

Anti-money laundering guidance for solicitors undertaking property work

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Introduction

1. Solicitors conducting conveyancing are at risk of money laundering because property transactions can involve any stage of the money laundering process, see paragraph 1.13 of the Guidance. As the property itself can be “criminal property” for the purposes of POCA, solicitors can still be involved in money laundering even if no money changes hands, see paragraph 3 below.

2. Conveyancing transactions can be attractive to money launderers who are trying to disguise the audit trail of the proceeds of their crimes. However, a criminal may also want to buy a property simply to live in themselves. This would also involve an offence or offences of money laundering under the wide definition in section 340(11) of POCA. Solicitors who defend clients charged with criminal offences should be particularly alert to the danger of money laundering if their firms also undertake property work.

3. Solicitors should also be aware that information about tax evasion or welfare benefit fraud may come to light in conveyancing matters. The notional proceeds of tax evasion, that is an amount of money equal to the saving in tax, are “criminal property” under section 340(3) and (6). Although the law on notional criminal property is unclear and it is uncertain how such property can be identified, solicitors are advised to act cautiously and treat assets, including bank balances, acquired in whole or in part after the date of any obtaining of a pecuniary advantage by tax evasion, as being or including criminal property. Depending on the date when notional property is obtained through tax evasion, real property may be regarded as “criminal property” either at the time of the purchase or later if mortgage payments in respect of that property are made from a bank account that should be treated as itself being or including criminal property. Any subsequent sale of the property for the “suspected party” would amount to money laundering. In such cases, the client may not even realise that their conveyancing instructions amount to money laundering. Solicitors should remain alert to situations of this kind and should speak to their client and, if appropriate, should make a money laundering report, see paragraph 31 onwards below.

4. Conveyancers should be alert to instructions which are a deliberate attempt to avoid assets being dealt with in the way intended by a court, or through the usual legal process, for example solicitors may sometimes suspect that instructions are

being given to avoid the property forming part of a bankruptcy, or forming part of assets subject to confiscation. Although money laundering reports may not necessarily arise, in such circumstances solicitors should consider their duties in conduct, in particular Principle 12.02 which prevents solicitors acting if instructions would involve the solicitor in a breach of the law or a breach of the principles of professional conduct.

5. The case of *Bowman v Fels* (2005) EWCA Civ 226 has drastically altered how conveyancers should deal with knowledge or suspicion of money laundering which they form in the course of their work, especially how they should balance their duties to inform clients with the reporting obligations under POCA. This has in turn affected solicitors' duties to their Lender clients. This recent change centres upon the increased importance of legal professional privilege, and an increased reliance on the defence to the tipping off offences which applies to professional legal advisers.

Money Laundering Regulations 2003

6. Conveyancing, and indeed any legal work connected to "real property", is "relevant business" for the purposes of the ML Regulations (2003) ("the Regulations"). The Regulations require the appointment of a Nominated Officer (Money Laundering Reporting Officer, MLRO), training of relevant employees, record-keeping, and client identification, see paragraph 3.16 of the Guidance. Chapter 3 of the Guidance provides guidance on methods of compliance with the Regulations, including how to identify clients who solicitors don't meet in person, see paragraphs 3.91-3.94 and paragraph 15 below.

Note:

The Regulations came into force for solicitors on 1 March 2004. If a solicitor formed a "business relationship" with a client before that date there will not usually be a need to identify the client, however solicitors are advised to exercise caution and check clients' identity if they have not undertaken any work for the client for some time.

7. Identification checks should be undertaken "as soon as reasonably practicable" after contact is first made between solicitors and their clients, see paragraph 3.29 of the Guidance. Given the money laundering risk posed by conveyancing, and the speed of some transactions, it may be preferable to make the necessary checks prior to starting work, and usually before accepting any money. In most cases the person or entity who needs to be identified will be the solicitors own client, but in some circumstances solicitors will consider Regulation 4(3)(d) and identify parties providing funding, see note to paragraph 18 below and Money Laundering Regulations 4 and 5.

Note:

Solicitors may be asked by others subject to the Regulations and involved in the transaction, to confirm they have undertaken identity checks, e.g. house building companies acting as Estate Agents regularly ask solicitors acting for purchasers to provide such confirmation. Solicitors are advised to ensure that if they provide information they do not accept liability for the compliance with the Regulations by others.

8. Commonly solicitors who undertake conveyancing also act for a Lender. However, the Lender client will usually not need to be identified if the exception from the identification requirement in Regulation 5(2) applies, see paragraph 3.42 of the Guidance and Money Laundering Regulations 4 and 5.

Note:

In some circumstances, solicitors' conducting fixed fee conveyancing may not fall within the definition of "business relationship" in the Regulation 2(2) because the total amount of any payments may be capable of being ascertained at the outset, see paragraph 3.33 of the Guidance. However, even if fixed fee conveyancing is defined as "one off", the client identification requirement will still apply unless the transaction involves less than approximately 15,000 Euro in total, see paragraph 3.44 of the Guidance.

9. In addition to the identification checks required under Regulation 4, Regulation 3 requires "systems" to prevent money laundering. For conveyancers compliance with this Regulation is likely to be achieved if the solicitor is reasonably comfortable about what they are being asked to do by the client and why. Some firms will choose to ask all clients for some basic information before accepting instructions, but this is not an absolute requirement and other firms will take a different approach. The important point is that higher risk transactions are identified and acted upon. Usually the most effective way of ensuring this is a sufficient level of training and awareness amongst staff, ongoing supervision by the MLRO, and detailed record-keeping about additional questions posed and responses received in particular cases.

10. Chapter 6 of the Guidance encourages solicitors to take a risk based approach which should avoid solicitors' wasting resources on low risk matters and allow greater focus of resources on higher risk transactions. Higher risk work may require broader checks to be made beyond basic identification, the extent of which will depend upon the level of risk. However, conveyancing instructions automatically include obtaining significant information about both the client and the proposed transaction, especially if instructions are also received from a Lender. For example, a solicitor conducting conveyancing is already likely to know about their client's occupation, especially if they also act for the Lender. This information will help the solicitor judge whether the amount of private funding available to the client makes

sense, or whether they need to ask more questions. All information which is already available should be considered before other enquiries are made, especially as this will avoid repetition and enable the solicitor to determine what additional questions to ask. If additional enquiries are to be made it is usually helpful to consider whether there are any reasons for concern about the provenance of funds used either in the original purchase of a property about to be sold, and/or to be used in a current property purchase, i.e. is there any reason to know or suspect that those funds could constitute “criminal property”.

11. Solicitors should consider whether it is preferable to collect in all of the money needed for the purchase before exchange of contracts takes place to avoid unexpected matters arising at a later stage when they can be much more difficult to deal with. This method is likely to be of most use if a solicitor is uncertain about the information they have been given by a client including what the client has said about where the monies are coming from.

12. Solicitors acting for purchasers will usually make sufficient checks about their client, and transfer the funds to the seller’s solicitors. In effect, the purchaser’s solicitors act as a filter, which gives the seller’s solicitor additional comfort. For this reason solicitors acting for sellers should try and avoid accepting money direct from the purchaser if possible, although in some instances this will be unavoidable, e.g. if the purchaser is unrepresented.

Warning signs

13. Both sales and purchases of domestic, commercial, and agricultural property can have money laundering implications under POCA, and so solicitors conducting such transactions need to remain alert. Solicitors should take care not to be deterred from making the necessary checks because instructions are given urgently as this may be a tactic designed to draw the focus away from making the necessary checks.

14. Attention should also be paid to the Law Society’s green warning card, Property Fraud II (see Annex 15 of the Guidance), the blue warning card (see Annex 5 of the Guidance) , and paragraphs 6.14 – 6.34 of the Guidance. The additional comments below may also be of assistance to conveyancers specifically.

15. Many conveyancers receive instructions from clients whom they never meet and who may live and/or work a considerable distance away from their solicitor, perhaps because the client is introduced by an intermediary or because of online conveyancing. The anti money laundering requirements are not intended to restrict the development of innovative business practices. However, where solicitors do not meet their clients, they should consider how they check their client’s identity and minimise any increased risk of money laundering. If an intermediary is involved they

may be able to provide information which could allay concerns. Regulation 4(3)(b) also refers to the need to take into account the greater potential for money laundering which arises when the client is not physically present when being identified.

Ownership issues

16. In the absence of any logical explanation properties owned by nominee companies, multiple owners may be used as sophisticated money laundering vehicles designed to disguise the true owner and / or confuse the audit trail. Solicitors also need to be alert to quick or unexplained changes in ownership.

17. For example, a solicitor may know or suspect that a third party is providing the funding for a purchase, but that the property is being registered in somebody else's name. There may be legitimate reasons for this, such as a family arrangement, but it is important that solicitors are alert to the possibility that they are being misled about the true ownership and consider Regulation 4(3) (d).

Methods of funding

18. Many properties are bought with a combination of deposit, mortgage, and/or equity from a current property. Usually solicitors will have information about how their clients intend to fund the transaction, and will expect to be updated if those details change, e.g. if a mortgage offer falls through and new funding is obtained. Obtaining this information will help firms with their risk assessment, and decision whether they need to know more. As well as assisting with anti-money laundering procedures, this information may prevent difficulties linking payments received into client account with particular clients.

Note:

Third parties often assist others with purchases, e.g. relatives of a first time buyer. Solicitors may be asked to receive funds direct from those third parties. Whether, and to what extent, any checks need to be undertaken in relation to the third parties will be a matter of judgement for the solicitor dependant upon the level of risk and whether there are suspicions that in fact the client is not the true owner, Regulation 4(3)(d). Relevant risk factors may be what is known about the actual client and/or the third party - including the relationship between them, the proportion of the funding being provided by the third party, and whether any warning signs are apparent. In some circumstances identification checks of the third parties, and / or information about provenance of funds they are providing, should be obtained. Solicitors should also consider their obligations to Lenders in these circumstances as there is generally a requirement to advise Lenders if the purchasers are not funding the balance of the price from their own resources.

Cash payments

19. Most commonly purchase funds are made up of some private funding, with the majority of the purchase price being provided by way of a mortgage. Transactions are likely to be a higher risk if they do not involve mortgages. However, concerns over such transactions may be allayed by the solicitor simply asking the client for an explanation, and assessing whether in their view the explanation is valid, e.g. money received from an inheritance, or from the sale of another property. In such higher risk situations it may be prudent for the solicitor to ask some questions about the provenance of the private funding. "Provenance" is not limited to the whereabouts of the monies, but goes beyond that to how the client has come by the money. However, solicitors are not required to become detectives, but to prevent money laundering.

20. Payments made through the mainstream banking system are not guaranteed to be of clean "provenance", although the fact that a client has successfully opened and maintained an account with a mainstream financial institution may be one of the factors solicitors take into consideration in their risk assessment. If payments may be made from an individual's personal funds, or collected from a number of individuals or other sources, solicitors should consider whether they would feel more comfortable proceeding only after asking some questions about where the money has come from and also consider Regulation 4(3) (d). For example, large amounts of money provided by clients who only have relatively low incomes may be a cause to ask more questions. It is good practice to make a file note both of the questions posed and the responses received. However, if there are concerns about money laundering the circulation of these notes will need to be carefully managed, e.g. not provided to clients if they ask for their files.

21. Large payments made in actual cash can also give rise to money laundering suspicions. Firms can avoid this difficulty by having a clear office policy on not accepting cash at the office or direct into their bank account, see paragraph 6.2 of the Guidance. However, clients may attempt to circumvent such a policy, and avoid paying a bank fee, by depositing cash direct into the solicitor's client account at a branch of the solicitor's bank. If possible solicitors should try and avoid this by controlling the manner and circumstance of the disclosure of their client account details, and when doing so making it clear that an electronic method of transfer of the funds is expected. Having said that, it is accepted that account details are readily available on client account cheques. Solicitors may also wish to arrange with their bank that such cash deposits should never be accepted by the bank. Ultimately if a cash deposit is received solicitors will have to consider what they know about their clients and the overall circumstances to assess whether or not they are suspicious of money laundering.

22. Solicitors may form knowledge or suspicion that, cash has changed hands directly, between a seller and purchaser, e.g. where money has changed hands at a rural auction. If a solicitor is openly informed about this payment, they may be

requested to bank the cash payment into their client account. This places the solicitor in a difficult position as the source of the cash is not their own client, which can make checking more difficult. The auction house may be able to assist because of checks they must make themselves under the Regulations, but ultimately the solicitor may feel more comfortable not banking the cash into their account and would prefer their client to do so. Again, this is where a firm's cash policy can be helpful. If the solicitor is not openly informed but forms knowledge or suspicion that there has been a direct payment between a seller and purchaser's solicitors, the solicitor will need to consider whether there is any reason for concern, or whether the documentation will include the true purchase price, so that there are no concerns about tax evasion, see paragraph 30 below.

23. On the other hand solicitors may feel that, although their instructions are that money has changed hands directly, in fact it has not done so. The motivation for such a misrepresentation could be to encourage a mortgage Lender to lend more than they would ordinarily do so, because they are under the impression that private funds will also be put into the purchase when in fact this is not the case. Solicitors in this situation who act for the Lender need to consider their duties to their Lender, see paragraph 24 onwards below.

Lender issues

24. Solicitors may form knowledge or suspicion that a lay client is attempting to mislead a Lender client to improperly inflate a mortgage advance, e.g. misrepresentations about the potential borrower's income, or that a seller and purchaser are conspiring to overstate a sale price, see paragraph 25 below. Transactions which are not "arms length" may warrant particularly close consideration, see paragraph 4 above. However, until the improperly obtained mortgage advance is received there will not be any "criminal property" for the purposes of reporting obligations under POCA.

25. Where a solicitor acting for purchaser suspects that their client maybe making a misrepresentation to a mortgage they must either dissuade their client from doing so, or terminate their retainer. Even if the solicitor no longer acts in these circumstances they may still be under a duty to advise the mortgage company (see footnote).

26. If knowledge or suspicion is formed that a mortgage advance has already been improperly obtained a solicitor may advise the mortgage Lender that they were misled. In fact if a solicitor is acting in a remortgage and forms knowledge or suspicion about a previous mortgage there may be a duty to advise the Lender, especially if the remortgage is with the same Lender. It may also be necessary to consider reporting to NCIS as there is "criminal property", namely the improperly obtained mortgage advance. If the client has purposefully decided to make a misrepresentation on their mortgage application it is likely that the crime/fraud

exception to legal professional privilege would apply, meaning that no waiver to confidentiality will be needed before a report is made, but solicitors will need to consider matters on a case by case basis, and if necessary seek guidance from Professional Ethics or take independent legal advice.

27. Naturally solicitors will be concerned about whether speaking to their lender client conflicts with the tipping off offences. A key element of these offences is likelihood of prejudicing an investigation, and this may be a small risk when making disclosures to reputable Lenders. Also if the Lender is the solicitor's client the exception in s.333(3)(a) and s.342(4)(a) may apply, relating to professional legal advisers giving advice to their clients, see paragraph 2.61 of the Guidance, and the guidance about the case of *Bowman v Fels*.

Unusual instructions

28. It may be important to know why instructions have been received. Asking for that information may help deter potential money launderers.

29. Transactions which abort without good apparent cause and/or which lead a solicitor to be unexpectedly asked to transfer funds back to their source, may be suspicious. Firms may wish to have a policy on only sending money back to clients, or to the original source. Such a policy also avoid a breach of Rule 15 of the Solicitors' Accounts Rules (note (ix)), see paragraph 6.24 of the Guidance and Money Laundering Regulations 4 and 5.

Tax issues

30. Tax evasion of any type, by whatever means, whether committed by a client or the other party to a transaction, can lead to a solicitor committing a section 328 arrangements offence, see paragraph 2.17 of the Guidance. Abuse of the new Stamp Duty Land Tax procedure may also give rise to money laundering implications, e.g. through misleading apportionment of the purchase price. If a client gives a solicitor instructions which offend the Stamp Duty Land Tax procedure the solicitor must consider their position under Principle 12.02. If a solicitor discovers the evasion after it has occurred they may have a reporting obligation, see paragraph 31 onwards below.

Reporting issues

31. If a solicitor continues to act in a conveyancing matter which has a money laundering element, this may amount to the commission of a section 328 arrangements offence, see paragraph 2.17 of the Guidance. However a defence is

available if a report is made and “appropriate consent” obtained, see paragraph 2.23 of the Guidance.

32. The recent case of *Bowman v Fels* has drastically altered how conveyancers should approach this area and careful attention should be paid to the full Law Society guidance about the implications of this case. Essentially, if a conveyancer forms knowledge or suspicion of money laundering he should first consider whether the information on which that knowledge or suspicion is based was received in legally privileged circumstances; if it was, he cannot make a report to NCIS without the client’s authority. In *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48 at 111 common law privilege was described as covering “ all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice,,, notwithstanding that they do not contain advice on matters of law and construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client.” Communications to which the crime/fraud exception applies will not be covered by legal professional privilege and conveyancers must be particularly careful in this regard see paragraphs 5.11 and 5.12 of the *Bowman v Fels* guidance.

33. Section 6 of the *Bowman v Fels* guidance covers the exception to the tipping off offences for professional legal advisers. Solicitors who cannot make reports because of legal professional privilege need to consider whether they would prefer not to act, or use this exception to speak to clients about reporting. Weighing up the options can be very difficult, and will need to be approached by MLROs on a case by case basis, although Professional Ethics can help. (The Professional Ethics helpline telephone number is 0870 606 2577.)

34. Solicitors conducting conveyancing transaction often feel they could benefit from speaking to the solicitor acting for the other side in a transaction. The exceptions to the tipping off offences applies to communications with clients, which may either be the lay client or Lender client. The exceptions also apply to disclosures made to “any person in connection with the giving by the adviser of legal advice to the client”, see paragraphs 5.6 – 5.10 of the *Bowman v Fels* guidance. In any event a key element of the tipping off offences is “likely to prejudice an investigation”, and it may be unlikely that speaking to another solicitor who is also under a duty not to tip off would fulfil this test.

35. In urgent cases where appropriate consent is required faster than the usual statutory timetable, perhaps because suspicions are formed when a transaction is at an advanced stage and a Notice to Complete has been received the NCIS fast track procedure may be used, see paragraphs 7.18 - 7.21 of the Guidance. Reliance cannot be placed on others already having made a report. However, a key advantage achieved by the judgment is that a solicitor who makes a report would be

able to continue work on the transaction short of transferring funds or taking some other irrevocable step without committing a section 328 offence, see section 3 of the Bowman v Fels guidance, especially paragraph 3.3. However, for other professional reasons solicitors who report pre-exchange should not exchange until “appropriate consent” has been received.