The Law Society

Money Laundering: Guidance for Solicitors - (with related annexes)

(Pilot – January 2004)

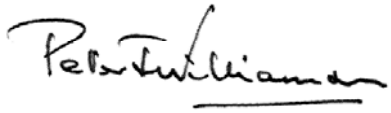
PREFACE

The tragic events of 11th September 2001 intensified the international impetus for the effective tackling of money laundering and terrorist financing globally. That initiative has been fully embraced by the European Union, and by the UK Government.

The Law Society continues to press for proportionality in the application of the money laundering regime to the provision of legal services, but recognises that solicitors have an important part to play in helping to fight crime and secure the confiscation of the proceeds of crime. This guidance is aimed to be a practical aid to solicitors in their compliance with the new money laundering regime, whatever the nature of their practice.

The guidance will develop over time in the light of experience. It may not presently answer all your questions. We would welcome suggestions for additional areas to be covered, to make subsequent editions even more comprehensive. We are also keen to deal with your concerns in communicating with Government bodies on the implementation and future development of the new regime.

In the meantime, I believe that if solicitors conscientiously follow the advice in this guidance, they will maximise their ability to comply with their obligations under the legislation whilst continuing to serve their clients.



Peter J Williamson
President of the Law Society

FOREWORD

In 2000 the Law Society formed a specialist Money Laundering Task Force to help steer the Society's policy work on money laundering legislation and to help the Society's Professional Ethics service deal with the anticipated greater volume and complexity of money laundering dilemmas faced by solicitors. The Task Force has lobbied the Government on both EU and domestic law with a view to ensuring that the new regime is workable.

In my role as Chairwoman of the Task Force I am acutely aware that money laundering has become an area of great concern for solicitors. This is reflected in the considerable rise in money laundering enquiries dealt with by the Law Society's Professional Ethics team, and has been expressed to me and my Task Force colleagues as we speak to the profession around the country, as well as to other Law Society Committee members and to specialist groups of solicitors.

This guidance is published now in a pilot form as we recognise that it will need to be revised in the light of comments from practitioners and in the light of developments in the interpretation of the legislation and the way in which law enforcement responds. The revised version will, we hope, also include practical guidance aimed at different areas of legal work. The Task Force is currently working on that with the help of the Law Society's specialist committees.

This guidance has been prepared in the light of Task Force discussions with Government, law enforcement, other regulatory bodies and, most importantly, the profession. Our objective is always to ensure that there is a proper balance between the public interest in fighting crime, the interests of individual clients and the public interest in access to justice. It is also important that the law makes practical sense in the context of a solicitor's practice. Our work continues through participation in Government committees which are consulting on methods of implementation and enforcement, and through considering evolving policy initiatives. We hope that the information and guidance provided here for solicitors in England and Wales is comprehensive and contemporary. It will, however, develop over time.

I would like to take this opportunity to thank my colleagues on the Task Force and the Law Society's staff who have been closely involved in the preparation of this guidance, in particular, Chris Murray and Toby Graham who wrote Chapters 4 and 5 respectively. The policy adviser responsible, Elizabeth Richards, has made a particularly invaluable contribution to this work.

Louise Delahunty
Chairwoman, Money Laundering Task Force, Law Society

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Chapter 1 Introduction to the Law Society Guidance on money laundering

Purpose of this Guidance

1.1 This Guidance replaces the second edition of *"Money Laundering Legislation: Guidance for Solicitors"* issued in 2000. The Money Laundering legislation has changed significantly and these changes are reflected in the far greater detail included in this Guidance. Part 7 of the Proceeds of Crime Act 2002 ("POCA") (Annex 1) consolidated and amended the criminal law relating to money laundering with effect from 24 February 2003. The Money Laundering Regulations 2003 ("ML Regulations 2003") (Annex 2) replace the 1993 and 2001 Regulations and will apply to a much wider range of solicitors' activities from 1 March 2004.

1.2 All solicitors' firms and their staff should be aware of the new criminal legislation and how they could be used by money launderers. In addition nearly all firms will have to comply with the ML Regulations 2003 in relation to a much wider range of legal work than before.

1.3 The purpose of this Guidance is to:

- outline the requirements of the UK Money Laundering legislation;
- provide a practical interpretation of the ML Regulations 2003;
- show how firms can develop policies and procedures appropriate to their own business.

1.4 The "Golden Rules" remain the same as set out in earlier guidance:

- Know the legislation;
- Know the professional guidelines;
- Know your client;
- Know your business;
- Train your staff;
- Monitor compliance.

Status of this Guidance

1.5 This Guidance has been drawn up by the Law Society of England and Wales in consultation with solicitor specialists in order to assist solicitors in complying with their statutory requirements and playing their part in the fight against money laundering. It is intended to explain how the legislation impacts on solicitors and to give guidance on good practice. This first edition is a pilot only. Both POCA and the ML Regulations 2003 contain provisions which **require** a court to take into account guidance which has been approved by HM Treasury in considering whether a person has committed the "failure to disclose" offence in POCA, or has failed to comply with any of the requirements of the ML Regulations 2003. (see section 330(8) POCA, and Regulation 3(3).ML Regulations 2003).

1.6 As much of the legislation (and therefore aspects of this Guidance), is new and untested, the Law Society does not intend to seek Treasury approval of this pilot edition of the Guidance. This means that the courts are not **required** to take this Guidance into account. However, as with previous guidance, courts **may** take it into account. The Society will review this pilot edition, in the light of experience and feedback from the profession and will then consider whether to seek Treasury approval.

1.7 Please send your comments about this pilot Guidance to: commentsonmlguidance@lawsociety.org.uk. However, enquiries to Professional Ethics about potential money laundering situations or anti-money laundering ("AML") procedures should ideally be made by a firm's nominated officer, who will be aware of all relevant facts. The Professional Ethics helpline [0870 606 2577] is usually open between 11am – 1.00pm and 2.00pm – 4.00pm but can deal with enquiries outside those hours in emergencies.

Application of this Guidance

1.8 This Guidance is relevant to all staff working in firms in private practice because:

- they are subject to the main money laundering offences, as set out in POCA (see chapter 2);
- they are likely to be subject to one or more of the "failure to disclose" offences in POCA which apply to the regulated sector (see chapter 2); and
- they are likely to be subject to the ML Regulations 2003 which apply to the regulated sector in relation to some services provided by the firm (see chapter 3).

1.9 Chapter 2 which deals with the offences in POCA applies to everyone, including in-house solicitors.

1.10 This Guidance covers the work of solicitors in England and Wales.

What is money laundering?

1.11 Money laundering is the process by which the proceeds of crime, and the true ownership of those proceeds, is changed so that the proceeds appear to come from a legitimate source.

1.12 The ability to launder the proceeds of crime is vital to the success of criminal operations. Anti Money Laundering ("AML") laws and systems are aimed at preventing criminals from being able to benefit from their actions, and at taking the profit out of crime.

1.13 There are three acknowledged phases to money laundering:

- **Placement** – this occurs when cash generated from crime is placed in the financial system. As many crimes generate cash, this is the point at which the proceeds of crime are most apparent and at risk of detection. As banks and financial institutions have developed AML procedures, criminals have to look for other ways of placing cash within the financial system. Entities which commonly deal with client money, such as solicitors' firms, have increasingly become at risk of being targeted to deal with cash. In chapter 6 there is guidance about use of a solicitor's client account and Annex 5 reproduces the Law Society's money laundering warning card which warns solicitors not to provide a banking facility if there is no underlying legal purpose for doing so. Firms should decide whether to operate a policy which limits the amount of cash they will accept, and explain that in terms of business or client care letters.

- **Layering** – after the proceeds of crime have been placed into the financial system, layering occurs when the money passes through a series of complex transactions in order to obscure the origin. These transactions often involve different entities, such as companies and trusts and can take place in multiple jurisdictions. Solicitors firms are at risk of being targeted to assist in money laundering at this stage, although detection can be more difficult.

- **Integration** – once the origin of the funds has been obscured, the funds can reappear as legitimate funds or assets. At this stage the criminals will invest funds in legitimate businesses or other forms of investment. Solicitors will often be used in this process, for example through buying a property, setting up a trust,

acquiring a company, or even through the settlement of litigation. This is not an exhaustive list.

Important note:

Although paragraph 1.13 describes the usual money laundering phases note that the definition of money laundering offences in POCA is much wider and defines even passive "possession" of criminal property as money laundering.

What is the Government's strategy?

1.14 It is difficult to estimate how much money is laundered in the UK every year, but it is likely to be billions of pounds. Money laundering is also a global problem. At one end of the scale it can involve the very simple conversion of criminal proceeds and at the other, the routing of complex transactions through many countries to disguise the illegal origin of the money. Accordingly AML controls have to be international if they are to be effective. Some of the recent changes to the UK legislation covered in this Guidance flow from the Second European Money Laundering Directive. This Directive aims at improving AML controls throughout Europe. The UK is a major international financial and legal centre, with a high reputation for honesty and integrity. This means that the UK financial and professional firms are attractive to money launderers. The Government wants to ensure that these firms are not used by launderers. Compliance with the protective measures prescribed by the legislation, will assist in the fight against organised and terrorist crime.

1.15 The statutory measures discussed in this Guidance are targeted upon areas of work which are subject to the highest money laundering risks. The aim is to maximise the difficulties criminals face when trying to launder money. The legislation aims, in high-risk areas, to:

- set up barriers, such as the obligation to check identity;
- create systems to identify suspicious transactions;
- create duties to report suspicious transactions;
- create duties to keep records of transactions. These records establish audit trails providing evidence for prosecutions and helping to identify funds for confiscation.

Measuring and managing the risk in solicitors' firms

1.16 Previous Law Society guidance referred solicitors to the Joint Money Laundering Steering Group (JMLSG) – guidance for banks and financial institutions because the previous ML Regulations applied mainly to solicitors' investment business activities. As the ML Regulations 2003 now apply to a wider area of solicitors' work, this new Guidance provides a much greater level of detail than the previous guidance. However, if this Guidance is silent on a matter, solicitors may still find it helpful to consult the most current version of the JMLSG Guidance.

1.17 A key to effective compliance with the legislation is risk assessment and risk management. Money laundering is one of many risks facing solicitors' firms. Many firms already operate risk management techniques in order to avoid negligence claims or the risk of employee dishonesty. The same thinking should be applied to assessing and managing money laundering risk. Assessment of risk involves a common sense approach. However the additional risks faced by firms through money laundering include, significant loss of reputation, possible loss of livelihood and criminal liability.

1.18 Firms in smaller communities, where solicitors are likely to know most clients and understand why they are entering into legal transactions, may face a different risk from city firms with a large international client base. If your assessment is that your firm's activities and client base present a low money laundering risk, then the AML systems and procedures can be set accordingly. If you operate in a high-risk area then you may need to consider additional procedures in order to manage that higher level of risk. The ML Regulations 2003 set out basic AML systems requirements but are written at a high level of generality to give different businesses flexibility in adapting procedures to the risk presented by their own business.

1.19 This Guidance, specifically written for solicitors, rather than banks or other financial institutions, helps firms to deal with the ML Regulations 2003. However firms must consider the risks to their own business and client base, and adapt their AML systems and procedures to meet those risks.

The Financial Services Authority

1.20 The Financial Services Authority (FSA) has a specific statutory objective of reducing financial crime and makes rules relating to the prevention and detection of money laundering, which apply to firms authorised by the FSA. The FSA's rules are contained in the FSA's Money Laundering Sourcebook which is part of the FSA Handbook and can be found at www.fsa.gov.uk. The FSA is also a prosecuting

authority for the criminal law on money laundering and can prosecute breaches of the ML Regulations 2003, under section 402, Financial Services and Markets Act 2000.

1.21 Solicitors' firms which are not authorised by the FSA are not subject to the FSA's rules. Most firms will not be authorised by the FSA but will be conducting "exempt regulated activities" under Part XX of the Financial Services and Markets Act 2000. The Part XX regime allows professional firms to carry on "exempt regulated activities" i.e. investment activities which are incidental to their normal business activities, provided that those firms meet certain conditions. Those conditions include complying with rules made by a Designated Professional Body (DPB). The Law Society is a Designated Professional Body (DPB) under the Financial Services and Markets Act 2000. The FSA has supervisory duties in relation to all the Designated Professional Bodies.

1.22 The Law Society's rules are set out in the Solicitors' Financial Services (Scope) Rules 2001 which are explained in the Law Society guidance " Financial Services and Solicitors", available from www.lawsociety.org.uk (then go to: View all Contents A-Z/Financial Services and Solicitors Information Pack). This Guidance applies to those activities regulated by the Law Society under the DPB regime.

1.23 Some solicitors' firms are authorised and regulated by the FSA because they are involved in mainstream "regulated activities" e.g. advising clients directly on investments such as stocks and shares. Those firms must comply with the FSA Money Laundering Sourcebook for their mainstream *" regulated activities"* in addition to the ML Regulations 2003.

1.24 This Guidance does not deal with the FSA's rules on money laundering. FSA authorised firms should consider the JMLSG Guidance on the FSA's rules as well as complying with the rules and guidance contained in the Money Laundering Sourcebook for their mainstream regulated activities.

1.25 However, this guidance will be relevant to FSA regulated solicitors' firms because the FSA Money Laundering Sourcebook does not apply to FSA regulated solicitors' firms in relation to *"non mainstream regulated activities".* Non mainstream regulated activities are broadly equivalent to exempt regulated activities and are subject to the Law Society's rules made under the DPB regime. This Guidance covers such work.

Costs

1.26 The Law Society has made representations to the UK Government about the costs impact of the statutory AML requirements on solicitors practices, see www.lawsociety.org.uk (- Money Laundering-Law Society Response-Treasury Consultation about Revision of ML Regulations. If firms are able to make specific

calculation of the cost of compliance with the ML Regulations, then the Law Society will be pleased to receive the details which we can then pass on to the Government.

Overview of this Guidance

Chapter 2 – The substantive law

1.27 Chapter 2 explains the substantive criminal law on money laundering. Much of the substantive law applies to everyone, so if your client enters into a transaction knowing or suspecting that it involves the transfer of proceeds of crime then he can be convicted of an offence. If you, the solicitor also know or suspect that proceeds of crime are involved in the matter, then you too may be liable if you assist in the transaction. Significantly, under the new POCA regime, money laundering offences are committed when the proceeds of **any** crime are involved. The money laundering offences are no longer limited to the proceeds of drug trafficking, terrorism or serious crime.

1.28 In addition a *"failure to disclose"* offence applies to persons within the "regulated sector", i.e. those areas of business which are also subject to the ML Regulations 2003. What is notable about this additional offence is that in addition to the previous subjective test i.e. actual knowledge or suspicion, there is now an **objective test** i.e. “reasonable grounds for “for knowledge or suspicion. The justification for this is that those in the regulated sector must receive AML training and their firms must have AML systems to prevent money laundering, and so a higher standard of compliance is expected. If your area of business is in the regulated sector (see chapter 3), and you know, suspect, **or should have known or suspected** that proceeds of crime are involved in a matter you may be guilty of a criminal offence if you do not make a report.

1.29 A key offence carried over from the previous legislation is the *"tipping off"* offence. There is also a new offence of prejudicing an investigation. It is an offence to prejudice an investigation by informing anyone that a disclosure has been made or that the authorities are investigating allegations of money laundering.

Chapter 3 – Money Laundering Regulations 2003

1.30 Chapter 3 explains the effect of the ML Regulations 2003. The detailed requirements of the ML Regulations 2003 have changed little from the 1993 and 2001 Regulations. The key requirements are:

- to appoint a “nominated officer”, often known as a Money Laundering Reporting Officer (“MLRO”);

- to check the identity of clients;
- to establish internal reporting procedures;
- to train staff.
- to keep records.

1.31 It is important to note that the ML Regulations 2003 apply when "relevant business" is undertaken rather than to a particular organisation as a whole. Firms must first establish which areas of work are subject to the ML Regulations 2003 and then set up systems to ensure compliance in those areas. As a matter of risk assessment and management, firms should consider whether their internal AML systems should require compliance with the regulations more widely than required by a strict interpretation of what is "relevant business" under the ML Regulations 2003. For example, firms may see less risk in requiring that all clients' identity be checked rather than having different procedures in different areas. Chapter 3 explains the requirements of the ML Regulations 2003 in more detail.

Chapter 4 – Privilege, confidentiality and POCA

1.32 Chapter 4 deals with issues of legal professional privilege and confidentiality. POCA protects legal professional privilege for the failure to report and tipping off offences. This chapter explains the law relating to privilege and confidentiality and its inter-relationship with the criminal offences. The existence of a defence of privilege provides an additional level of complexity for solicitors and other lawyers. While most solicitors have a general understanding of privilege and confidentiality, a more detailed understanding tends to be confined to litigators, whether civil or criminal. In practice, the risk of money laundering arises more in non-contentious areas of work such as property, corporate and trust work. Solicitors working in these fields must also ensure that their understanding of privilege enables them to deal with the Money Laundering legislation.

Chapter 5 – Civil liability

1.33 Chapter 5 considers issues of civil liability that may arise when the legislation requires a solicitor to make a report to the National Criminal Intelligence Service ("NCIS"). If the report is made before completion of the suspicious transaction, then the law enforcement agencies have a time period in which to provide or refuse "appropriate consent" to the transaction proceeding. In these cases, solicitors may be put into a difficult situation. Proceeding with the transaction without appropriate consent could lead to criminal liability. Telling the client or any other party to the transaction why you cannot proceed could constitute a tipping off offence. Inability to

proceed may expose your firm to a negligence claim. If a solicitor already has money relating to the transaction in a client account, then a constructive trust of those funds may be created, which could be subject to civil action for recovery by the true owner of the funds. This chapter discusses which civil liabilities could arise in transactions where a suspicion of money laundering has arisen, and gives guidance on steps to be taken to minimise or deal with potential liability.

Chapter 6 – Practical help

1.34 Chapter 6 contains further information on how firms can assess risk in order to establish internal AML systems and procedures. It can help solicitors to consider whether their work or particular clients give rise to any “warning signs” commonly associated with money laundering. An important but difficult aspect of the law relates to the concept of “suspicion”. Although this is an area which the criminal courts will ultimately decide, it is hoped that the background information in this chapter will help solicitors to decide whether to make a report under POCA.

Chapter 7 – Dealing with NCIS

1.35 Chapter 7 deals with money laundering reports to the National Criminal Intelligence Service ("NCIS") and contains guidance on how solicitors should deal with NCIS. It also explains what happens to money laundering reports made to NCIS.

Chapter 8 – Law Society's role

1.36 Chapter 8 explains what the Law Society's role is in relation to ensuring compliance with ML legislation and the ML Regulations 2003. The Society is a supervisory authority under the legislation.

Chapter 2 The substantive law

Introduction and overview

2.1 The impact of the money laundering regime has been strengthened by the implementation of POCA. In addition, the ML Regulations 2003 (Annex 2) will come into force and apply to most lawyers, on 1 March 2004. As with the previous legislation, solicitors may unwittingly commit an offence simply by carrying on activities which are regarded as forming part of the normal business of a solicitor's practice. Acting in the purchase of a house or business, in establishing and then transferring funds to a bank account onshore or offshore, or even acting during the course of litigation, may implicate a solicitor in money laundering if the funds involved are, or represent, criminal property.

2.2 The new legislation extends the reporting requirements. An objective test now applies to the regulated sector to require disclosure of transactions to the authorities where there are **reasonable grounds** for knowing or suspecting money laundering, even if the person concerned did not actually know or suspect.

2.3 The scope of the ML Regulations 2003 has been widened to include a broader range of activities. Firms undertaking these activities will fall within the "regulated sector". The 1993 Regulations broadly applied only when a practice undertook broadly financial services work for its clients. The ML Regulations 2003 will apply when a practice undertakes any of a range of specified activities ("relevant business") which covers much of the work traditionally undertaken by solicitors. As with the old legislation, some of the work carried out in a practice may not constitute relevant business and so will not be subject to the ML Regulations 2003. Even within departments of a practice, there may be a mix of "relevant business" to which the ML Regulations 2003 apply, and other work which is outside the scope of the Regulations.

2.4 The statutory criminal law is contained in Part 7 of POCA (Annex 1) which came into effect on 24 February 2003, and in the terrorism legislation (Annex 6). The ML Regulations 2003 (Annex 2) were laid before Parliament on 28 November 2003 and will apply to solicitors from 1 March 2004.

2.5 For the earlier legislation, see the second edition of Money Laundering Legislation: Guidance for Solicitors (2nd edition available from www.lawsociety.org.uk). There are transitional provisions which are described later in this chapter.

2.6 Part 7 of POCA sets out the new money laundering offences. POCA replaces and expands all earlier money laundering statutes (apart from the terrorism legislation which has already been strengthened – references to the Terrorism Act 2000 and Anti-terrorism, Crime and Security Act 2001 will be made as appropriate in this chapter). Most of the new statutory criminal law applies to **all** solicitors and their staff in relation to **all** areas of practice. The new offences apply to the proceeds of **all** crimes (not just drug trafficking, terrorism or serious crime as under the previous provisions).

Meaning of some terms which regularly appear in the legislation

2.7 ***Criminal conduct*** is defined as any conduct constituting an offence in the UK, or any conduct which would constitute an offence in the UK if it took place in the UK. Conduct which takes place outside the UK can, therefore, be criminal conduct. There is no need to have a knowledge of the criminal law of any other country in which the conduct may have occurred. Criminal conduct for the purpose of money laundering is defined in section 340(2) as being "conduct which would constitute an offence in any part of the United Kingdom if it occurred there". For this reason the place where the criminal conduct occurred is irrelevant. What matters is whether the conduct would constitute an offence if it had occurred in the United Kingdom.

2.8 Tax evasion is a criminal offence and the financial benefit gained represents a person's benefit from criminal conduct, even if the money or property on which tax should have been paid was legitimately earned. Criminal property can be in its original form (for example, cash obtained by selling drugs) or may have changed in character (for example, a house bought with drugs cash represents the benefit of criminal conduct even if part of the purchase price comes from legitimate funds). Money received as a result of benefit fraud is also criminal property.

2.9 It is important to note that the new legislation covers all offences, no matter how minor, whatever the size of the benefit gained.

2.10 ***Criminal property*** is property which is or represents a person's benefit from criminal conduct, **and** the alleged offender knows or suspects that this is the case. This definition is important because it means that for the **principal** money laundering offences to be established, the alleged offender must know or suspect that the property is or represents the proceeds of crime. Property is all property, whether situated in the UK or abroad, and includes money, real and personal property, things in action and other intangible property. It includes an interest in land or a right (such as a right to possession) in relation to property other than land.

2.11 Before implementation of the ML Regulations 2003, most solicitors' practices will need to appoint a ***nominated officer*** (often known as the Money Laundering Reporting Officer) and, even if this is not a requirement, may choose to do so. There is no statutory definition of a nominated officer but the legislation implies that it is a person nominated by an employer to receive internal reports. 'Employer' covers any body (including a voluntary organisation) for which someone works, whether paid or not. Directors, partners and volunteers, as well as employees, will be able to report a knowledge or suspicion of money laundering to the nominated officer who is then responsible for deciding whether to report externally to the authorities. Firms already subject to the 1993 Regulations will already have an MLRO who will be able to take on the role of nominated officer.

What are the offences and how might a solicitor become involved?

2.12 This Guidance sets out the offences in three parts:

Part 1

The first category of principal money laundering offences relates to laundering the proceeds of crime or **assisting** in that process and is contained in sections 327-329. These offences are punishable on conviction by a maximum of 14 years' imprisonment and/or a fine. The main offences relating to terrorist financing are also described and are subject to the same penalties.

Part 2

The second category of offence relates to **failing to report** a knowledge or suspicion of money laundering (or reasonable grounds for knowing or suspecting) and which is contained in sections 330-332. The offences set out in these sections are punishable on conviction by a maximum of 5 years' imprisonment and/or a fine. There are specific failure to report offences relating to terrorist financing which are subject to the same penalties.

Part 3

The third category of offence relates to **tipping off** and is contained in sections 333 and 342. The offences set out in these sections are punishable on conviction by a maximum of 5 years' imprisonment and/or a fine.

PART 1 – THE PRINCIPAL MONEY LAUNDERING OFFENCES - sections 327 – 329

2.13 Proceeds from all types of criminal conduct are covered. No conviction for the underlying criminal conduct is necessary for a person to be prosecuted for a money laundering offence. Note also that it is an offence to conspire or attempt to launder the proceeds of crime, or to counsel, aid, abet, or procure money laundering.

Transitional provisions

2.14 The new principal money laundering offences apply if the money laundering activity occurred on or after 24 February 2003. However the predicate offence (crime giving rise to the criminal property) can occur before 24 February 2003. See the Proceeds of Crime Act 2002 (Commencement No. 4, Transitional Provisions and Savings Order 2003) Annex 7. If the money laundering occurred or started before 24 February 2003, the old law will apply, see second edition of Money Laundering Legislation: Guidance for solicitors available from www.lawsociety.org.uk*.*

Section 327 – concealing, etc.

2.15 Under section 327, it is an offence to conceal, disguise, convert, transfer or remove criminal property from England and Wales, Scotland or Northern Ireland.

2.16 Concealing or disguising criminal property is widely defined to include concealing or disguising its nature, source, location, disposition, movement or ownership or any rights connected with it.

Section 328 - arrangements

2.17 Under section 328, it is an offence to become involved in an arrangement which the person knows or suspects facilitates the acquisition, retention, use or control of criminal property by someone else. Arrangement is a wide term and can include transactions but is not limited to transactions. See Annex 3, P v P guidance, paragraphs 1 – 5.

Section 329 – acquisition, use and possession

2.18 Under section 329, it is an offence to acquire, use or have possession of criminal property. It might be argued that a solicitor “has possession” simply by holding money in a client account, but to be guilty of the offence the person would need to know or suspect that the property is or represents the proceeds of crime.

Defences to section 327-329 offences

2.19 An offence is not committed if there is no knowledge or suspicion that the property constitutes or represents a benefit from criminal conduct, i.e. is criminal property. There are also two statutory defences to the principal offences:

(a) where an authorised disclosure is made under **section 338**; or

(b) where the intention was to make an authorised disclosure but there was a reasonable excuse for not doing so.

2.20 Section 338 sets out the circumstances in which a disclosure will be "authorised" for the purposes of affording a defence to the principal money laundering offences. Where a disclosure is "authorised" for these purposes, then it is not to be taken to breach any rule which would otherwise restrict that disclosure. Section 337 exempts a person in the regulated sector from any legal or other obligations which would otherwise prevent him from making the disclosures to authorities such as a duty of confidentiality – see chapter 4 for information on legal professional privilege and confidentiality. The NCIS reporting form may include a request for additional information, i.e. the reasons for suspicion. No breach of the duty of confidentiality arises from disclosing this information.

2.21 A nominated officer is the person identified by an organisation or firm to receive internal authorised disclosures. A report by a fee earner to a firm's nominated officer will be an authorised disclosure and should provide a defence for the fee earner. The nominated officer will then have to consider the report and will decide whether to make an external disclosure. In practice, most external disclosures are made to NCIS. References in POCA to a constable include the civilian staff employed at NCIS.

2.22 Authorised disclosures can be made either before or after a "prohibited act" occurs, e.g. before the completion of any transaction which amounts to a money laundering offence, or after completion of the transaction if there was a " good reason" for the disclosure not being made before. Good reason has not yet been defined by the courts.

Pre-transaction authorised disclosures – the need for consent

2.23 An authorised disclosure may be made before a money laundering act (a "prohibited act") takes place, i.e. before the completion of any transaction which amounts to a money laundering offence. In that case **appropriate consent** must be received or presumed before any substantive step is taken which would amount to a prohibited

act. The disclosure defence will not apply if the prohibited act takes place without this consent. Further practical guidance on ways in which solicitors can deal with a situation in which a suspicion arises in relation to an ongoing case can be found in Annex 3.

2.24 Section 335 lays down time limits relating to the delay between an authorised disclosure being made and the appropriate consent being given or presumed:

- if the person making the disclosure receives appropriate consent or hears nothing for 7 working days (the "notice period") starting the day after the disclosure is made, the transaction can proceed and the disclosure defence will be available;

- if consent is refused within the notice period, the transaction cannot safely proceed unless either consent is given within 31 calendar days starting on the day refusal is notified (the "moratorium period"), or the moratorium period has expired.

The moratorium period enables the authorities to take further action, such as seeking a court order to restrain the assets in question. Suspect funds may be frozen which will prevent the transaction continuing.

2.25 Consent can be given by NCIS or a nominated officer. An internal nominated officer however, must not give consent if a report has been made to NCIS until NCIS has given actual or presumed consent. It is an offence for a nominated officer to give consent to proceed without NCIS consent, with a maximum penalty of five years imprisonment and/or a fine.

2.26 A solicitor can be in an extremely difficult position, particularly if a substantive step needs to be taken before the expiration of the relevant statutory time period. The client and third parties may be pressing for information on progress but it may be difficult to explain the delay without risking committing the tipping off offence (see Part 3 below). On the other hand, appropriate consent is needed before matters can progress. If completion of the transaction is imminent, fax your report to NCIS and request on the front cover that it is put on the "fast track" and explain the need for urgency. It is also possible to press NCIS for an early response if the fast track was not used for the initial report but the matter subsequently becomes urgent. Chapter 7 provides further practical advice on how to deal with NCIS in these circumstances.

2.27 Evaluating a client and his transaction carefully at the outset helps to avoid this situation. It is accepted that a transaction or matter which seems legitimate at the beginning may develop in such a way as to arouse suspicion later on, in which case the fast track procedure may be appropriate. On occasion, early evaluation of a transaction may result in a solicitor deciding not to act in the first place, or to

terminate a retainer early on. In such circumstances, if any payment has already been received from the client, the money should not be returned without consent from NCIS. Even if no money has been received you may still be required to report suspicions under the " failure to report " offence discussed below in Part 2.

Post-transaction authorised disclosures

2.28 If an authorised disclosure is made after the money laundering act takes place, then appropriate consent is not relevant. The post-transaction authorised disclosure defence will only apply if there was a good reason for failing to report earlier, and the disclosure was made as soon as practicable. There is presently no case law on what might constitute a "good reason" for delay, but the law should be applied proportionately, taking account of what is reasonable in all the circumstances. Reasons for making a post transaction report should be carefully recorded.

Reasonable excuse for not making an authorised disclosure

2.29 The reasonable excuse defence applies where an authorised disclosure was intended but there was a reasonable excuse for it not being made (i.e. no report is made at all either before or after completion of the transaction). Reasonable excuse has not been defined by the courts. Again we suggest that you document the reason for not making the disclosure.

Additional defence to section 329 offence – acquisition, use and possession

2.30 In addition, no offence is committed under **section 329** if there was **adequate consideration** for acquiring, using and possessing the property; i.e. being paid a proper amount for providing goods and services, unless you know or suspect that those goods or services may help another to carry out criminal conduct. This defence clearly covers situations where goods are bought and sold. It may also apply to the services provided by a solicitor. Crown Prosecution Service guidance for prosecutors (www.cps.gov.uk) states that the defence will apply where professional advisers, 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). However, the fees charged must be reasonable in relation to the work carried out, or intended to be carried out, as the defence will not be available if the value of the work is significantly less than the money received for or on account of costs. This defence applies to costs only, but solicitors should be aware that it is not effective if they know or suspect that their services may help another to carry out criminal conduct.

2.31 There may be a problem if a balance remains after the final bill has been settled, as returning this balance to the client may amount to the commission of a money laundering offence if you know or suspect that the money is criminal property. In that case it may be necessary to make a pre-transaction authorised disclosure and obtain appropriate consent to deal with the money before any transfers take place.

Principal Terrorism offences

2.32 Section 18 of the Terrorism Act 2000 is the money laundering section. It is an offence under this section to enter into or become concerned in an arrangement which facilitates the retention or control of terrorist property by or on behalf of another person in the following ways:

(a) by concealment;
(b) by removal from the jurisdiction ;
(c) by transfer to nominees;
(d) in any other way.

2.33 The Terrorism Act 2000 also provides for additional offences relating to fund-raising. Under section 15 of the Terrorism Act 2000 (Annex 6), it is an offence to be involved in fund raising if the person who was so involved had knowledge or reasonable cause to suspect that the money or other property raised may be used for terrorist purposes. The offence can be committed by inviting others to make contributions, by receiving contributions or by making contributions towards terrorist funding. Providing money includes the making of gifts and loans. No defence arises from the money or other property being a payment for goods and services.

2.34 Under section 16 of the Terrorism Act 2000, it is an offence to use or possess money or other property for terrorist purposes. You can also be guilty of an offence if you possess money or other property which you have reasonable cause to suspect may be used for terrorist purposes.

2.35 Under section 17 of the Terrorism Act 2000, it is an offence to become involved in an arrangement as a result of which money or other property is available to another if you know or have reasonable cause to suspect that it may be used for terrorist purposes.

2.36 Strict liability offences of providing funds to terrorists are also included in the statutory instruments at Annexes 9 and 10. Terrorists can be funded from legitimately obtained income, including charitable donations, and it can be difficult to know at what stage legitimate earnings become terrorist assets. It may be helpful in appropriate circumstances, depending on the nature of your practice and client base,

to look at the consolidated sanctions list of the names of suspected terrorists maintained by the Bank of England on its website (http://www.bankofengland.co.uk/ Financial Sanctions>consolidated list>full active regulations).

Defences to terrorism offences

2.37 No offence is committed under section 18 if you did not know and had no reasonable cause to suspect that the arrangement related to terrorist property.

2.38 No offence is committed under sections 15-18 in the following circumstances:

(a) the act was done with the express consent of a constable (this includes civilian staff at NCIS);

(b) after becoming involved in a transaction a report was made on your own initiative as soon as reasonably practicable to a constable or NCIS – the report must disclose suspicion or belief that the money or other property is terrorist property and provide the information on which your suspicion or belief is based;

(c) if there was a intention to report as set out in (b) above but there was a reasonable excuse for not doing so;

(d) the person was in employment and made a report in accordance with their employer's procedures e.g. to their nominated officer.

PART 2 – "FAILURE TO DISCLOSE" - sections 330 - 332

Transitional provisions

2.39 The new failure to disclose provisions apply where the information or other matter on which the knowledge or suspicion is based, or which gives reasonable grounds for knowledge or suspicion, came to a person on or after 24 February 2003. If the information or other matter came to a person before 24 February 2003, the old law will apply, see the second edition of Money Laundering Legislation: Guidance for Solicitors available from www.lawsociety.org.uk.

Section 330 – failure to disclose: regulated sector

2.40 The failure to disclose offence under section 330 applies only when the information giving rise to knowledge or suspicion, or reasonable grounds for knowledge or suspicion, comes to a person in the course of business in the regulated sector.

Firms undertaking relevant business as described in Schedule 9 of POCA (see Annex 8) and the ML Regulations 2003 will fall within the regulated sector but only when actually conducting "relevant business". For further detail on the regulated sector, see chapter 3 of this Guidance, but note that the ML Regulations 2003 brings the activities of most solicitors into the regulated sector so section 330 will apply to them.

2.41 An offence will be committed if a person knows or suspects, or has **reasonable grounds** for knowing or suspecting, that another person is engaged in money laundering and he fails to report that knowledge or suspicion, or reasonable grounds for suspicion, as soon as practicable to a nominated officer or NCIS. It is not known how the courts will interpret “as soon as practicable”. However delays in reporting which arise from taking legal advice or seeking guidance from the Law Society may be acceptable.

2.42 POCA introduces an objective test for knowledge or suspicion for this section so that a person may be guilty of this offence **if he or she should have known or suspected**, even if there was no actual knowledge or suspicion.

2.43 When deciding whether an offence has been committed under section 330, the court must consider whether the alleged offender followed any relevant guidance issued by the Law Society, or other appropriate body, and approved by HM Treasury. This pilot Guidance has not been submitted for approval, however a court **may** still take it into consideration. An appropriate body is any body which regulates or is representative of any profession. The Guidance Notes for the Financial Sector issued by the Joint Money Laundering Steering Group will be relevant for those firms which conduct mainstream financial services work.

Terrorism – failure to disclose in the regulated sector

2.44 Section 330 of POCA was based on section 21A of the Terrorism Act 2000, inserted by the Anti–Terrorism Crime and Security Act 2001 (Annex 6) which already provided that it is a criminal offence for those in the regulated sector not to report where there are **reasonable grounds** for suspecting terrorist funding.

Section 331 – failure to disclose: nominated officers in the regulated sector

2.45 A nominated officer will commit an offence if, as a result of a disclosure under section 330, he or she knows or suspects, or has **reasonable grounds** for knowing or suspecting, that another person is engaged in money laundering and fails to report as soon as practicable to NCIS.

2.46 In proceedings under POCA courts must consider whether the nominated officer followed any relevant guidance issued by the Law Society, or other appropriate body, approved by the Treasury (see paragraph 2.42 above). This pilot Guidance is not approved for these purposes, although it still may be taken into account by a court.

Section 332 – failure to disclose outside the regulated sector

Nominated officer outside regulated sector

2.47 An organisation which does not carry out relevant activities and so is not in the regulated sector may decide to set up general internal reporting systems and appoint a person to receive internal reports. This is a sensible precaution to help a firm avoid committing one of the principal money laundering offences. This type of nominated officer will commit an offence if, as a result of a disclosure, he or she knows or suspects that another person is engaged in money laundering and fails to report as soon as practicable to NCIS. Note that the objective test of knowledge or suspicion does **not** apply here.

Terrorism

2.48 There is no failure to disclose offence for anyone else outside the regulated sector except in relation to the **terrorist** offences. Section 19 of the Terrorism Act 2000 provides that anyone must report as soon as reasonably practicable to a constable (or NCIS) if they know or suspect that another person has committed a terrorist financing offence based on information which came to them in the course of a trade, profession, business or employment. Note that the objective test of knowledge or suspicion does **not** apply here.

Confidentiality

2.49 “Authorised disclosures” are defined in section 338, and relate to disclosures made under the principal offences, sections 327 – 329. “Protected disclosures” are defined at section 337 and relate to disclosures under sections 330, 331 and 332. When making either type of disclosure, the legislation provides that there is no breach of any duty of confidentiality. This enables those in the regulated sector to make disclosures in order to avoid committing an offence, but also protects those in any trade, profession, business or employment outside the regulated sector who want to make a voluntary report to the authorities. The protection extends to solicitors doing voluntary work, such as giving free advice. See chapter 4 for further information on privilege and confidentiality.

Defences to a failure to disclose offence

Section 330 : regulated sector

2.50 Employees who have not received the training required under the ML Regulations 2003 from their employers, and who have no knowledge or suspicion of money laundering (even though there may have been reasonable grounds for knowledge or suspicion) will have a defence. Employers may also be prosecuted for a breach of the ML Regulations 2003 if they fail to train staff. For further details of the training requirements, see chapter 3 of this Guidance.

2.51 No offence is committed if you have a reasonable excuse for not reporting. (See paragraph 2.29)

2.52 No offence is committed if the information or other matter giving rise to knowledge or suspicion comes to a professional legal adviser in **privileged circumstances**, i.e. if it is communicated or given:

(a) by (or by a representative of) a client in connection with your giving legal advice to the client;

(b) by (or by a representative of) a person seeking legal advice from you;

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

2.53 The privilege defence does not apply if information is communicated or given to you with the intention of furthering a criminal purpose. For further detail on privilege and its relationship with the money laundering legislation, see chapter 4 of this Guidance. Crown Prosecution Service legal guidance for prosecutors indicates that if a solicitor forms a genuine but mistaken belief that legal professional privilege applies (for example, the client misleads the solicitor and uses the advice received for a criminal purpose), the solicitor would be able to rely on the reasonable excuse defence, www.cps.gov.uk.

Sections 331 - 332: Nominated officers in the regulated sector, and failure to disclose outside the regulated sector

2.54 The only defence available to a nominated officer under either of these sections is that there was a reasonable excuse for not disclosing the information or other matter giving rise to the knowledge or suspicion. There is no judicial guidance on what might constitute a reasonable excuse.

2.55 It is our view that privilege should be a reasonable excuse if the person making the disclosure to the nominated officer is a professional legal adviser to whom the information or other matter giving rise to knowledge or suspicion came in privileged circumstances. Under the ML Regulations 2003, Regulation 7 confirms that the professional legal adviser need not report privileged information to NCIS. See chapter 4 on legal professional privilege and confidentiality.

Section 19: Terrorism Act 2000

2.56 The following are defences to an alleged offence under section 19 of the Terrorism Act 2000 (see paragraph 2.47 above):

(a) you had a reasonable excuse for not making the disclosure; or

(b) you made an internal report in accordance with your employer's reporting procedures; or

(c) the information on which the belief or suspicion is based came to you in privileged circumstances (other than with a view to furthering a criminal purpose).

PART 3 – TIPPING OFF - s*ections 333 and 342*

2.57 These two offences mean that it is an offence to make a disclosure which is likely to prejudice an investigation if the person knows or suspects that a report has been made to a nominated officer or to NCIS, or if he knows or suspects that a money laundering investigation is being or will be carried out. You must not tell the person named in the report that a report has been made, or that the authorities are carrying out, or are intending to carry out, a money laundering investigation. An investigation may also be prejudiced and an offence committed, if you inform someone other than the person named in the report.

2.58 Solicitors will often want to make preliminary enquiries of their client, or third party to obtain further information to help the solicitor to decide whether they have a suspicion. Solicitors might also need to raise questions during a transaction to clarify such issues. There is nothing in the law to prevent a firm from making normal enquiries about the client instructions, and the proposed transaction in order to remove, if possible, any concerns and enable the firm to decide whether to take on, or continue, the retainer. These enquiries will not amount to tipping off, unless you know or suspect that a report (internal or external) has already been made or that an investigation is current or pending and make the enquiries in a way which discloses

those facts. It is also not tipping off to include a paragraph about your obligations under the money laundering legislation in your firm's standard client care letter.

2. 59 For information about communications with the Office for the Supervision of Solicitors and Professional Ethics see chapter 8.

Defences to tipping off

2.60 It is a defence if you did not know or suspect that the disclosure was likely to prejudice any investigation.

2.61 It is also a defence if the disclosure is made by a legal adviser to a client (or a client's representative) in connection with the giving of legal advice, or to any person in connection with legal proceedings or contemplated legal proceedings. The case of P v P (2003 EWHC Fam 2260) explored when legal advisers might safely rely on this defence and guidance on this issue is at Annex 3, and also discussed in chapter 4.

Chapter 3 Money Laundering Regulations 2003

Introduction

3.1 The ML Regulations 2003 (Annex 2) will come into effect on 1 March 2004 and replace the Money Laundering Regulations of 1993 and 2001. The Regulations implement the Second European Second Money Laundering Directive ("the Directive") and cover a broad range of activities identified as being high risk in that Directive, including much of the work traditionally undertaken by solicitors. While previous regulations focused principally on financial services, almost all solicitors will now be within the regulated sector.

3.2 POCA and the Terrorism Act 2000 apply to all solicitors and their staff, and all activities carried out by them. The ML Regulations 2003 impose additional anti-money laundering compliance requirements when certain specified activities are undertaken. The purpose of these administrative requirements is:

- to enable suspicious transactions to be recognised and reported to the authorities; and
- to ensure that the audit trail is available if a solicitor, client or other party to a transaction becomes the subject of an investigation.

3.3 Failure to comply with the ML Regulations 2003 is itself a criminal offence which can be prosecuted by the Financial Services Authority and the Crown Prosecution Service. However the scope of the ML Regulations 2003 is as yet untested in the courts, and there is some uncertainty as to their application in some cases. Firms in doubt as to whether the ML Regulations 2003 apply to their work, or as to the scope of any exemption, are advised to take specialist legal advice. This lack of clarity means it would be wise to comply with the ML Regulations 2003 on a broad, rather than a narrow, basis as a form of risk management within your firm. Solicitors may also wish to apply the requirements of the ML Regulations 2003 across the whole scope of their activities in order to protect against the committing of an offence under the statutory criminal law. This law applies even if the particular activities are not "relevant business" and, therefore, are not covered by the ML Regulations 2003.

3.4 Those solicitors who conduct mainstream financial services work, and who therefore are regulated by the Financial Services Authority, are subject to the FSA Money Laundering Sourcebook. They should also refer to the guidance notes on the prevention of money laundering issued by the Joint Money Laundering Steering Group. The FSA has prosecution and disciplinary powers for breaches of its rules, including the Money Laundering Sourcebook.

3.5 Part 1 of this chapter deals with the scope and requirements of the ML Regulations 2003 and Part 2 looks in more detail at how client identity can be established.

PART 1 – SCOPE AND REQUIREMENTS OF THE ML REGULATIONS 2003

When do the ML Regulations 2003 apply?

3.6 The ML Regulations 2003 apply to persons who carry on "relevant business" as defined in Regulation 2 (see paragraphs 3.9 - 3.11 below).

3.7 In addition to those businesses covered by the previous regulations, i.e. financial services businesses, the ML Regulations 2003 apply to:

- notaries and other legal professionals acting on behalf of their clients in any financial or real estate transaction;
- real estate agents;
- auditors, external accountants, tax advisers;
- money transmission service providers;
- dealers in high value goods, such as precious stones, metals, works of art, or auctioneers – wherever payment is made in cash (over Euro 15,000); and
- casinos.

3.8 The purpose of the ML Regulations 2003 is to help set up barriers to prevent money launderers from using your firm. This Guidance considers in more detail which activities undertaken by solicitors fall into the scope of the ML Regulations 2003. POCA and Terrorism Act 2000 continue to apply even where the ML Regulations 2003 do not.

3.9 The types of "relevant business" which may be carried out by solicitors include:

Legal transactional services

> ***"The provision by way of business of legal services by a body corporate or unincorporate or, in the case of a sole practitioner, by an individual, and which involves participation in a financial or real property transaction (whether by assisting in the planning or execution of any such transaction or otherwise by acting for, or on behalf of, a client in any such transaction)." (Regulation 2(2)(l))***

3.10 It is clear that the activities of solicitors acting on the sale or purchase of property fall within the scope of the ML Regulation 2003. What amounts to "participation in a financial transaction" is less clear. The Government has indicated that the ML Regulations 2003 are intended to reflect the identification of high-risk activities in the Directive. The text of the Directive should help in understanding the type of financial transactions which are included within the definition of Regulation 2(2)(l). The Directive provides that the following should be included:

"Independent legal professionals, when they participate, whether:

(*1*) *by assisting in the planning or execution of transactions for their client concerning the:*

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

(2) by acting on behalf of and for their client in any financial or real estate transaction."

3.11 "Managing of client money" is narrower than simply handling client money. Simply operating a solicitor's client account is not intended to be caught within the scope of the ML Regulations 2003. By way of contrast, where, for example, solicitors are acting as attorneys, they may be managing money or other assets on behalf of clients. The activity of "opening or management of bank accounts" is wide and is likely to cover trustees, attorneys and receivers.

3.12 The Treasury has confirmed that the following would not generally be viewed as "participation in financial transactions":

- a payment on account of costs to a solicitor or payment of a solicitor's bill (because the solicitor is not participating in a financial transaction **on behalf of** the client);
- legal advice;
- participation in litigation;
- will writing; and
- publicly funded work.

Company and trust services

"The provision by way of business of services in relation to the formation, operation or management of a company or a trust: "(Regulation 2(2)(m)).

Insolvency and tax services

"The activities of:

- ***a person appointed to act as an insolvency practitioner within the meaning of section 388 of the Insolvency Act 1986, or Article 3 of the Insolvency (Northern Ireland) Order 1989. (Regulation 2(2)(h)).***
- ***the provision by way of business of advice about the tax affairs of another person by a body corporate or incorporate or, in the case of a sole practitioner, by an individual. (Regulation 2(2)(i)).***

Financial Services

Certain "regulated activities" under the Financial Services and Markets Act 2000 ("FSMA 2000") such as dealing in investments, arranging deals in investments, managing investments, safeguarding and administering investments, and advising on investments. (Regulation 2(2)(a)).

3.13 These activities were subject to the Money Laundering Regulations 1993. They include mainstream investment business (including activities for which authorisation is now required from the Financial Services Authority) and non-mainstream investment business i.e. business which solicitors can do as part of the DPB regime. These activities are explained in the Law Society guidance "Financial Services and Solicitors". (See chapter 1 paragraphs 1.20 – 1.25)

General comments on "relevant business"

3.14. In deciding whether their firms carry out "relevant business" and fall within the scope of the ML Regulations 2003, solicitors are advised to take a cautious approach. Thus, for example, although litigation or advice on seeking asylum or criminal law work might fall outside the ML Regulations 2003, supplementary work in making arrangements for the investment or management of any monies received by way of settlement or acting on a house purchase, will be regulated. If firms are uncertain as to whether they are required to comply with the ML Regulations 2003, they should take legal advice on the individual circumstances of their practice.

3.15 The UK Government decided that as activities which are identified as high-risk (including company and trust formation) are not undertaken solely by professional lawyers and accountants, it is appropriate to apply the ML Regulations 2003 to cover those **activities** rather than specific categories of professional. This approach ensures that, for example, the provision of legal transactional services is covered, even if performed by an unlicensed practitioner.

What do the ML Regulations 2003 require?

Overview and general requirements – Regulation 3

3.16 The ML Regulations 2003 require all persons carrying on relevant business to *"establish such procedures of internal control and communication as may be appropriate for the purpose of forestalling and preventing money laundering"*. A person must be nominated as the "nominated officer" to receive internal reports of

suspicious circumstances. It is important that all relevant staff know and understand what the procedures are. Procedures must be set up for:

- training;
- client identification;
- record keeping; and
- the internal reporting of knowledge or suspicion, or reasonable grounds for knowledge or suspicion, that a person is engaged in money laundering.

Further details of each requirement are set out below.

3.17 The ML Regulations 2003, including the requirements of client identification and record keeping, apply to firms carrying on relevant business in the UK. However, firms with overseas offices may wish to consider operating client identification and record keeping procedures in those overseas offices, particularly for instructions which may involve work in the UK or where clients may subsequently be referred by an overseas office to the UK office.[1]See chapter 2 paragraph 2.7 on the extra territorial effect of POCA.

3.18 Failure to comply with the ML Regulations 2003 is an offence punishable on conviction by a maximum of 2 years' imprisonment and/or a fine, irrespective of whether money laundering has actually taken place.

3.19 When deciding whether an offence has been committed, the court must consider whether the defendant followed any relevant guidance issued by a supervisory authority or other appropriate body, and approved by the Treasury.[2] It is a defence to show that the defendant took all reasonable steps and exercised all due diligence to avoid committing the offence. The Law Society is a supervisory body for this purpose and, after the ML Regulations 2003 have been in force for some time and it is possible to assess the effectiveness of this Guidance, it may apply to the Treasury for approval of this Guidance. However, courts may take this Guidance into account, even if it is not Treasury approved.

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[1]Some countries do have as stringent anti-money laundering procedures as the UK.

[2] This guidance has not been approved by the Treasury, although future versions may be submitted for approval.

Training – Regulation 3

3.20 Firms must take appropriate measures so that **relevant employees** are made aware of the provisions of the ML Regulations 2003, Part 7 of the Proceeds of Crime Act 2002 and section 18 and 21A of the Terrorism Act 2000, and given training in how to recognise and deal with transactions which may be related to money laundering. Employers must also ensure that relevant employees are aware of the firm's internal money laundering procedures. The Treasury have indicated that the training requirements should be interpreted with common sense, and do not, for example, require that on 1 March 2004 all employees must be fully and finally trained. Training is an ongoing process, and it is recognised that most firms will establish a rolling programme.

3.21 Firms will need to consider, in the light of their own business activities, the extent of training necessary for employees and the method(s) by which it should be delivered (for example by guidance notes, staff manuals, internal money laundering handbooks, face to face training, e-learning or otherwise). All relevant staff in the firm should receive appropriate training in line with their responsibilities, activities and skills. The nominated officer may be best placed to provide training on the requirements of the ML Regulations 2003 and the firm's internal procedures. Some staff may require only basic training on the relevant legislation, the firm's procedures, and the more obvious warning signs in relation to money laundering.

3.22 Ongoing training should also be provided, as appropriate, to ensure that relevant employees are kept up to date. Firms must consider what training to provide for new staff. If new staff have already received training which meets the requirements of the ML Regulations 2003 in their previous employment, they may need only to be informed of the firm's money laundering procedures. However, new staff who have not previously been trained may need to receive fuller induction training to meet the requirements of the ML Regulations 2003.

3.23 Firms will need to decide whether to apply the ML Regulations 2003 only to the "relevant business" they conduct, or whether to apply them more widely. It is essential that employees know when they must apply the procedures.

3.24 It is recommended that members of a firm's accounts department who handle funds be trained so they can help in monitoring payments into and out of client account; and firms must also consider whether clerical, secretarial and administrative staff should receive some training, as they may encounter evidence of money laundering.

For example, those secretaries or receptionists who receive money or are involved in obtaining evidence of identification would certainly require training.

3.25 All persons in the firm involved in relevant activities should have access to information about their personal statutory responsibilities and those of the firm. They need to be able to judge whether a transaction or instruction is suspicious in the circumstances and need to know that a failure to report knowledge or suspicion of money laundering, or reasonable grounds for knowledge or suspicion, may lead to criminal prosecution. When the firm's internal procedures have not been followed, a breach could also result in disciplinary action within the firm.

3.26 If a breach of the ML Regulations 2003 is alleged, it may be necessary for a firm to show that it has complied with the ML Regulations 2003 provisions on training and therefore firms should consider which records they should keep about the training given. For example, the person receiving the training might be asked to sign an acknowledgement of the date and nature of the training received, or a list might be compiled showing details of the training given and the persons attending.

3.27 In summary, a firm should decide on and deliver an appropriate level of training for each partner, fee earner, and relevant staff.

Checking client identity – Regulation 4

3.28 Regulation 4 requires firms carrying out relevant business in the UK to obtain "satisfactory evidence" of the identity of each client (and, where the client is acting as agent to take reasonable measures to establish the identity of the underlying principal). For evidence of identity to be "satisfactory", the ML Regulations 2003 require it to pass two tests:

- an objective test in that the evidence must be "reasonably capable" of establishing that the client is the person he or she claims to be; and

- a subjective test in that the person who obtains the evidence must be satisfied that it does in fact establish that the client is the person he or she claims to be.

A more detailed section on how identity can be established appears in **Part 2** of this chapter. If the client is a money service operator then evidence must include his/her registered number (if any) (see paragraph 3.43). There are some exceptions to the requirement to obtain evidence and these are discussed in paragraph 3.40 – 3.49 below.

3.29 A firm's identification procedures must provide for the client's identity to be checked as soon as is reasonably practicable after contact is first made between solicitor and client.

3.30 The need to check identity arises:

- if client and solicitor form, or agree to form, a business relationship; or
- in respect of any one-off transaction, if the solicitor knows or suspects that the transaction involves money laundering, or payment of 15,000 Euro or more (excluding the solicitor's costs) is to be made by or to the client; or
- if it appears to the solicitor, whether at the outset or subsequently, that two or more one-off transactions are linked and involve in total 15,000 Euro's or more.

As at 24 November 2003 the value of 15,000 Euros was just over £10,300 and the current value of the Euro can be found in the Financial Times. The correct figure is also featured on the monthly data page of the Gazette. The ML Regulations 2003 do not, unlike previous Regulations, provide a common date for a valuation of 15,000 Euros. The Treasury have indicated that it will be up to the Courts to identify what rate will apply. Courts may take the rate applicable when any business is entered into. In cases of doubt, when close to the limit, it may be safest to make the identity check.

3.31 Solicitors should remain vigilant about clients avoiding identification checks by purposefully entering into a number of transactions below the 15,000 Euro limit. If such tactics are suspected, identification should be obtained, and the suspicions reported to the nominated officer or NCIS.

3.32 **Where satisfactory evidence of identity is not obtained the business relationship or one-off transaction must not proceed any further.**

3.33 In relation to relevant business carried out by solicitors, there are three key definitions in the context of Regulation 4:

- an **"applicant for business"** is any person seeking to form a business relationship, or carry out a one-off transaction (e.g. a prospective client), with a solicitor acting in the course of relevant business in the UK;
- a **"business relationship"** arises between a client and a solicitor when there is any arrangement between them the purpose of which is to facilitate the carrying

out of transactions on a frequent, habitual or regular basis where the total amount of any payments to be made by any person to any other in the course of the arrangement is not known or capable of being ascertained at the outset. Examples of a business relationship might be acting for a company in the course of acquiring a series of businesses or shares, or acting for a wealthy individual in acquiring a portfolio of investment properties, or conducting all legal work as it arises for a company or unincorporated business;

- a **"one-off transaction"** means any transaction other than one carried out in the course of an existing business relationship.

3.34 Many solicitors' firms will mainly be involved in one-off transactions, others are more likely to be involved in business relationships, most will be involved in a mixture of both. The distinction is relevant because different exceptions apply in relation to obtaining evidence of identity. Different record keeping requirements also apply. When deciding which category a transaction falls into, solicitors will need to be aware that what starts off as a "one-off transaction" may evolve into a "business relationship", and arrangements must be made to ensure compliance at all times with the relevant identity and record keeping requirements. For some firms the most appropriate and practical course may be to treat all new matters as if they arise in the course of a business relationship notwithstanding the strict position under the ML Regulations 2003; others may wish to consider each new matter on a case by case basis. Whichever approach is taken it is the responsibility of each firm to ensure it is compliant. Where a one-off transaction with the client (below the threshold) may develop into a business relationship, firms may find it easier to ask for identification evidence early on, which will also have the benefit of ensuring that the firm is compliant when the nature of the retainer changes.

3.35 When a firm acts on instructions from two or more clients on a matter, satisfactory evidence of identity will be required for all clients.

3.36 Where a client acts, or appears to act, for another person (e.g. if the client is acting as agent or nominee), the ML Regulations 2003 state that "reasonable measures" must also be taken to establish the identity of the other person. The requirement to establish evidence in relation to underlying principals appears to be less onerous than the evidential requirement for the "applicant for business" .

3.37 If satisfactory evidence of identity is not obtained about a client the business relationship or one-off transaction must not proceed any further. If a solicitor accepts money from a client before establishing identity, and then cannot proceed because identity is not established, care must be taken before returning the money to the

client. If, by reason of the failure to produce evidence or for any other reason, the solicitor has formed a suspicion that the client or another may be involved in money laundering, it may be necessary to make a report and obtain NCIS consent before returning that money to the client or otherwise progressing the matter, and he may need to take steps to ensure that he does not inadvertently commit the criminal offence of "tipping off". (See chapter 2)

3.38 Identification procedures must be undertaken for linked transactions that together equal or exceed the 15,000 Euro exemption limit. Whether transactions are linked depends upon any obvious correction rather than an arbitrary time limit. However, for lower risk work concerning transactions between which there is no obvious link, a 3 month period may be a useful yardstick.

3.39 New clients are sometimes introduced by partners or staff members. Records of evidence of identity should still be made and kept in such cases.

Exceptions – when checking client identity is not required – Regulation 5

3.40 There are a number of exceptions by which firms are not required to obtain evidence of clients' identity. However, evidence of identity must always be obtained if you know or suspect that a one-off transaction involves money laundering, even if an exception would otherwise apply. Note that the "postal concession" contained in regulation 8 of the 1993 Regulations is no longer available.

3.41 The exceptions are very narrowly drawn and solicitors will in most cases need to obtain satisfactory evidence of identity. Where a solicitor wishes to take advantage of an exception, but is in doubt as to whether or not it applies to the particular facts of a case, then expert legal advice should be taken.

Client subject to regulation

3.42 Evidence of identity is not required (Regulation 5(2)) when the solicitor has reasonable grounds for believing that the client:

(a) carries on relevant business falling within sub-paragraphs (a)–(e) of Regulation 2(2) (and is not a money service operator) - for example, a UK bank or building society or stockbroker; or

(b) does not carry on relevant business but carries on comparable activities to those mentioned in (a) above and is covered by the first Directive of

1991/308/EEC on prevention of the use of the financial system for the purpose of money laundering – for example, an EEA[3] bank; or

(c) is regulated by an overseas regulatory authority (within the meaning given by section 82 of the Companies Act 1989) and is based or incorporated in a country (other than an EEA state) which has laws containing comparable provisions to those in the 1991 Directive– for example, a US bank.

3.43 This exception does not apply to money service operators. A money service operator is a person who carries on money service business but does not carry on relevant business falling within sub-paragraphs (a)-(c) of Regulation 2(2). With a few exceptions, a money service business is a business which operates a bureau de change, transmits money, or cashes cheques made payable to customers. Solicitors operating their client or office account would not usually be a money service business. Money service operators are not regulated by the FSA unless they carry on FSA regulated activities but were made subject to a Customs & Excise registration regime under the 2001 Regulations, and now under the ML Regulations 2003.

One-off transactions

3.44 Evidence of identity is not required if the transaction involves less than 15,000 Euro, or if two or more linked transactions involve less than 15,000 Euro in total. This exception does not apply if there is any suspicion of money laundering.

3.45 Under Regulation 5(3), evidence of identity is not required where a solicitor carries out a one-off transaction with or for a client pursuant to an introduction from a person who has provided a written assurance that evidence of identity of all third parties introduced by him/her will have been obtained and recorded under procedures maintained by him or her and:

(1) the introducer identifies the client; and

(2) you have reasonable grounds for believing that the introducer falls into any of the categories listed in paragraph 3.42.

3.46 This exception only applies to a limited range of introducers, mainly in the banking sector, and does not, for example, cover introductions from lawyers or accountants, whether in the EEA or elsewhere. If you wish to rely on this exception, you need to

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[3] See Annex 17 for current EEA countries (website address: http://europa.eu.int/comm/external_relations/eea/)

be satisfied that the introducer falls within the exception and has carried out the relevant identification procedures. Firms may wish to request a copy of the evidence obtained by the introducer and are recommended to keep a record of how identity was verified by the introducer. The specimen certificate suggested for use by the JMLSG in these circumstances appears at Annex 11.

3.47 Solicitors wishing to take advantage of this exception need to be aware that the introducer may view the proposed transaction from a different standpoint, reflecting a different relationship with the client and, in some cases, differences in the laws and regulations to which the parties are subject. Solicitors need to consider their own position and ensure that their obligations under the ML Regulations 2003 (which may sometimes differ from those of the introducer) are met.

Proceeds used for another transaction

3.48 Evidence of identity is not required when the proceeds of a one-off transaction are payable to the client but are instead directly reinvested on his behalf in another transaction of which a record is kept, provided that the new transaction can result **only** in another reinvestment on the client's behalf or in a payment direct to the client. Treasury advice is that this exception is intended to apply to pensions payments, and care should be taken not to interpret this exception widely.

Transitional provisions for existing clients

3.49 Firms which carry on relevant business falling within sub-paragraphs (a) to (e) of Regulation 2(2) do not have to verify the identity of clients with whom they had formed a business relationship before 1st April 1994. This transitional provision is likely to apply only to firms which were subject to the 1993 Regulations.

3.50 Firms which carry out relevant business falling within any of sub-paragraphs (f) to (n) of Regulation 2(2) do not have to verify the identity of clients where a business relationship was formed before 1 March 2004.

Record-keeping procedures – Regulation 6

What sort of records must be kept?

3.51 A firm's procedures must require the retention of the following records:

(a) a copy of the evidence of identity obtained, or information as to where a copy of that evidence may be obtained, or where neither of these are reasonably

practicable, information enabling the evidence of identity to be re-obtained; and

(b) details of each transaction carried out in the course of relevant business.

For how long?

3.52 **Records of identity** must be kept for at least five years:

- where a business relationship has been formed, from the date on which the relationship ends. (See paragraph 3.33 above for the definition of "business relationship");

- In the case of a one-off transaction (or a series of such transactions), from the date of completion of all activities taking place in the course of that transaction (or, as the case may be, the last of the transactions). (See paragraphs 3.33 – 3.39 on one-off and linked transactions.)

3.53 **Details of each transaction** must be kept for at least 5 years commencing with the date on which all activities taking place in the course of the transaction were completed. In most cases, keeping a copy of the client file and the accounting records for this period should satisfy this requirement.

Where?

3.54 As mentioned above, evidence of identity in cases where there is a business relationship must be kept for 5 years after the end of that relationship. For many clients (including trusts and businesses) this may mean that evidence of identity has to be kept beyond the normal retention periods operated by firms in relation to client files. For this reason, and because some client relationships which start off as a one-off transaction may develop into a business relationship, firms may consider separating their records of identity from their client files and keeping these in separate "client identity" files.

3.55 Firms might consider keeping central records of evidence of identity as a precaution against the inadvertent early destruction of files. Keeping a central record could also make it easier for staff to check the evidence obtained.

Nominated officers and reporting procedures – Regulation 7

3.56 A firm's internal reporting procedures must require:

(a) the nomination of a person (the "nominated officer") to receive reports of money laundering

(b) that anyone in the firm handling relevant business makes an internal report to the nominated officer if he or she knows or suspects, or has reasonable grounds for knowing or suspecting, that a person is engaged in money laundering;

(c) that the nominated officer considers any internal report in the light of any relevant information available to the firm, and determines whether that information gives rise to such a knowledge or suspicion, or reasonable grounds for so knowing or suspecting; and

(d) that the nominated officer makes an external report to a person authorised by the Director General of NCIS if he or she does so determine.

3.57 In practice, most external reports will be made to NCIS.

3.58 A **sole practitioner** who does not employ or act in association with anyone else does not have to maintain internal reporting procedures under Regulation 7, nor appoint a nominated officer. However, other parts of the ML Regulations 2003 and the money laundering criminal law still applies and the sole practitioner must report to NCIS if he or she knows or suspects money laundering, or has reasonable grounds for suspicion (see chapter 2).

Position of the nominated officer

3.59 The nominated officer should be of sufficient seniority and in a position of sufficient responsibility to enable him or her to have access to all of the firm's client files and business information. Firms authorised by the Financial Services Authority will need to obtain its approval to the appointment of the nominated officer as this is a controlled function under the FSA's rules.

3.60 The ML Regulations 2003 place the responsibility for making an internal report on **any person** who knows or suspects that the client is involved in money laundering. If in doubt, that person may first wish to consult the supervising partner about the circumstances and whether privilege applies.

3.61 The nominated officer is responsible for ensuring that, when appropriate, the information or other matter leading to a knowledge or suspicion, or reasonable grounds for knowledge or suspicion, of money laundering is properly disclosed to the relevant authority. The decision to report (or not to report) must not be subject to the consent of anyone else. The nominated officer will also liaise with NCIS on the issue of whether to proceed with a transaction.

3.62 The size and nature of some firms may lead to the nominated officer delegating certain duties, whilst retaining overall responsibility for compliance with the obligations of the nominated officer under the ML Regulations 2003 and the Proceeds of Crime Act 2002. In some large firms, one or more permanent deputy officers of suitable seniority may be appointed. All firms will need to consider arrangements for temporary cover when the nominated officer is absent.

3.63 In addition to any penalties for breach of the ML Regulations 2003, the nominated officer will commit an offence under section 331 of The Proceeds of Crime Act 2002 if he or she knows or suspects money laundering, or has reasonable grounds for knowing or suspecting, on the basis of information or other matters which have come to him or her as a result of an internal disclosure and fails to report this to NCIS as soon as is practicable. The only defence available is that the nominated officer has a “reasonable excuse” for the non-disclosure.

3.64 Although there is no specific requirement to do so, in each case where an internal report is made, the nominated officer may consider it prudent to record the names of the person(s) making each internal report, the information or other matter leading to the making of an internal report, and any other information taken into consideration in making his/her determination, the action taken and the reasons for reporting, or not reporting, to NCIS.

3.65 When determining whether or not the information or other matter disclosed to him or her gives rise to a suspicion or knowledge of money laundering, the nominated officer must consider the disclosure in the light of all relevant information available within the firm.

PART 2 – HOW CAN IDENTITY BE ESTABLISHED?

General principles

3.66 Solicitors must be satisfied that they are dealing with a real person or organisation (natural, corporate or legal), and obtain satisfactory evidence of identity to establish that the client is that person or organisation. For the purpose of the ML Regulations 2003, "satisfactory evidence of identity" is evidence which is reasonably capable of establishing (and does in fact establish to the satisfaction of the person obtaining it) that the client is the person he or she claims to be.

3.67 Some firms may wish to produce standard forms for use by their staff in relation to evidence of identity.

3.68 In deciding what evidence is satisfactory, and how much evidence is required, a common sense approach should be applied. There will be circumstances when it will be both necessary and permissible to apply commercial judgement to the extent of the initial identification requirements. Decisions will need to be taken on the number of persons to be identified within the client organisation, the identification evidence required, and whether additional evidence is necessary.

3.69 The first step in the identification process is to think about exactly who your client is. In some cases it will be immediately obvious but in others it may be necessary to consider the position and, on occasion, to discuss and agree this with the client(s). For example, if you are acting for one of a group of companies, exactly which company or companies will you be acting for? If another professional firm or a bank asks you for advice, are you acting for them or for their underlying client? If acting on a domestic house purchase, are you acting for one individual or for both partners within a relationship? You must obtain satisfactory evidence of identity in relation to all persons for whom you intend to act. In the case of joint instructions from two or more clients, the identity of all the clients must be checked (but see paragraph 3.120 below in relation to partnerships).

3.70 You must also consider whether your client is instructing you as principal or agent. Where the client is or appears to act for another person then, in addition to obtaining evidence of identity in relation to the client, under Regulation 4(3)(d), you must also take reasonable measures to establish the identity of any principal for whom that client is acting, and under Regulation 6 you must maintain records in relation to that evidence. This obligation to take reasonable measures is rather less than the

obligation to obtain satisfactory evidence in relation to the client, but it must still be complied with.

3.71 You may make checks by looking at actual documentary evidence such as passports and certificates of incorporation issued by Companies House, or by making electronic checks of suitable databases such as the FSA register, the Law Society database of practising solicitors, and the electoral register. Where you rely on an electronic check it may be advisable to print out and retain a copy of the evidence with your records. (See Annex 16 for details of services offered on the internet)

3.72 You may also ask third parties, such as investigation and information service providers, and credit reference agencies, to obtain the evidence for you as long as you are reasonably satisfied that they are reputable, and that the evidence they produce will be reliable, and that you ensure that your records of the evidence are complete. For example, you may rely on a copy of the details page of a passport as part of the evidence of identity if it has been certified by a reputable lawyer (for details as to who may photocopy UK passports see paragraphs 3.79 – 3.80).

3.73 When using a combination of electronic and documentary checks, you must ensure that different original sources of information are used. For example, a physical check of a mortgage statement and an electronic check of the same mortgage account come from the same source, so one does not corroborate the other.

3.74 Some clients may object to providing evidence of identity. It may be helpful to explain the reason for requiring evidence of identity in the initial interview or client care letter. More people in the UK are now used to being asked for evidence of identity by their bank or building society, so it will be increasingly rare to find a client who objects to such a request from a solicitor. If a client is unwilling to provide evidence it will be for the solicitor to assess whether this in itself is a cause for concern.

Copying and certifying original identification documents

3.75 As already mentioned, usually you should keep a printed or other copy of any evidence of identification obtained as you may be required to produce the evidence in the future. It may be helpful to make a note on the retained copy as to when the original document was seen and by whom. If reliance is being placed on copies provided by others these should be certified.

3.76 Such a copy may be made in several ways, including fax copying, photocopying, scanning, filming and reproduction in any other medium, including the placing of materials on the Internet.

3.77 Certified copies of original identification evidence should be made by checking the copy against the original and then signing and dating the copy as a true copy of the original. In the case of photographic evidence of an individual's identity the person certifying should confirm that the individual is the person shown in the photograph. When copying a passport or national identity card, only the personal details pages need to be copied and kept as evidence.

3.78 If the client cannot meet you to produce the original identification document, you should think carefully before asking the client to send valuable personal identity documents, such as passports, driving licences and identity cards by normal post because of the dangers of interception and fraud. These dangers can even exist with registered or other guaranteed postal services. The client should be warned of the dangers and given a choice as to another method. You should arrange an appointment when the client can produce the documents required or, if you are not able to meet the client, you should follow the guidance in paragraphs 3.90 to 3.94 below.

3.79 The HMSO guidance note no. 20 dated 5 December 2002 confirms that copies of the personal details page of a UK passport may be made for the purposes of record keeping by the following persons only:

(a) the holder of the passport

(b) notaries, solicitors, UK government departments and British consulates;

(c) financial institutions and other persons and firms who are subject to the ML Regulations 2003; and

(d) any person or firm for the purpose of certifying that identification checks have been made in accordance with the ML Regulations 2003.

3.80 The guidance says that copies must be in black and white only so that they cannot be mistaken for a real passport page. Copying for these purposes includes photocopying, scanning, filming, reproduction in any other medium, including placing material on the Internet. The original document is the evidence of identity. The photocopy of the original is used to record and certify that identification checks have been made. There is no need to apply for a licence or pay a fee to take such copies.

Individuals

3.81 In general, an individual's identity is made up of both full name and current address, including the postcode where available and in most cases you should obtain satisfactory evidence in relation to both name and address, and a combination of checks should be carried out. Where an EEA member state identity card is produced showing name, address, and with a photograph this may be accepted as satisfactory evidence without further corroboration. The previous address should be confirmed if the client has moved recently.

3.82 Where evidence of identity is required in relation to an individual, and that individual is known to a solicitor or qualified EEA or US lawyer who confirms in writing (a) that s/he has known the individual for over two years and (b) the individual's private or trading address, then no further evidence of identity is usually required, unless there are circumstances which increase risk.

3.83 Where you are reasonably satisfied that an individual is nationally or internationally known a record of identification can include a file note of your satisfaction about identity, usually including an address.

Individuals: documentary evidence of personal identity: UK residents

3.84 The following is a list of examples of suitable documentary evidence of name for UK resident private individuals. You should be satisfied that any documents offered are originals to guard against forged or counterfeit documents and that photographs, if any, provide a likeness to the client:

- current signed passport;
- EEA member state identity card (which can also be used as evidence of address if it gives this);
- cheque drawn on an account in the name of the client with a bank in the UK or EEA;
- residence permit issued by Home Office to EEA nationals on sight of own country passport;
- current UK or EEA photo-card driving licence;

- current full UK driving licence– old-style provisional driving licences should not be accepted;
- benefit book or original notification letter from the Benefits Agency confirming the right to benefits;
- photographic registration cards for self-employed individuals and partnerships in the construction industry C1S4 (the card does not contain an issue or expiry date and is renewed only if the individual's appearance changes dramatically);
- firearms or shotgun certificate;
- national identity card containing a photograph of the client; and
- an entry in a local or national telephone directory confirming name and address.

Documentary evidence of address

3.85 The following is a list of examples of suitable documentary evidence of address for UK resident private individuals. Do not use any of these documents if you have already used them as evidence of name:

- confirmation from an electoral register search that a person of that name lives at that address;
- a recent utility bill or statement, or a certificate from a utilities supplier confirming an arrangement to pay for services on pre-payment terms (do not accept mobile telephone bills which can be sent to different addresses);
- local council tax bill for current year;
- current full UK driving licence– old-style provisional driving licences should not be accepted;
- bank, building society or credit union statement or passbook containing current address;
- a recent original mortgage statement from a recognised lender;
- solicitor's letter confirming recent house purchase or land registry confirmation of address;

- local council or housing association rent card or tenancy agreement;
- benefit book or original notification letter from the Benefits Agency confirming the right to benefits;
- EEA member state identity card;
- Inland Revenue self-assessment statement or tax demand;
- house or motor insurance certificate;
- record of any home visit made; and
- an entry confirming name and address in a local or national telephone directory.

Individuals: persons not resident in the UK

3.86 If you meet the client, you should be able to see a passport or national identity card as evidence of name and, if it gives it, an address. You can take copies of the pages containing the relevant information (reference numbers, date and country of issue) in which case you should certify the copy examined against the original and the date of the examination, or record that information in your records as part of the identification evidence. You must be reasonably satisfied that the document is a genuine passport or national identity card, and if in doubt as to whether it is genuine you could ask advice from an embassy or consulate official for the country concerned.

3.87 Where a prospective client is a national of, or resident in, a country on the FATF list of non-co-operative countries and territories, solicitors should consider whether they need to carry out further checks to find out exactly who the client is and what his or her business is before accepting instructions.

3.88 In addition, separate evidence of the client's permanent residential address (or, for business clients, principal business address) should usually be obtained, preferably from a national identity card, an official source, a reputable directory or from a qualified lawyer who confirms that the client is known to him and that he lives or works at the address given. A post box number alone is not normally sufficient evidence of address (although there are some countries, such as Hong Kong and the Gulf States, where post box addresses are commonly used) and if you accept a box number as evidence of address you should satisfy yourself (personally or through an

agent*)* that the address can be physically located by way of a recorded description or other means.

3.89 Evidence of name and address could be obtained from a credit or financial institution in the client's home country or country of residence or through a reputable investigation and information service provider or credit reference agency. For professionals, evidence of name and practising address may be obtained from reputable professional directories.

Individuals: when you do not meet the client

3.90 There may be difficulties in verifying identity if the client is unable to visit your office (for example if he or she is disabled or lives at a distance from you or is overseas). In such cases you must satisfy yourself that your instructions have been given to you by the client or an authorised person on his or her behalf. A client who is unwilling to meet you without a good reason may be cause for concern (see chapter 6).

3.91 Where you are so satisfied, you should enquire whether it is possible for the client to produce the documentary evidence you require to someone else qualified and willing to take and certify copies on your behalf. This would enable you to obtain evidence from valuable documents such as his or her passport. For a person physically within the UK, copies of evidence should be certified, for example, by a UK solicitor, accountant, doctor or high street bank manager, whose name and address should be noted and checked by reference to a professional directory or, for solicitors, the Law Society database of practising solicitors. The person undertaking the certification must be capable of being contacted if necessary. The certified copies should be kept with your other records of identity.

3.92 For a person not resident within the UK, the copy of the passport, national identity card and documentary evidence of address can be certified by:

- an embassy, consulate or high commission of the country of issue;
- a qualified lawyer or notary; or
- in the case of international students, the registrar of a UK higher education institution.

3.93 Where reliance is placed on certification by a qualified lawyer or notary, you should verify that his or her name and practice address appear in a reputable professional directory, or that the professional is currently on record with the appropriate

professional body as practising at the address shown on the certificate or practice notepaper, and you should keep a note of this name and address with the evidence of identity.

3.94 Where it is not possible either to meet the client or for someone else to take and certify copies for you as set out above, you may not wish to ask the client to post valuable identity documents to you so, in practice, you may not see documents such as a passport, driving licence or identity card. You could, however, ask to see a combination of other less valuable documents which might satisfy you as to identity. You might also wish to make some electronic checks or arrange for evidence to be obtained though a reputable investigation and information service provider or credit reference agency. In all cases you must satisfy yourself that you have evidence which is reasonably capable of establishing (and does in fact establish to your satisfaction) that the client is the person he or she claims to be.

Disadvantaged clients

3.95 It is not the intention of the ML Regulations 2003 to exclude those who are already at a disadvantage from access to legal advice and financial services. Some disadvantaged clients may not be able to produce detailed evidence of identity (for example, they may not have a passport or driving licence and their name may not appear on utility bills). You might consider accepting as identification evidence a letter or statement from someone in a position of responsibility who knows the client (for example, a solicitor, doctor, minister of religion, teacher, hostel manager, social worker) which tends to show that the client is who he or she says he or she is and, if applicable, to confirm his or her permanent address.

3.96 Evidence of address might include:

- correspondence from a relevant government agency, including a benefits payment book or giro cheque;
- a tenancy agreement from a local housing association;
- a letter from the householder with whom the client is living who is named on a current council tax bill;
- a letter from the matron of a nursing or residential care home or the client's care worker;
- a letter from a hostel manager confirming temporary residence; or

- a letter from the Home Office confirming refugee status and granting permission to work, or a Home Office travel document for refugees.

Mentally incapacitated clients

3.97 Solicitors unsure as to whether a client is mentally incapacitated should refer to Principle 24.04 of the Guide to the Professional Conduct of Solicitors 1999.

3.98 Where solicitors are unable to comply with normal identification requirements because of their clients' mental health problems medical workers, hostel staff, social workers, or Receivers or Guardians appointed by a court, may assist with locating and producing identification documents. It is recognised that confirming the identity of clients whose personal affairs are in some disarray can be difficult, and so solicitors must exercise extra flexibility in the ways identification checks are done, e.g. in some circumstances oral confirmation of identity from a person who knows the client well may suffice.

Asylum seekers

3.99 An applicant's registration card could be used in conjunction with other evidence. The details in the card should, wherever possible, be verified by a passport, identity card or birth certificate. Please note that the registration card does not contain a signature as the Home Office relies on a biometric check (fingerprint held on microchip) to confirm identity.

3.100 Evidence of address can be obtained in the way suggested for disadvantaged clients.

Students and minors

3.101 The normal identification procedures should be used but if they do not provide satisfactory evidence, verification could be obtained in the following ways:

- through the home address of the parents;
- once the student is in residence, confirmation of the UK address from the registrar of the client's higher education institution;
- looking at a tenancy agreement or student accommodation contract; or

- confirmation of a temporary address and documentary evidence from the householder with whom the student is living (for example, by seeing the council tax bill in the householder's name).

3.102 If instructions are given by a family member or guardian, you should check the identity of that adult as well as the minor.

Estates

3.103 When acting for an estate, the firm's client will be the executor(s) or administrator(s) of that estate. Their identities will need to be established using the procedures for individuals or companies set out in this chapter. When acting for more than one executor or administrator it will normally be necessary to establish the identity of at least two. In addition to the will, solicitors should obtain copies of the grant of probate or letters of administration, and in the case of an existing executorship or administration obtain a copy of the death certificate. If a will trust is created, and the trustees are different from the executors the procedures in relation to trusts (see below) need to be followed in relation to the trustees when the will trust comes into operation.

Trusts

3.104 Trusts do not, of course, have separate legal personality. There are many different types of trust. Firms are advised to adopt a risk based approach in determining what evidence should be obtained and the nature of the evidence that is appropriate, recognising that trusts are popular vehicles for money launderers. The classic long established family settlement may raise different issues to an offshore discretionary trust.

3.105 When acting for trusts, the firm's client will be the trustees whose position can be checked by referring to the document establishing the trust (and, if appropriate, documents dealing with the appointment of the current trustees). Their identities need to be established using procedures for individuals or companies summarised elsewhere in this Guidance. When acting for more than one trustee it will be necessary to establish the identity of at least two individual trustees. Whether all the trustees, and/or the identity of any living settlor should also be established will depend on your assessment of the risk which will itself depend on your knowledge of the nature, purpose and original source of the funding for the trust. When acting for trustees who are based in offshore jurisdictions with strict bank secrecy and confidentiality rules or in jurisdictions without equivalent money laundering

procedures, you may need to make fuller enquiries of the trustees to obtain details (for example, full name and business or home address) of the settlor.

3.106 When acting for the settlor to form the trust, it will be necessary to establish his or her identity using procedures already mentioned.

3.107 Except where the firm is acting for beneficiaries, there is no need to establish the identity of beneficiaries for the purpose of the ML Regulations 2003, although it would be normal practice for a firm of solicitors to check the identity of beneficiaries before making any distribution.

Employee and Pension Trusts

3.108 Such trusts would normally be low risk. Where the client is the sponsoring employer or settlor of a pensions trust or employee benefits trust, only the identity of that sponsoring employer or the settlor need be verified. Where the client is the trustee(s)

of a tax approved pension scheme trust, identification of the sponsoring employer would normally be sufficient.

CORPORATE CLIENTS

3.109 Company structures are attractive to money launderers and firms should take a risk based approach in determining what evidence should be obtained, and the nature of the evidence that is appropriate. Dealing with a listed company presents a different risk to a private company. The following paragraphs set out minimum requirements, and firms may need to seek further evidence in higher risk situations.

Companies listed on the London Stock Exchange or a UK recognised investment exchange

3.110 Where a company is:

- listed on the London Stock Exchange or another recognised UK investment exchange ; or
- a member of a UK recognised investment exchange; or
- the subsidiary of such a company;

no further evidence is required of identity beyond evidence of listing (such as a copy of the relevant dated page from the Financial Times or the London Stock Exchange's list of companies (which can be found at www.londonstockexchange.com) and, for subsidiaries, a copy of the latest annual return or comparable evidence such as an extract from a reputable online information provider showing the parent/subsidiary relationship.

Corporates listed or traded on any other recognised, designated or approved exchange.

3.111 A list of these exchanges is published by the FSA (www.FSA.gov.uk stock exchanges) and the JMLSG website: www.jmlsg.org.uk also sets out a list. Where a company or corporation is listed or traded on a recognised, designated or approved exchange, or is one whose shares or securities are traded there, or is a subsidiary of such an entity, no further evidence is required of identity beyond evidence of such listing or trading and, for subsidiaries, a copy of the latest annual return or comparable evidence such as an extract from a reputable online information provider showing the parent/subsidiary relationship.

Banks, investment firms and insurance companies carrying on relevant business in the UK or subsidiaries of such entities (see Regulation 2(2) for the definition of relevant business).

3.112 In such cases you may obtain satisfactory evidence of identity by taking a copy of the relevant dated page from the on-line FSA register (www.fsa.gov.uk) showing that the bank, investment firm or company is authorised by the FSA to carry on relevant business, and for subsidiaries, a copy of the latest annual return or comparable evidence such as an extract from a reputable online information provider showing the parent/subsidiary relationship

Banks, investment firms and insurance companies regulated in another EU or FATF member country, or for subsidiaries of such entities

3.113 In such cases you may obtain satisfactory evidence of identity by checking the regulated status of the prospective client with the relevant regulatory or supervisory authority, for example, by taking a copy of the relevant page from the regulator's website, and, for subsidiaries, a copy of the latest annual return or comparable evidence such as an extract from a reputable online information provider showing the parent/subsidiary relationship

Other corporate clients: general

3.114 For UK companies not within paragraphs 3.109 to 3.111 above, and where reasonably practicable for overseas corporations not within those paragraphs, evidence of identity should be obtained as set out below.

UK companies

3.115 Evidence of identity will be required in relation to the company itself, usually comprising:

- a copy of the certificate of incorporation
- a list of directors
- a list of shareholders
- the registered address

which can be obtained from an official, or recognised independent source including an extract from a reputable online information provider

3.116 In addition, where it is reasonably practicable, you should obtain evidence of identity in relation to one of its directors or shareholders, one of whom should usually be the person instructing you or alternatively appears to you, on the face of it, to be active in the management or control of the company. Note that lists of Directors and Shareholders should contain details of home addresses for the relevant individuals and so provide the documentary evidence of address (see paragraph 3.85). Where it is not reasonably practicable to obtain such additional identification evidence you might consider establishing a list of any shareholders holding 20% or more of the shares in the company or, if there are none, the principal owners. It may be necessary for further checks to be made about beneficial ownership if the initial information obtained is of the identity of mere nominees. By way of exception where the company is a well established household name there is no need to obtain the additional identification referred to in this subparagraph;

Overseas corporations (unlisted)

3.117 Evidence of identity will be required in relation to the company itself. Where it is obtainable in the relevant country this will usually include the certificate of incorporation, but can also include the lists referred to above in relation to UK companies. In countries where there is no certificate of incorporation, or equivalent,

other evidence that reasonably satisfies you that the corporation is in existence should be obtained (for example a copy of the most recent audited accounts).

3.118 You may use an extract from a reputable online information provider, or the services of a reputable directory or information search agency. In addition, where it is reasonably practicable, you should obtain evidence of identity in relation to one of its directors or shareholders, one of whom should usually be the person instructing you or alternatively appears to you, on the face of it, to be active in the management or control of the company. Where it is not reasonably practicable to obtain such additional identification evidence you might consider establishing a list of any shareholders holding 20% or more of the shares in the company or, if there are none, the principal owners.

Subsidiaries [and sister companies] whether in the UK or elsewhere

3.119 Where the new client is a subsidiary of an existing client, in respect of whom an identification check has been carried out recently, evidence of the subsidiary or other relationship will be required and may be sufficient, provided that the record of the identification of the existing client is kept for the correct time period in relation not only for that existing client but also for the new client.

Partnerships, limited partnerships and Limited Liability Partnerships

3.120 For partnerships and limited partnerships you should obtain evidence of identity in respect of the partner who is instructing you and one other partner together with satisfactory evidence of the trading address (possibly obtained from a directory or similar). UK LLPs should obtain evidence in line with the requirements for other corporate clients set out above.

3.121 If preferred, where you are instructed on behalf of a partnership, limited partnership or a LLP formed under the Limited Liability Partnerships Act 2000, of lawyers, chartered or certified accountants or chartered surveyors, satisfactory evidence of identity may be obtained in the form of (a) confirmation of the firm's existence from a reputable directory or information or search agency or from the appropriate professional body (for example a copy of the relevant page from the Law Society's on-line directory of solicitors) and (b) confirmation of the firm's trading address, such as a copy of the relevant page from a reputable directory (such as Chambers, The Legal 500 or Martindale Hubble). For these professional partnerships it is not usually necessary to obtain evidence in relation to individual partners or members of the limited partnership or LLP.