the interest or having control over the trust.

A “specified interest” means a vested interest which is:

1. In possession or in remainder or reversion (or in Scotland, in fee); and
2. Defeasible or indefeasible (Regulation 6(5)).

This rule does not apply where the individual has control solely as a result of:

1. Their consent being required in accordance with section 32(1)(c) (power of advancement) of the *Trustee Act 1925*;
2. Any discretion delegated to them under section 34 (power of investment and delegation) of the *Pensions Act 1995*;
3. The power to give a direction conferred on them by section 19(2) (appointment and retirement of trustee at instance of beneficiaries) of the *Trusts of Land and Appointment of Trustees Act 1996*; or
4. The power exercisable collectively at common law to vary or extinguish a trust where the beneficiaries under the trust are of full age and capacity and (taken together) absolutely entitled to the property subject to the trust (or, in Scotland, have a full and unqualified right to the fee) (Regulation 6(4)(b)).

Estates

In relation to an estate of a deceased person in the course of administration, Regulation 6(6) defines beneficial owner as:

1. In England and Wales and Northern Ireland, the executor, original or by representation, or administrator for the time being of a deceased person;
2. In Scotland, the executor for the purposes of the *Executors (Scotland) Act 1900*.

Other Legal Arrangements

In relation to any other legal entity or arrangement, Regulation 6(7) & (8) defines “beneficial owner” as:

1. Any individual who benefits, whether directly or via a body corporate, from the property of the entity or arrangement;
2. Where the individuals who benefit from the entity or arrangement have yet to be determined, the class of persons in whose main interest the entity or arrangement is set up or operates;
3. Any individual who exercises control, whether directly or via a body corporate, over the property of the entity or arrangement.

In any other case, “beneficial owner” is defined as the individual who ultimately owns or controls the entity or arrangement or on whose behalf a transaction is being conducted (Regulation 6(9)).

Criminal conduct (§51) – Conduct which constitutes an offence in any part of the United Kingdom, or which would constitute an offence in any part of the United Kingdom if it occurred there, (s.340(2) POCA).

Criminal property (see also **Property** below) (§48, 51 & 64-66) – Property is criminal property if it constitutes a person's benefit from criminal conduct or represents such benefit (in whole or part and whether directly or indirectly), and the alleged offender knows or suspects that it constitutes or represents such a benefit, (s.340(3) POCA).

Customer due diligence (“CDD”) (§187) – Identifying the client and verifying the client’s identity on the basis of documents, data or information obtained from a reliable and independent source; where the client is beneficially owned, identifying the “beneficial owner” (see above) and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement; and obtaining information on the purpose and intended nature of the business relationship (Regulation 28).

Enhanced due diligence (§231) – Additional Customer Due Diligence measures required, on a risk-sensitive basis, in any situation which by its nature presents a higher risk of money laundering or terrorist financing. For a non-exhaustive list of relevant matters (Regulation 33).

Excluded Material – Personal records that you have acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which is held subject:

1. To an express or implied undertaking to hold it in confidence; or
2. To a restriction on disclosure or an obligation of secrecy contained in any enactment, including an enactment contained in, or made under, an Act passed after the Regulations (Regulation 72(7)).

FATF (§39) – Financial Action Task Force: 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.

High-risk Third Countries (§2 and Annex 3: A Basic Guide to CDD) – High-risk jurisdictions are those that FATF considers non-cooperative (for example, Iran) or failing due to unaddressed or inadequately addressed strategic AML/CFT deficiencies (for example Algeria). For an up to date list see FATF’s “[High-risk and non-cooperative jurisdictions](#)” page on its website, and its [geographic list](#).

Inadequate consideration (§79) – It is a defence to the POCA s.329 offence of acquiring, possessing or using criminal property to show that “adequate consideration” was given for the property. ‘Inadequate consideration’ is defined as being where the value of the consideration is significantly less than the value of the property; a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or possession. The provision by a person of goods or services which a person knows or suspects may help another to carry out criminal conduct is not consideration (s.329(3) POCA).

Laundered property (§4 & §48) – Criminal property (see above) that is dealt with in any one of the ways prohibited by ss.327, 328 or 329 of POCA.

LLP (§202.1) – Limited Liability Partnership (a form of partnership structure); a body incorporate, with legal personality separate from that of its members, formed by incorporation under the *Limited Liability Partnerships Act 2000*.

Legal Professional privilege (LPP) (§88) – The protection against disclosure of confidential communications between a client and their legal advisor. In England and Wales there are two recognised categories of privilege.

(a) Communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client (**Legal Advice Privilege**);

(b) Communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings (**Litigation Privilege**).

This privilege also extends to items enclosed with or referred to in such communications and made in connection with the giving of legal advice; or in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when they are in the possession of a person who is entitled to possession of them (*Police and Criminal Evidence Act 1984*, s.10(1) (“PACE”).

LPP does not protect information that is communicated with the intention of furthering a criminal purpose (*R. v. Cox & Railton*, 14 QBD 153; s.10(2) PACE).

Legal Sector Affinity Group (“LSAG”) (§141) – A sub-group of the HM Treasury and Home Office Anti-Money Laundering Supervisors Forum consisting of representatives of AML/CTF Supervisors from the legal sector. Amongst other functions the LSAG acts as the Government’s contact point with the UK legal sector regarding sector wide AML policy developments and activities, produces AML/CTF Guidance for use by the UK Legal Sector and aims to facilitate best practice sharing amongst its members.

Money laundering (§366) – Any act that is prohibited by ss.327, 328 or 329 of the *Proceeds of Crime Act 2002*, any inchoate offence pertaining to those offences, any act committed overseas that would amount to one of the above offences had it been carried out in the United Kingdom, or any act that amounts to becoming concerned in an arrangement in relation to terrorist property (s.340(11) POCA, s.18(1) Terrorism Act 2000 (“TACT”) and Regulation 3).

Money Laundering Reporting Officer (§365 & 370) – Regulation 21 of the Regulations requires the appointment of a nominated officer within a professional organisation to receive disclosures made pursuant to the *Proceeds of Crime Act 2002*. Regulation 21(6), however, provides that this is not required where the relevant person is an individual who neither employs nor acts in association with any other person, for example, most self-employed barristers.

Moratorium period (§319) – An authorised period of delay in the performing of an obligation. In the context of the NCA processing and monitoring SARs, the moratorium period is the period of 31 days starting with the day on which the person receives notice that consent to the doing of the act is refused (s.335(6) POCA).

Politically exposed person (“PEP”) (§239) – an individual who is entrusted with prominent public functions, other than a middle-ranking or more junior official (Regulation 35(12) (a)).

Property (§48) – All property wherever situated, including money, all forms of property, real or personal, heritable or moveable, things in action and other intangible or incorporeal property. Property can therefore include, for example, rights under a contract. (s.340(9) POCA).

Regulated market or exchange (Annex 3: A Basic Guide to CDD) – A regulated market or exchange is a market within the EEA that falls within the scope of Point 14 of Article 4(1) of the *Marketing in Financial Instruments Directive* 2004/39/EC (“MiFID”) (Regulation 3).

A non-EEA market that is “a regulated financial market which subjects companies whose securities are admitted to trading to disclosure obligations which are equivalent to the specified disclosure obligations” (Regulation 3).

The European Securities and Markets Authority maintains a list of regulated markets within the EU.

Regulated sector (§362) – Activity occurring within the definition of Sch.9 of POCA.

Relevant Employee or Agent (§155) – An employee or agent whose work is:

- (a) relevant to your compliance with any requirement under the Regulations,
or
- (b) otherwise capable of contributing to the:
 - (i) identification or mitigation of the risks of money laundering and terrorist financing within your instructions, or
 - (ii) prevention or detection of money laundering and terrorist financing in relation to your instructions (Regulation 21(2)(b) & 24(2)(a) & (b)).

Relevant person(s) (§137 *et seq.*) – Persons to whom the definitions within Regulations 3 and 8 of the Regulations apply. A reference to a ‘barrister’ in this section is a reference to a barrister who, by virtue of the Regulations, is a ‘relevant person’.

Reliance (§275) – A Relevant Person may rely upon certain specified others to apply any Customer Due Diligence measures, provided that (a) the other person consents to

being relied upon and (b) notwithstanding the reliance, the relevant person remains for any failure in his compliance with the Regulations (Regulation 39).

Risk-based approach (§158 and Annex 1: A Guide to Assessing AML/CTF Risk) – the requirement to consider, address and mitigate the threat of money laundering or terrorist financing in a manner proportionate to the threat that it poses to the business of the regulated person (Regulation 18).

SAR (§297 *et seq.*) – Suspicious Activity Reports; also known as ‘disclosures’. SARs are made to the NCA, which is the UKFIU. The NCA states that such SARs/disclosures can contribute intelligence to existing law enforcement operations, identify the proceeds of crime, and initiate investigation into previously unknown criminal activities. Provisions concerning the making of SARs can be found at s.337 of POCA onwards.

Screening (§156) – An assessment of:

- (a) the skills, knowledge and expertise of a “relevant employee or agent” to carry out their functions effectively;
- (b) the conduct and integrity of a “relevant employee or agent” (Regulation 21(2)(a)).

Simplified due diligence (§226) – The appropriate level of due diligence to be applied to a particular business relationship or transaction where the relevant person determines that the business relationship or transaction presents a low degree of risk of money laundering and terrorist financing (Regulation 37). Contrast with **Enhanced Due Diligence**.

Terrorist financing (§45 & 114 *et seq.*) – Any act that is prohibited by sections 15, 16, 17 or 17A of TACT or any inchoate offence pertaining to those offences.

Terrorist property (§115-116) – Any property which is likely to be used for the purposes of terrorism (whether by a proscribed organisation or not), proceeds of the commission of acts of terrorism, and proceeds of acts carried out for the purposes of terrorism (s.14(1) TACT).

Working Day (§85, §316 & §319) – A day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the *Banking and Financial Dealings Act 1971* (c.80) in the part of the United Kingdom in which the person is when he makes the disclosure. (s.335(7) POCA).

Annex 5

Typologies

Typology 1 – Public Access

Topics Covered: Crime – “Adequate Consideration” & s.329 of POCA – “Authorised Disclosure” & s.338 of POCA – Litigation – *Bowman v Fels* – LPP

Mr. Cockles, a Client with a History

Part One

You are a criminal practitioner who accepts public access instructions.

You are contacted by a prospective client, Mr. Cockles, 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 Mr. Cockles 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 at the Aylesford Crown Court before HHJ Mellow in just under four weeks’ time. Mr. Cockles’ former counsel and solicitors acted on a publicly-funded basis but the funding certificate has been discharged and 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 sent the statements and exhibits upon which the prosecution base their case and within this is a print out of Mr. Cockles’ antecedent history. This shows that he has numerous previous convictions for similar offences of dishonesty, some resulting in custodial sentences, the earliest of which took place when he was a youth. It would appear that he is a career criminal, repeatedly engaged in either stealing, fencing or breaking down stolen goods, chiefly cars.

The prospective client 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 Mr. Cockles states that if you provide him with your account details he will pay cash into your branch that same day. Slightly concerned you ask him what the source of the funds is. With a wounded look Mr. Cockles opens his hands in front of you and says “*From my own fair labours Sir. It’s all above board and ‘legit’, every penny.*” However, as far as you can see Mr. Cockles has never done an honest day’s work in his life.

Mr. Cockles 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*”.

What should you do?

Provided that the fee that you have agreed represents “adequate consideration” (within the meaning of s.329(2)(c); [78] of the Guidance) 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.

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.

Part Two: A Conflict of Interest

Shortly after meeting with Mr. Cockles you learn that you are in fact conflicted from acting in the case and cannot represent him. You communicate this to Mr. Cockles, and you consider that your involvement in this matter is now concluded.

Without you knowing, Mr. Cockles had obtained your bank details from your most junior clerk. 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 Mr. Cockles’ previous convictions lead you to suspect that the funds you are now in possession of are the proceeds of criminal conduct.

What should you do?

You have not provided and cannot provide “adequate consideration” for those funds, as you are no longer acting for Mr. Cockles. You are obliged to return the money to Mr. Cockles.

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 Mr. Cockles' 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 Mr. Cockles 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", aka a Suspicious Activity Report (an "SAR" or "disclosure"), in accordance with s.338 of POCA, to the NCA and seek to obtain consent to return the funds to Mr. Cockles.

You must not disclose any information provided to you by Mr. Cockles that is subject to legal professional privilege. The evidence against Mr. Cockles in the prosecution case and his list of previous convictions, whilst provided to you in confidential circumstances are not confidential as between you and Mr. Cockles: 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.

However, the additional information provided to you by Mr. Cockles, 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 disclosure process is explained further at [\[297\]](#) in the Guidance. Only once consent to the transaction has been obtained can a transfer of the funds be made.

In the meantime, you must take care not to reveal the fact of the disclosure to Mr. Cockles. Not keeping the fact of the disclosure confidential could lead to committing the offence of prejudicing an investigation (POCA s.342).

Related Questions

1. Does the ruling in *Bowman v Fels* apply to the scenario in Part Two?

No. The payment of the monies into your account in those circumstances does not fall within the “ordinary conduct of litigation” in *Bowman v Fels*.

2. Can a disclosure to the NCA be made?

Yes. A disclosure can be made of the information that gives rise to your suspicion that does not attract the protection of legal professional privilege.

3. 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.

4. As the information that leads to your suspicion was received in confidential circumstances, is it covered by legal professional privilege?

No. The documents you received and on which you will base your disclosure are not privileged: the prosecution supplied them and as such they are not confidential as between you and your client.

5. If there is information that is subject to legal professional privilege does that prevent such information being disclosed?

Yes. Information subject to legal professional privilege may not be disclosed to anyone outside of the confidential lawyer-client relationship without the consent of the client.

6. Can the money simply be returned to Mr. Cockles?

No. A disclosure to the NCA must be made and no transfer of the funds should be made until consent is given.

Typology 2 – Tax

Topics Covered: Tax, Advising re Revenue Investigations – “Transactions” – Offshore Accounts – “Tax Advisers”

Mr. David Rich

Part One

You are instructed by Sarah Bigg-Dial, who is a member of the Chartered Institute of Taxation and a qualified Chartered Tax Advisor. Ms. Bigg-Dial wishes to instruct you on behalf of Mr. David Rich. Mr. Rich has received an advanced payment notice from HMRC and wishes to contest it by means of judicial review proceedings. Ms. Bigg-Dial has instructed you on a number of previous occasions, always in respect of contested matters, although you have never previously advised or represented Mr. Rich. You are asked to prepare and represent Mr. Rich in the judicial review proceedings.

Are you required to undertake Customer Due Diligence on either Ms. Bigg-Dial or Mr. Rich?

No.

Your instructions relate to proposed litigation in relation to a tax assessment made against Mr. Rich and you are not therefore subject to the Regulations.

Where you are providing legal services to a client you will be subject to the Regulations only where 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 concerning:

- (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.

Where you are acting as a “tax adviser” you may also, and separately, be subject to the Regulations. A person who by way of business, whether as a firm or a sole practitioner, provides advice about the tax affairs of another person 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: Mr Rich Seeks Further Advice

In the course of considering Mr. Rich's papers you realize that he has a very poor case for judicial review. In reaching this view you have had to consider Mr. Rich's somewhat complex financial affairs, including his offshore trust structure, the Channelled Away Trust. 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 Ms. Bigg-Dial; who passes the news on to an even more disappointed Mr. Rich. He insists on proceeding, but instructs you, via Ms. Bigg-Dial, to provide him with advice as to why he is unlikely to succeed so that he can reassess the situation. Time is now very short to provide this advice and complete Mr. Rich's judicial review papers.

Should you now seek to undertake Customer Due Diligence?

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).

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 Mr. Rich's tax affairs, and the considering the underlying structure, you have provided tax and not litigation advice. 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.

Related Questions

1. Does this matter fall within the scope of the Regulations?

No. You are not “assisting in the planning or execution of the transaction” or “acting for or on behalf of a client in the transaction”, and you are not acting as a “tax adviser”.

2. Do you need to undertake Customer Due Diligence?

No. You are not within the scope of the Regulations, and therefore the requirement to undertake Customer Due Diligence does not apply.

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

Advice to Tax Scheme Promoters

Part One

Ms. Sharp, a solicitor whose firm is known to you, but for whom you have never previously worked, approaches you to advise one of its clients. You are surprised to find that Ms. Sharp’s client is a well-known provider of aggressive, if not notorious, tax avoidance schemes, “Low Tax Advisers”. They require your assistance in relation to Messrs. Pew, Cuthbert and Dibble, all of whom entered into one of their film scheme partnerships: the “Spotlight Studio Revenue Protection Scheme”, operated by the “Silver Screen Trust”. Enquiries have been opened by HMRC into the partnership and all its participants including Messrs. Pew, Cuthbert and Dibble. Pursuant to an agreement with the participants, Low Tax Advisers have the right to conduct their response to any HMRC enquiries 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 Messrs. Pew, Cuthbert and Dibble.

You are asked to advise in relation to the enquiries being undertaken by HMRC and how best to deal with them.

Are you required to undertake Customer Due Diligence on either Ms. Sharp, Low Tax Advisors or any of Messrs. Pew, Cuthbert and Dibble?

No.

Your instructions relate to enquiries conducted by the Revenue and, by inference, potential contentious proceedings thereafter. You are not therefore subject to the Regulations.

Where you are providing legal services to a client you will be subject to the Regulations only where 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 concerning:

- (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.

Where you are acting as a “tax adviser” you may also, and separately, be subject to the Regulations. A person who by way of business, whether as a firm or a sole practitioner, provides advice about the tax affairs of another person 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 an enquiry 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 Ms. Sharp to advise Low Tax Advisors 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. Low Tax Advisors 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.

Do you need to undertake CDD?

Yes. You would be considered to be acting as a “tax adviser” within the meaning of the Regulation 11(d) and are therefore subject to the Regulations in that regard.

As the obligations under the Regulations apply 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, Low Tax Advisors and Messrs. Pew, Cuthbert and Dibble 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.

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 take into account the size and nature of the matter in which you are instructed (Regulation 18(3)). You must also take into account:

- (a) The current BSB AML/CTF Risk Assessment of 25 April 2017 and its assessment that the overall risk level of the Bar is "low".
- (b) Any further information made available by the BSB pursuant to Regulation 17(9) and 47 in relation to ML/TF risk;
- (c) 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)).

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)).

If you are unsure how to assess the relevant AML/CTF risk factors you should refer to the Guide to Assessing AML/CTF Risk at Annex 1 to the Guidance.

For further assistance in relation to CDD see the Basic Guide to Customer Due Diligence at Annex 3 to the Guidance.

Application

In this case you may consider that there is a raised level of risk in relation to Messrs. Pew, Cuthbert and Dibble 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 Messrs. Pew, Cuthbert and Dibble.

Notwithstanding your reliance upon your instructing solicitors’ due diligence you remain liable for “any failure to apply such 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 Ms. Sharp that Low Tax Advisors, 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 Mr. Dibble 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 Mr. Dibble left his post after a high-profile corruption investigation accused him of accepting bribes in return for recommending sites for exploration and drilling. Mr.

Dibble 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 Low Tax Advisors Limited, the payment has come in three equal tranches from Messrs. Pew, Cuthbert and Dibble. Pew and Cuthbert each paid you from their personal bank accounts, held at well-known UK High Street banks. However, Mr. Dibble has arranged for payment to be made to you from a corporate bank account held in Russia. You suspect that the payment from Mr. Dibble has arisen from ill-gotten gains obtained in his previous employment.

Concerned, you ask your instructing solicitors about these matters. Ms. Sharp seeks to reassure you that Mr. Dibble 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 Mr. Dibble, 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 Low Tax Advisors.

You need to consider the effectiveness of the enhanced due diligence that you have previously applied to Mr. Dibble. 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 Mr. Dibble is a Politically Exposed Person 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 come to the conclusion 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.

Disclosure

You conclude that the source of the funds that Mr. Dibble 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.

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 Low Tax Advisors, 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 Mr. Dibble’s previous employment being the chief government adviser on oil and gas mining in a mineral-resource rich African country, Mr. Dibble having left his post and the country after a corruption investigation accused him of accepting bribes whilst in

that post, Mr. Dibble 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 Mr. Dibble’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 Mr. Dibble’s funds in the tax scheme have come from a corporate bank account held in Russia. The Bar Council takes the view that, when combined with the publicly available information, this would amount to being in possession of “*some prima facie evidence*” that your belief that Mr. Dibble is laundering the proceeds of criminal conduct “*has some foundation in fact*”.

In this scenario you would conclude that the communications to you on Mr. Dibble’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)).

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 [\[297\]](#) in the Guidance.

Fees

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 Mr. Dibble, 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 Mr. Dibble (Guidance [\[297\]](#)). 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 Low Tax Advisors or Mr. Dibble. Not keeping the fact of the disclosure confidential could lead to committing the offence of prejudicing an investigation (POCA s.342).

Related Questions

1. What level of Customer Due Diligence should be applied to Low Tax Advisors?

Given the geographical risk factors related to its location and the nature of the matter in which you are instructed you should consider applying an enhanced level of due diligence in relation to Low Tax Advisors.

2. Is Mr. Dibble a Politically Exposed Person?

If Mr. Dibble’s role as the chief government adviser on oil and gas mining and exploration amounted to a “prominent public function, other than as a middle-ranking or more junior official” he should be considered a politically exposed person.

3. What level of Customer Due Diligence should be applied to Mr. Dibble?

Given his former role and the risks in relation to his source of funds you should apply an enhanced level of due diligence to Mr. Dibble. A Basic Guide to Customer Due Diligence is at Annex 3 to the Guidance.

4. Can I rely upon the Customer Due Diligence of my solicitor, Ms Sharp?

If Ms Sharp’s firm consent to you doing so, you may rely upon the CDD carried out by them. Where this is the case, you should ensure that you are satisfied that

they have applied the appropriate level and degree of due diligence, including, if required, enhanced due diligence. Where you do rely upon someone else's due diligence you remain liable for "any failure to apply such measures" (Regulation 39(1)).

5. Can a disclosure be made to the NCA under s.330 of POCA in respect of Mr. Dibble?

Yes. Some of the information that leads to you believe that a money laundering offence is taking place comes from publicly available sources, e.g. Mr. Dibble being charged with corruption. A disclosure may be made in relation to that information. Some of the information comes to you from your instructions, e.g. the funds in the Russian bank account. As you have *prima facie* evidence to believe that a money laundering offence is being committed you are also able to make a disclosure in relation to that information.

6. Should a disclosure be made to the NCA under s.330 of POCA in respect of Mr. Dibble?

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 failure to disclose offence under s.330 of POCA and a substantive money laundering offence under one or more of POCA ss.327-329.

7. As some of the information that leads to your suspicion was received in confidential circumstances, is it covered by the "privileged circumstances" exemption in s.330(6)?

No. As you believe that there is a criminal purpose to the instructions of Mr. Dibble the provisions of s.330(11) apply and "privileged circumstances" do not exist.

8. Is the information in relation to Mr. Dibble covered by Legal Professional Privilege in any event?

No. As you believe that there is a criminal purpose to the instructions of Mr. Dibble, the crime /fraud exemption applies and the information is not covered by the common law protection of Legal Professional Privilege.

9. If the information was privileged would that prevent a disclosure being made?

Legal Professional Privilege would prevent the disclosure of material to which privilege applies. The obligation to make a disclosure under s.330 of POCA does not apply to information received in "privileged circumstances" within the meaning of s.330(6).

10. If you do not make a disclosure can you continue to act?

No. As you suspect that the source of the funds of Mr. Dibble may be the proceeds of criminal conduct, you are required to make a disclosure in accordance with s.338 of POCA in which you seek consent to act.

11. If you cannot continue to act what should you do about the fees that you have been paid?

You should seek consent to return the fees. This consent should be sought by way of an alternative request when you make the disclosure to seek to act.

Typology 4 – A Commercial Case

Topics Covered: Commercial Agreements – Litigation/Arbitration – *Bowman v Fels* – LPP – Sham Litigation – “Authorised Disclosure” & s.338 of POCA

Enable Ltd’s Written Services Agreement

Part One: Arbitration

A well-known City firm has instructed you to advise and, in due course, act for Enable Ltd, a company incorporated in the British Virgin Islands. Your instructions are that Enable 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 Enable Ltd was somewhat vague. You notice references within the documents supporting your client’s case to an individual associated with Enable 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 Enable 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.

What should you 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 Customer Due Diligence, 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 Enable 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 Enable 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 Enable 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. The Bar Council takes the view that 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 Enable 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.

What do you do?

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. The Bar Council would advise that, 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] 1 WLR 2126, SC ([2015] UKSC 24).

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 Enable Ltd in relation to the services provided, the connection between Enable Ltd and the official in the energy ministry and the resolution of the arbitration in Enable

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.

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", aka a Suspicious Activity Report (an "SAR" or "disclosure") in accordance with s.338 of POCA, to the NCA and seek consent to act. For assistance in relation to the making of Suspicious Activity Reports and the obtaining of consent see [\[297\]](#) 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).

Related Questions

1. Does the ruling in *Bowman v Fels* apply to the scenario in Part One?

Upon the facts as known to you at that time, you should consider that it does. However, you should keep the matter under review as the ruling may not apply to litigation brought to enforce payment of a bribe.

2. Does the ruling in *Bowman v Fels* apply to the scenario in Part Two?

If the proceedings are a sham, then the ruling in *Bowman v Fels* does not apply; it applies only to the "ordinary conduct of litigation".

3. As the information that leads to your suspicion was received in confidential circumstances, is it covered by legal professional privilege?

No. The information is not confidential as between you and your client. As it is known to the other party to the party to the dispute it is not covered by the protection of legal professional privilege.

4. Can a disclosure to the NCA be made in Part Two?

Yes.

5. 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.

Typology 5 – Crime

Topics Covered: Crime – Litigation – *Bowman v Fels* – LPP

Mr. Pipe’s Properties

You are instructed to represent Mr. Pipe, who has been charged with one count of conspiring to supply 50Kg of Class A drugs. Between his arrest and the first hearing at the Crown Court a case conference is held with Mr. Pipe at HMP Wandsworth, at which your instructing solicitor, Mr. Vipps, is also present.

During the course of the conference the incautious Mr. Pipe 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 Mr. Pipe insisting that no-one must ever be told about what has just been said and asking Mr. Vipps whether you can be trusted. The conference then ends abruptly as Mr. Pipe asks to be brought back to his cell. You have no idea whether Mr. Pipe is telling you the truth or not.

A few days later you receive a call from your instructing solicitor, Mr. Vipps. He informs you that Mr. Pipe 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 Mr. Pipe.

Mr. Vipps suggests that Mr. Pipe has *“dodged a bullet there”*. Your response, that Mr. Pipe may be a fantasist, is met by Mr. Vipps 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 Mr. Vipps, might need to take advice.

You think that you are under a duty to disclose these matters to the relevant authorities before acting for Mr. Pipe any further.

What should you do?

The Regulations

First, 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.

Disclosure

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", aka a Suspicious Activity Report (an "SAR" or "disclosure") 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.

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 Mr. Pipe that he did not have any beneficial ownership of any realisable property.

Related Questions

1. Does Mr. Pipe's intention to hide his criminal property take you outside the scope of the "ordinary conduct of litigation" per *Bowman v Fels*?

No. Neither Mr. Pipe's intention to conceal property or his behaviour during the course of the litigation bears upon the question of whether or not you are instructed in the "ordinary conduct of litigation". The nature of the prosecution against him has not been altered. Mr. Pipe is not suggesting, for example, that any litigation be entered into or settled for the purposes of concealing his criminal property. The litigation in which you are involved is an ordinary (if serious) criminal case.

2. Does the lay client's criminal intention mean that the information he provided to you is not protected by Legal Professional Privilege?

No. Mr. Pipe did not have a fraudulent intention in making the communication to you, *R v Cox & Railton*, 14 QBD 153.

3. Should you make a disclosure to the NCA?

No. There is no basis for you to make a disclosure to the NCA. You must respect your client's legal professional privilege.

Typology 6 – Real Property

Topics Covered: Real Property – Advice – “Transactions”

A Proposed Sale and a Right of Way

Part One: Scope of the Right of Way

Careful Ltd owns a piece of land. It is registered at the Land Registry as the owner of the land. It used to be the site of its headquarters, but it has now moved to another location.

Careful 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. Steady 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), Careful Ltd seeks advice from counsel about a right of way which runs to its property over Steady Ltd’s land. The right of way was granted several years ago, at a time when neither Careful Ltd nor Steady Ltd owned their respective sites.

Careful 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 Careful Ltd has had no contact with Steady Ltd.

Are you required to undertake Customer Due Diligence in relation to Careful Ltd?

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 concerning:

- (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.

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 HM Treasury approved Legal Sector Affinity Group Anti Money Laundering Guidance (“LSAG Guidance”) states that the “provision of legal advice” would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. Whilst this concession does not change the wording of the Regulations, the Bar Council takes the view that if your involvement in the transaction amounts to no more than the provision of legal advice, that would not, without more, amount to participating in a transaction by assisting in its planning or execution or otherwise acting for or on behalf of a client in the transaction.

You should however note that this is not a matter that has ever been tested before the courts and accordingly it cannot be definitively said that where your involvement in a financial transaction is limited to the provision of legal advice in relation to that matter you would not fall 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.

As you are being asked to do no more than give legal advice in relation to the the scope of a right of way, and bearing in mind the terms of the LSAG Guidance, 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*”.

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

Part Two: Informal Discussions

In informal discussions between Careful Ltd and Steady Ltd about possible development plans, Steady Ltd has suggested that Careful Ltd’s right of way will prevent it from developing its land as it might want to.

Are you now required to undertake Customer Due Diligence in relation to Careful 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 Customer Due Diligence.

Part Three: A Contemplated Transaction

Draft Heads of Terms for the sale of Careful Ltd's land to Steady 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 Careful 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 Careful Ltd as to:

- (i) Whether the covenant is enforceable, and whether it would prevent residential development, and
- (ii) Careful Ltd's risk of exposure to liability, and what that liability might be, if it were to agree to indemnify Steady 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 Careful 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 Careful 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 Customer Due Diligence.

Related Questions

1. Are you undertaking work to which the Regulations apply?

No. Where you are providing legal services to a client in relation to real property you will only be subject to the Regulations where you are assisting the client in the planning or execution of a transaction or otherwise acting for or on behalf of the client in a transaction. Here you are not advising upon or in the proposed transaction between Steady Ltd and Careful Ltd but upon Careful Ltd's rights and potential liabilities.

2. Do you need to undertake Customer Due Diligence?

No. Your instructions do not bring you within the ambit of the Regulations and therefore you do not need to undertake Customer Due Diligence.

Typology 7 – Real Property

Topics Covered: Real Property – Advice – “Transactions”

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. Quite-Particular. Mr. and Mrs. Quite-Particular have already entered into a contract to buy the land, but the completion date has not yet arrived.

Mr. Quite-Particular 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 Quite-Particulars 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.

Are you required to undertake CDD in relation to Mr. and Mrs. Quite-Particular?

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 concerning:

- (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.

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, and you will not need to undertake CDD.

Related Questions

1. Are you undertaking work to which the Regulations apply?

No. Where you are providing legal services to a client in relation to real property you will only be subject to the Regulations where you are assisting the client in the

planning or execution of a transaction or otherwise acting for or on behalf of the client in a transaction. Here you are asked to advise the Quite-Particulars in relation to a potential dispute over the purchase of the property, not the transaction itself.

2. Do you need to undertake Customer Due Diligence?

No. Your instructions do not bring you within the ambit of the Regulations and therefore you do not need to undertake Customer Due Diligence.

Typology 8 – Real Property

Topics Covered: Real Property – Advice – “Transactions” – Customer Due Diligence – Reliance – The Risk-Based Approach

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 Minor-Detail. Mr Minor-Detail is a recently retired Chartered accountant and Mrs Minor-Detail is the headmistress of a local preparatory school. Mr and Mrs Minor-Detail 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 Minor-Details 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 Minor-Detail spoke to a friend, Major Blunder, who warned him that he and Mrs Blunder had been unable to enforce a similar undertaking when they had sought to rely upon it a few years ago. The Minor-Details 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.

Are you required to undertake Customer Due Diligence in relation to Mr. and Mrs. Minor-Detail?

Potentially, yes.

When providing legal services to a client and where, pursuant to Regulation 12(1), you are assisting the client in *the planning or execution of a transaction* or otherwise *acting for or on behalf of the client in a transaction*, and the transaction is a financial or real property transaction concerning:

- (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, you are subject to the Regulations.

In this case, you are being asked to:

- (a) Advise the Minor-Details 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 HM Treasury approved Legal Sector Affinity Group Anti Money Laundering Guidance states that the “provision of legal advice” would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. Whilst this concession does not change the wording of the Regulations, the Bar Council takes the view that if your involvement in the transaction amounts to no more than the provision of legal advice, that would not, without more, amount to participating in a transaction by assisting in its planning or execution or otherwise acting for or on behalf of a client in the transaction.

You should however note that this is not a matter that has ever been tested before the courts and accordingly it cannot be definitively said that where your involvement in a financial transaction is limited to the provision of legal advice in relation to that matter you would not fall 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.

Application

If your involvement in the matter amounts to no more than giving legal advice in relation to the operation of the indemnity clause, and bearing in mind the terms of the LSAG Guidance, 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”.

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 will need to carry out CDD on your instructing solicitors and Mr. and Mrs. Minor-Detail 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.

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 [\[257\]](#) 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 take into account the size and nature of the matter in which you are instructed (Regulation 18(3)). You must also take into account:

- (a) The current BSB AML/CTF Risk Assessment of 25 April 2017 and its assessment that the overall risk level of the Bar is “low”.
- (b) Any further information made available by the BSB pursuant to Regulation 17(9) and 47 in relation to ML/TF risk;
- (c) 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)).

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)).

If you are unsure how to assess the relevant AML/CTF risk factors you should refer to the Guide to Assessing AML/CTF Risk at Annex 1 to the Guidance.

For further assistance in relation to CDD see the Basic Guide to Customer Due Diligence at Annex 3 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. Minor-Detail.

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.

Notwithstanding your reliance upon your instructing solicitors' due diligence you remain liable for "any failure to apply such 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.

Related Questions

1. Are you undertaking work to which the Regulations apply?

Where you are providing legal services to a client in relation to real property that is more than the provision of legal advice you will be subject to the Regulations if you are assisting the client in the planning or execution of a transaction or otherwise acting for or on behalf of the client in a transaction. Where you go on to prepare the draft indemnity clause you should consider that you are assisting the Minor-Details in the transaction.

2. Do you need to undertake Customer Due Diligence?

In the circumstances of this scenario, yes. Your instructions bring you within the ambit of the Regulations and therefore you are required to undertake Customer Due Diligence in relation to your instructing solicitors and the Minor-Details.

3. Can you rely upon the Customer Due Diligence carried out by your instructing solicitors?

If your instructing solicitors consent to you doing so, you may rely upon the CDD carried out by them. Where this is the case, you should ensure that you are satisfied that they have applied the appropriate level and degree of due diligence to the Minor-Details. Where you do rely upon someone else's due diligence you remain liable for "any failure to apply such measures" (Regulation 39(1)).

4. What level of risk should be applied to the Minor-Details?

In each case the assessment of risk is fact specific and the determination reached based upon the facts known to you (see Annex 1). In this case would be likely to assess the risk as low and accordingly apply a standard level of due diligence in relation to Mr. and Mrs. Minor-Detail. A Basic Guide to Customer Due Diligence is at Annex 3 to the Guidance.

Typology 9 – Family

Topics Covered: Litigation – Contemplated Litigation – Disclosure – CDD

A Matrimonial Dispute

Part One: Undeclared Income and Cash in the Attic

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.

Are you required to undertake Customer Due Diligence in relation to your client?

No.

The Regulations

Your instructions relate to proposed *litigation* in relation to a matrimonial dispute between a husband and a wife. 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.

Part Two: Further Instructions in Relation to the Cash that was in the Attic

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.

What should you do?

Disclosure

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.

Fees

Provided that the fee that you have agreed represents "adequate consideration" (within the meaning of s.329(2)(c); [78] of the Guidance) 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 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 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.

Are you required to undertake Customer Due Diligence in relation to your client and make an SAR?

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 Bar Council takes the view that 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.

Related Questions

1. Does the ruling in *Bowman v Fels* apply to the scenario in Part Two?

Yes. The decision in *Bowman v Fels* applies to contemplated and commenced proceedings.

2. Given the state of your knowledge in Part Two, are you entitled to retain the fees that have been paid?

Provided you have given “adequate consideration” for your fees you are entitled to retain the payment and continue to represent your client, s.329(2)(c) POCA.

3. Do the Regulations apply to the scenario in Part Three?

No. The Regulations do not apply to litigation. The consensual settlement of contemplated proceedings is part of the “ordinary conduct of litigation”, *Bowman v Fels*.

4. Does the husband’s suspected defrauding of the Revenue take you outside the scope of the “ordinary conduct of litigation” per *Bowman v Fels*?

No. Your suspicion that the husband has defrauded the Revenue, and your belief that your client has, and may further, come into possession of the proceeds of that suspected fraud does not bear upon the question of whether or not you are instructed in the “ordinary conduct of litigation”. It is not suggested, for example, that any litigation be entered into or settled for the purposes of concealing criminal property. The litigation in which you are involved is an ordinary matrimonial matter.

5. Does your client’s intention to take possession of the husband’s suspected criminal property mean that her communications to you is not protected by Legal Professional Privilege?

No. Your client did not have a fraudulent intention in making the privileged communication to you, *R v Cox & Railton*, 14 QBD 153.

6. Should you make a disclosure to the NCA?

No. There is no basis for you to make a disclosure to the NCA. You must respect your client’s legal professional privilege.

Typology 10 – Trusts

Topics Covered: Litigation – CDD – Legal Advice

A Family Dispute

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.

Are you required to undertake Customer Due Diligence?

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 advisor.

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 3(8) 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.

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.

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 take into account the size and nature of the matter in which you are instructed (Regulation 18(3)). You must also take into account:

- (a) The current BSB AML/CTF Risk Assessment of 25 April 2017 and its assessment that the overall risk level of the Bar is “low”.
- (b) Any further information made available by the BSB pursuant to Regulation 17(9) and 47 in relation to ML/TF risk;
- (c) 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)).

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)).

If you are unsure how to assess the relevant AML/CTF risk factors you should refer to the Guide to Assessing AML/CTF Risk at Annex 1 to the Guidance.

For further assistance in relation to CDD see the Basic Guide to Customer Due Diligence at Annex 3 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)).

You may be able to rely upon the CDD carried out by your instructing German lawyers.

As an EEA member state, you may rely upon the CDD checks of a German law firm provided that you can assure yourself that they are:

- (i) subject to requirements in national legislation implementing the Fourth Money Laundering Directive; and
- (ii) supervised for compliance with the requirements laid down in the Fourth Money Laundering Directive in accordance with section 2 of Chapter VI of that Directive (Regulation 39(3)(b)).

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.

Notwithstanding your reliance upon your instructing lawyers' due diligence you remain liable for "any failure to apply such 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.

Related Questions

1. Are you undertaking work to which the Regulations apply?

Yes. 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 3(8) and are therefore subject to the Regulations.

2. Do you need to undertake Customer Due Diligence?

Yes. As you are within the ambit of the Regulations you need to undertake Customer Due Diligence on your professional and lay client.

3. What level of Customer Due Diligence should be applied to your clients?

There are no apparent flags to indicate money laundering and so you should apply a standard level of due diligence. However, where you are unable to meet with either of your clients then you should apply an enhanced level of due diligence to that client.

4. Can I rely upon the Customer Due Diligence of my instructing lawyers?

If your instructing lawyers consent to you doing so, and provided that you can assure yourself that, as a German law firm, they are:

(i) subject to requirements in national legislation implementing the Fourth Money Laundering Directive; and

(ii) supervised for compliance with the requirements laid down in the Fourth Money Laundering Directive in accordance with section 2 of Chapter VI of that Directive, then you may rely upon the CDD carried out by them.

You should ensure that you are satisfied that your instructing lawyers have applied the appropriate level and degree of due diligence to the lay client. Where you do rely upon someone else's due diligence you remain liable for "any failure to apply such measures" (Regulation 39(1)).

Typology 11 – Trusts

Topics Covered: Drafting Transactional Documents – CDD – Legal Advice

Standard Form Wills and Settlements

You are asked by a Swiss firm of lawyers, Messrs. Tobler & Rone, known by you to have a specific practice in wealth management, to draft standard form wills and settlements.

Are you required to undertake Customer Due Diligence?

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 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 concerning:

- (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.

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. You do not, therefore, fall within the ambit of the Regulations, and as such you do not have to undertake Customer Due Diligence.

By drafting a standard form will you are not, without more, giving advice as to the tax affairs of another person such as to bring you within the meaning of acting as a “tax adviser” in Regulation 3(8) of the Regulations.

However, you should consider the issue as if your instructions alter or develop you may find that you are giving advice in relation to the tax affairs of another person

within the meaning of Regulation 3(8). 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.

Related Questions

1. Are you undertaking work to which the Regulations apply?

No. Where you are providing legal services to a client in relation to the creation, operation or management of trusts you will only be subject to the Regulations where you are assisting the client in the planning or execution of a transaction or otherwise acting for or on behalf of the client in a transaction. Here there is no transaction in operation or contemplation, rather you are only instructed to prepare standard form documents.

2. Do you need to undertake Customer Due Diligence?

No. Your instructions do not bring you within the ambit of the Regulations and therefore you do not need to undertake Customer Due Diligence.

Typology 12 – Trusts

Topics Covered: Regulations – CDD – Legal Advice – Disclosure – Fees

Mr. Phibb's Will

Mr. Probert is an experienced high street solicitor for whom you, and other members of chambers, have worked on many occasions over a number of years. He has instructed you to advise on all aspects of the will of his late client, Mr. Phibb. Unfortunately, Mr. Probert has not been appointed executor, instead, Mr. Phibb's adult children have been. Mr. Phibb has left his estate to his four children for life.

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 Mr. Probert, but you are not expressly asked to advise on this aspect of his duties.

After your initial advice Mr. Probert mentions to you his "long-held" reservation that Mr. Phibb was guilty of some form of tax avoidance, if not tax evasion. He wonders whether Mr. Phibb's estate consists, at least in part, of those funds. He seeks your further advice in relation to that matter and in relation to further aspects of the will.

Given the comments by Mr. Probert you are concerned that you and Mr. Probert may be lending yourselves to a scheme whereby the benefits of Mr. Phibb's criminality are being passed to his children. You are also concerned as to whether you are entitled to accept payment from Mr. Phibb's estate for the work that you have done. Accordingly, you discuss the matter further with Mr. Probert to understand fully the basis of his suspicions. When, in conference, you question Mr. Probert about the matter he states that he has no firm basis for his concern, it was just an impression he had formed about Mr. Phibb in general.

Are you required to undertake Customer Due Diligence in relation to your client?

Potentially, yes.

The Regulations

Your instructions relate to the management of a deceased's estate and this is a regulated activity.

You are subject to the Regulations when providing legal services to a client and where, pursuant to Regulation 12(1), you are assisting the client in *the planning or execution of a transaction* or otherwise *acting for or on behalf of the client in a transaction*, and the transaction is a financial or real property transaction concerning:

- (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,

The HM Treasury approved Legal Sector Affinity Group Anti Money Laundering Guidance (“LSAG Guidance”) states that the “provision of legal advice” would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. Whilst this concession does not change the wording of the Regulations, the Bar Council takes the view that if your involvement in the transaction amounts to no more than the provision of legal advice, that would not, without more, amount to participating in a transaction by assisting in its planning or execution or otherwise acting for or on behalf of a client in the transaction.

You should however note that this is not a matter that has ever been tested before the courts and accordingly it cannot be definitively said that where your involvement in a financial transaction is limited to the provision of legal advice in relation to that matter you would not fall 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.

As you are only instructed to provide *legal advice* to Mr. Probert in relation to the estate of Mr. Phibb, then, bearing in mind the terms of the LSAG Guidance, 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*”.

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*, as defined by the Regulations, and the following requirements apply to you:

- 1) 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.
- 2) 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.

1) Customer Due Diligence

You will need to carry out CDD on your instructing solicitor and the executors of Mr. Phibb'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 Law Society's database, see [\[257\]](#) 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 take into account the size and nature of the matter in which you are instructed (Regulation 18(3)). You must also take into account:

- (a) The current BSB AML/CTF Risk Assessment of 25 April 2017 and its assessment that the overall risk level of the Bar is "low".
- (b) Any further information made available by the BSB pursuant to Regulation 17(9) and 47 in relation to ML/TF risk;
- (c) 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)).

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)).

If you are unsure how to assess the relevant AML/CTF risk factors you should refer to the Guide to Assessing AML/CTF Risk at Annex 1 to the Guidance.

For further assistance in relation to CDD see the Basic Guide to Customer Due Diligence at Annex 3 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 Mr. Phibb's executors.

You may be able to rely upon the CDD carried out by your instructing solicitor in relation to Mr. Phibb'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.

Notwithstanding your reliance upon your instructing solicitor's due diligence you remain liable for "any failure to apply such 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.

2) Disclosure

Are you required to make a Suspicious Activity Report (SAR)?

Given what you have been informed by Mr. Probert about Mr. Phibb, 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 Mr. Probert 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 Mr. Phibb’s estate will result in the proceeds of crime being transferred to Mr. Phibb’s children, you do not have any information, beyond the suspicions of Mr. Probert, 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 Mr. Phibb.

The Bar Council takes the view that in these circumstances there is not a “*foundation in fact*” to satisfy the requirement of “*prima facie* evidence”. The Bar Council considers that in this scenario there is not sufficient evidence to justify the application of s.330(11).

The Bar Council also considers that for the same reason the communications to you on behalf of Mr. Phibb’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.

Fees

Provided that the fee that you have agreed represents “adequate consideration” (within the meaning of s.329(2)(c); [\[78\]](#) of the Guidance) 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.

Related Questions

1. Are you undertaking work to which the Regulations apply?

Potentially, yes. Where you are providing legal services to a client in relation to the creation, operation or management of trusts that is more than legal advice you will be subject to the Regulations if you are assisting the client in the planning or execution of a transaction or otherwise acting for or on behalf of the client in a transaction. Here, you are being asked to advise Mr. Probert in relation to the settling of the estate of his former client, Mr. Phibb. If your involvement goes beyond the provision of legal advice you will be considered to be assisting in the transaction, a matter that falls within the Regulations.

2. Do you need to undertake Customer Due Diligence?

If you fall within the scope of the Regulations, yes. Where your instructions bring you within the ambit of the Regulations you are required to undertake Customer Due Diligence.

3. Can you rely upon the Customer Due Diligence carried out by your instructing solicitors, Mr. Probert?

If Mr. Probert consents to you doing so, you may rely upon the CDD carried out by him. Where this is the case, you should ensure that you are satisfied that he has applied the appropriate level and degree of due diligence to Mr. Phibb’s executors. Where you do rely upon Mr. Probert’s due diligence you remain liable for “any failure to apply such measures” (Regulation 39(1)).

4. What level of risk should be applied to Mr. Phibb?

In each case the assessment of risk is fact specific and the determination reached based upon the facts known to you. In this case would be likely to assess the risk as medium-low and accordingly apply a standard level of due diligence in relation to Mr. Phibb’s executors. A Basic Guide to Customer Due Diligence is at Annex 3 to the Guidance.

5. Can a disclosure to the NCA be made?

No. The information that forms the basis of your suspicion was communicated to you in privileged circumstances and the s.330(11) exception does not apply. The protection of legal professional privilege applies to these circumstances.

Typology 13 – Company

Topics Covered: Company Purchase – Regulations – CDD – Disclosure

The Purchase of Quarry Ltd

You receive instructions from one of your regular solicitors to advise an investment company, Pursuit Ltd, for whom you have acted for on a number of previous occasions.

Pursuit Ltd is proposing to purchase all of the shares in an English company, Quarry Ltd that is a subsidiary of Xenon Ltd, a company registered in Panama.

You are provided with a copy of Heads of Terms agreed between Pursuit and Xenon. These say that they are confidential to Pursuit, Xenon and Quarry, to several representatives of each company, and to Pursuit's 13 shareholders.

You are told that Quarry's business is investment in commercial property in England and Wales.

One of Quarry'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 Pursuit 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 Pursuit's shareholders has come across a report on a website claiming that Quarry 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 Quarry 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 Xenon and Quarry, and that both have denied this (through their respective solicitors) and have asserted that the building is occupied by Quarry as the base for its property investment operations.

Your advice is sought as to the risk of enforcement action succeeding, whether Pursuit 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, Pursuit, of being involved in any criminal conduct.

Are you required to undertake Customer Due Diligence in relation to your client?

Potentially, yes.

The Regulations

When providing legal services to a client and where, pursuant to Regulation 12(1), you are assisting the client in *the planning or execution of a transaction* or otherwise *acting for or on behalf of the client in a transaction*, and the transaction is a financial or real property transaction concerning:

- (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, you are subject to the Regulations.

The HM Treasury approved Legal Sector Affinity Group Anti Money Laundering Guidance (“LSAG Guidance”) states that the “provision of legal advice” would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. Whilst this concession does not change the wording of the Regulations, the Bar Council takes the view that if your involvement in the transaction amounts to no more than the provision of legal advice, that would not, without more, amount to participating in a transaction by assisting in its planning or execution or otherwise acting for or on behalf of a client in the transaction.

You should however note that this is not a matter that has ever been tested before the courts and accordingly it cannot be definitively said that where your involvement in a financial transaction is limited to the provision of legal advice in relation to that matter you would not fall 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.

In this case, you are being asked to provide legal advice to Pursuit Ltd, at least in part, in relation to the terms of the sale and purchase contract for Quarry 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, bearing in mind the terms of the LSAG Guidance, 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”.

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.

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.

CDD

You will need to carry out CDD on your instructing solicitors and Pursuit 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 [\[257\]](#) of the Guidance.

In relation to your lay client, Pursuit, 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 take into account the size and nature of the matter in which you are instructed (Regulation 18(3)). You must also take into account:

- (a) The current BSB AML/CTF Risk Assessment of 25 April 2017 and its assessment that the overall risk level of the Bar is “*low*”.
- (b) Any further information made available by the BSB pursuant to Regulation 17(9) and 47 in relation to ML/TF risk;
- (c) 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)).

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)).

If you are unsure how to assess the relevant AML/CTF risk factors you should refer to the Guide to Assessing AML/CTF Risk at Annex 1 to the Guidance.

For further assistance in relation to CDD see the Basic Guide to Customer Due Diligence at Annex 3 to the Guidance.

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 Pursuit.

You may be able to rely upon the CDD carried out by your instructing solicitors' in relation to Pursuit. 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.

Notwithstanding your reliance upon your instructing solicitors' due diligence you remain liable for "any failure to apply such 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.

Are you required to make a Suspicious Activity Report?

You suspect that Quarry may have purchased Rotten Row House using the proceeds of criminal conduct and are concerned that the purchase by your lay Pursuit 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 subject to the Regulations then you are within the “regulated sector” for the purposes of POCA.

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 Xenon and Quarry 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 Xenon and Quarry 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 Quarry will result in the proceeds of crime being realised by Xenon 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 (an “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 [\[297\]](#) in the Guidance.

Related Questions

1. Are you undertaking work to which the Regulations apply?

Potentially, yes. Where you are providing legal services to a client in relation to the buying and selling of business entities that is more than just the provision of legal advice you will be subject to the Regulations if you are assisting the client in the planning or execution of a transaction or otherwise acting for or on behalf of the client in a transaction. Where you go on to prepare the draft indemnity clause you should consider that you are assisting Pursuit Ltd in the transaction.

2. Do you need to undertake Customer Due Diligence?

If you fall within the scope of the Regulations, yes. Where your instructions bring you within the ambit of the Regulations you are required to undertake Customer Due Diligence.

3. Can you rely upon the Customer Due Diligence carried out by your instructing solicitors?

If your instructing solicitors consent to you doing so, you may rely upon the CDD carried out by them. Where this is the case, you should ensure that you are satisfied that they have applied the appropriate level and degree of due diligence to Pursuit Ltd. Where you do rely upon someone else's due diligence you remain liable for "any failure to apply such measures" (Regulation 39(1)).

4. What level of risk should be applied to Pursuit Ltd?

In each case the assessment of risk is fact specific and the determination reached based upon the facts known to you. In this case would be likely to assess the risk as medium and accordingly apply a standard level of due diligence in relation to Pursuit Ltd. A Basic Guide to Customer Due Diligence is at Annex 2 to the Guidance.

5. Can a disclosure to the NCA be made?

Yes. The information that forms the basis of your suspicion has not been communicated to you in "privileged circumstances". The disclosure that you do make should not refer to material that is subject to the protection of legal professional privilege.

6. 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 ss.327-329 of POCA.