

ChBA DRAFT guidance on Moneylaundering – October 2008

1. The Money Laundering Regulations 2007 replaced the Money Laundering Regulations 2003 with effect from 15 December 2007. They implement the EU Third Directive on Money Laundering (the “Directive”) and made important changes.

2. The purpose of these notes is to provide guidance to members of the Chancery Bar in independent practice as to their obligations under the new Regulations. Under Regulation 23 the Bar Council is the supervisory authority for the Bar and members and it is also publishing guidance. A copy of that guidance is set out in Schedule 1. These notes are intended, however, to deal with the particular issues likely to confront Chancery barristers and Schedule 2 sets out a form of draft letter which may be found useful in complying with the requirements of the Regulations.

3. Under Regulation 3(1) the relevant persons to whom the Regulations apply include insolvency practitioners, tax advisers, independent legal professionals and trust or company service providers. Barristers in private practice are independent legal professionals and, in some cases, tax advisers. But advising on insolvency, trust or company law does not make them insolvency practitioners or trust or company service providers within the meaning of the Regulations. We know of no member of the Chancery bar who falls within the definition of insolvency practitioners (i.e. office-holders) or trust or company service providers (i.e. those who form companies, act as company officers or act as trustees), and these notes are not intended to deal with their position.

4. As one might expect, a tax adviser as defined in Regulation 3(8) is someone who by way of business provides advice about the tax affairs of other persons. This is self-explanatory.

5. The definition of independent legal professional in Regulation 3(9) is not so simple:–

“Independent legal professional” means a firm or sole practitioner who by way of business provides legal or notarial services to other persons, when participating in financial or real property transactions concerning –

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

and, for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction.

6. The first (and for many of our members the most important) point to make about this definition is that the decision of the Court of Appeal in *Bowman v Fels* [2005] EWCA Civ 226 (on the comparable provisions of the Proceeds of Crime Act 2002) means that the Regulations do not apply where advice is sought for the purposes of litigation which is on foot or in prospect or of

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seeking consensual resolution of disputes which could otherwise reasonably be expected to lead to such litigation. As a result it will not be necessary to apply customer due diligence measures in matters related to contentious litigation.

7. However, this will not be the case where proceedings are brought not to resolve a dispute, but for approval of a transaction. Some proceedings in which members of the Chancery bar are instructed relating to trusts (e.g. Variation of Trust Act 1958 applications) and companies will fall into this category.

8. Customer due diligence measures will not be required in many purely advisory matters. But the definitions are wider than might at first be thought. Those with trust, company or property practices may be affected by the new Regulations on a substantial scale, and should review their procedures with their clerks. Although it is only where barristers participate in real property or financial transactions (or are acting as tax advisers) that they are required to carry out customer due diligence, participation is given an extended meaning including assisting in the planning of a transaction. Those who regularly advise on the creation or operation of trust or corporate structures, in particular, may find that the rules apply to a large part of their work. In general, advice given after the event on the effect of a transaction cannot in our view be regarded as participation in the transaction. But the boundaries may not be clear in trust or company work.

9. The net result is the Regulations will apply if the instructions do not involve dispute resolution but involve some or all of the following:–

- (a) the giving of tax advice;
- (b) assisting in the planning or completion of sales or purchases of real property or business entities;
- (c) assisting in the planning or completion of transactions relating to the creation operation or management of trusts companies or similar structures.

Although the Regulations use the expression “real property” we would expect it to be interpreted as including any form of land rather than in any narrow technical sense, and we consider that civil law entities such as anstalts, stiftungs and foundations will be treated as “similar structures” to trusts and companies, as will limited liability partnerships.

10. Under Regulation 5:–

“Customer due diligence measures” means –

- (a) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;
- (b) identifying, where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement; and
- (c) obtaining information on the purpose and intended nature of the business relationship.

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11. Identifying and verifying the client's identity is already familiar under the 2003 Regulations. But Regulation 7(3)(a) lays down that the relevant person is to determine the extent of the customer due diligence measures on a risk-sensitive basis, depending on the type of customer, business relationship, product or transaction. The concept of risk-sensitivity is derived from the Directive and is intended to permit a flexible, effective and proportionate approach as opposed to a more prescriptive tick-box approach. Regulation 7(3)(b) requires the relevant person to be able to demonstrate to his supervisory authority, in our case the Bar Council, that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing.

12. There are new rules about when customer due diligence measures must be applied:–

- (1) Under Regulation 7(1) barristers must apply those measures when they:–
 - (a) establish a business relationship – an expression defined in Regulation 2(1) as including a professional relationship that the relevant person expects at the time when contact is established to have an element of duration;
 - (b) carry out an occasional transaction – defined in Regulation 2(1) as a transaction carried out other than as part of a business relationship amounting to 15,000 euros or more;
 - (c) suspect money laundering or terrorist financing; or
 - (d) doubt the veracity or adequacy of documents, data or information previously obtained.
- (2) Regulation 7(2) also requires customer due diligence to be applied to existing customers on a risk-sensitive basis.
- (3) Regulation 8 requires ongoing monitoring.
- (4) Under Regulation 9(2) the identity of the customer and any beneficial owner must be verified before the business relationship is established or the occasional transaction is carried out. However, this is qualified by Regulation 9(3) – if necessary not to interrupt the normal conduct of business and there is little risk of money laundering or terrorist financing, then verification may be carried out as soon as practicable during the establishment of the relationship.

13. Before commenting further on the question of timing, we note that the effect of the definitions of business relationship is that one-off transactions involving less than 15,000 euros do not appear to require client due diligence measures. In some small cases, this may make it unnecessary to carry out those measures.

14. Returning to timing, it will be seen that where the Regulations apply:–

- (1) due diligence measures will have to be applied to existing clients as at 15 December 2007; and
- (2) there will have to be periodic ongoing monitoring.

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15. What of urgent instructions requiring immediate advice? In our view, Regulation 9(3) is likely to permit barristers to give that advice even if verification has not been received because this would otherwise interrupt the normal course of business. However, it will have to be checked that there is little risk of money laundering or terrorist financing and verification must be completed as soon as possible.

16. The requirement in Regulation 5(b) to identify and verify on a risk-sensitive basis the “beneficial owner” is also new. It should be noted that whereas the customer’s identity must be verified by documents, data or information from an independent source there is no specific requirement of this in the case of the beneficial owner.

17. The meaning of beneficial owner is to be found in Regulation 6. Its effect may be summarised as follows:–

Client	Beneficial owner	Comment
Unlisted company	(a) any individual who is the ultimate owner or controller (directly or indirectly) of more than 25% of the shares of voting rights	
Any company	(b) any individual who otherwise exercises control over the management	seemingly not limited to unlisted companies
Partnership	(a) any individual ultimately entitled to or owning more than 25% of the capital or profits or voting rights (b) any individual who otherwise exercises control over the management	capital/profits/voting rights are alternatives
Trust	(a) any individual who is entitled to a specified interest (i.e. a vested interest whether or not in possession and whether or not defeasible) in at least 25% of the trust capital (b) as respects any trust other than one which is set up or operates entirely for the benefit of individuals falling within (a), the class of persons in whose main interest the trust is set up or operates (c) any individual who has control over the trust, that is any person who has a power (whether exercisable alone, jointly with another person or with the consent of another person) under the trust instrument or by law to – (a) dispose of, advance, lend, invest, pay or apply trust property (b) vary the trust (c) add or remove a person as a beneficiary or to or from a class of	also includes individual who is beneficial owner of a company with a specified interest no requirement to identify the members of the class: see Regulation 7(4) appears to include:– <ul style="list-style-type: none">● investment managers● holders of powers of appointment● settlors with powers to hire and fire trustees● protectors <u>but query</u> whether, as we believe,

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Client	Beneficial owner	Comment
	beneficiaries	paragraph 20 of Appendix 2 to the Bar Council guidance is too wide
	(d) appoint or remove trustees	
	(e) direct, withhold consent to or veto the exercise of a power such as is mentioned in sub-paragraph (a), (b), (c) or (d)	
	<u>But</u> an individual does not have control solely by reason of:–	
	(i) his consent being required under the statutory power of advancement	
	(ii) any discretion delegated to him under section 34 of the Pensions Act 1995 (power of investment and delegation)	
	(iii) the power to give a direction conferred by section 19(2) of the Trusts of Land and Appointment of Trustees Act 1996 (appointment and retirement of trustee at instance of beneficiaries) or	
	(iv) the power of the beneficiaries collectively to vary or extinguish a trust under the rule in <i>Saunders v Vautier</i>	
Other legal entity or legal arrangement	(a) where the individuals who benefit from the entity or arrangement have been determined, any individual who benefits from at least 25% of the property of the entity or arrangement	
	(b) where the individuals who benefit from the entity or arrangement have yet to be determined, the class of persons in whose main interest the entity or arrangement is set up or operates	no requirement to identify the members of the class: see Regulation 7(4)
	(c) any individual who exercises control over at least 25% of the property of the entity or arrangement.	
Estates in administration	the executors or administrators	in terms refers only to UK personal representatives
Any other case	the individual who ultimately owns or controls the customer or on whose behalf a transaction is being conducted	

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Precisely what enquiries are needed will vary according to the circumstances, but the starting point will obviously be the governing documents of the particular entity or arrangement, e.g. in the case of trusts the trust deed or deeds.

18. Where a relevant person is unable to apply customer due diligence measures Regulation 11 requires that person to cease to act. However, this is qualified by Regulation 11(2) and does not apply where a lawyer is in the course of ascertaining the legal position for his client or performing his task of defending or representing the client in, or concerning, advice on the institution or avoidance of proceedings.

19. There are two special forms of due diligence:–

- (1) What is called simplified due diligence – where there is in fact no requirement to apply customer due diligence – applies where there are reasonable grounds for believing that the customer, transaction or produce falls within Regulation 13. The most significant for the Bar are:
 - (a) credit or financial institutions subject to the Directive or “equivalent” requirements imposed by other countries;
 - (b) listed companies in the UK; and
 - (c) UK public authorities.
- (2) Enhanced due diligence is required under Regulation 14 for “politically exposed persons” including their families and associates. This may be brought into play in unexpected circumstances, for instance where a PEP is a trustee or member of the management council of a charity. But as enhanced due diligence is required to be on a risk sensitive basis this will not in general call for particular extra measures. However, the possibility that enhanced due diligence is required must always be borne in mind.

20. Regulation 17 permits relevant persons to rely on certain third parties to apply customer due diligence measures provided that the third party consents. Given that the Bar is a referral profession this is of great practical importance. However, it should be noted that notwithstanding the relevant person’s reliance on the third party the relevant person remains liable for any failure to apply customer due diligence measures. For practical purposes, the relevant third parties are: credit or financial institutions, auditors, insolvency practitioners, external accountants, or independent legal professional based in the UK, EEA or a country which imposes requirements equivalent to those of the money laundering directive.

21. The draft letter in Schedule 2 is designed to take advantage of Regulation 17.

22. Note that in-house lawyers or accountants do not qualify for the purpose of that Regulation. Nor do many of the others who are now able to instruct counsel under direct professional access or licensed access (formerly direct professional access or Bardirect). Still less do members of the public who instruct counsel under public access.

23. So far as non-EEA countries are concerned there is an obvious difficulty about knowing how far a territory does impose “equivalent” requirements. For this calls for knowledge not only of the relevant local requirements and supervisory arrangements, but also of the requirements of

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the Directive. However, in May 2008 the Member states participating in the EU Committee on the Prevention of Money Laundering and Terrorist Financing agreed a list of equivalent third countries, for the purposes of the relevant parts of the Third Money Laundering Directive. The list is a voluntary, non-binding measure that nevertheless represents the common understanding of Member States. That list was agreed for the purposes of simplified due diligence under Regulation 13, but the UK accepts that it is valid for Regulation 17 purposes

24. The list is as follows:–

- Argentina
- Australia
- Brazil
- Canada
- Hong Kong
- Japan
- Mexico
- New Zealand
- The Russian Federation
- Singapore
- Switzerland
- South Africa
- The United States

There is the following footnote to the list:–

The list does not apply to Member States of the EU/EEA which benefit de jure from mutual recognition through the implementation of the 3rd AML Directive. The list also includes the French overseas territories (Mayotte, New Caledonia, French Polynesia, Saint Pierre and Miquelon and Wallis and Futuna) and the Dutch overseas territories (Netherlands Antilles and Aruba). Those overseas territories are not member of the EU/EEA but are part of the membership of France and the Kingdom of the Netherlands of the FATF. The UK Crown Dependencies (Jersey, Guernsey, Isle of Man) may also be considered as equivalent by Member States.

The UK has indicated that it regards the Crown Dependencies as equivalent. Gibraltar is also directly subject to the requirements of the Directive, which it has implemented. It is therefore considered to be equivalent for these purposes.

25. It should be noted that Crown dependencies do not include British overseas territories such as Bermuda, the BVI and the Cayman Islands. Gibraltar is the only overseas territory regarded as equivalent. Nor are any other offshore financial centres so regarded.

26. The existence of broadly comparable requirements will of course justify a light touch approach to risk sensitive issues such as identification of beneficial owners. Members of the Chancery bar may however well wish to err on the side of caution in terms of the identification and verification of clients if they cannot satisfy themselves that those by whom they are instructed are subject to express requirements imposing criminal sanctions for failure to identify and verify the identity of the client and beneficial owner (if any).

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27. The Regulations also impose record-keeping requirements and require appropriate and risk-sensitive procedures to be maintained.

28. Under Regulation 19, a barrister must maintain records for at least 5 years, relating to both the business relationships and transactions which are the subject of customer due diligence; and, where evidence of client identity has been obtained, either a copy of that evidence, or information as to where a copy of that evidence may be obtained.

29. Regulation 20 calls for the establishment and maintenance of appropriate and risk-sensitive policies and procedures relating to: –

- (a) customer due diligence measures and ongoing monitoring;
- (b) reporting;
- (c) record-keeping;
- (d) internal control;
- (e) risk assessment and management;
- (f) the monitoring and management of compliance with, and the internal communication of, such policies and procedures,

in order to prevent activities related to money laundering and terrorist finance.

30. This is the responsibility of individual barristers though in practice it is likely to be discharged on a chambers-wide basis. Chambers staff, including clerks, should be told that if they know or suspect or have reasonable grounds to suspect that a transaction involves money laundering, they must report it to the individual barrister instructed in the case who must then take such action as is appropriate. Where several barristers are working together as part of a team, those barristers should try to reach agreement as to the relevant anti-money laundering policies and procedures that they will adopt in relation to a particular transaction.

31. Regulation 20(2)(d) also requires a “nominated officer” to be appointed within the professional’s organisation to receive disclosures under Part 7 of POCA, or Part 3 of the Terrorism Act 2000. However, that is expressly disapplied where the professional is an individual who neither employs nor acts in association within any other person. Although barristers (through Chambers) employ clerks, and may work alongside other barristers as part of a team, nonetheless the Bar Council takes the view that barristers do not have an organisation within the terms envisaged by this part of the Regulations: and are instead individually responsible for their own professional practice. It is not therefore thought to be necessary for barristers within a set of chambers to appoint a nominated officer, to whom other barristers must report any money laundering suspicions.

32. Regulation 21 provides:–

A relevant person must take appropriate measures so that all relevant employees of his are –

- (a) made aware of the law relating to money laundering and terrorist financing; and

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- (b) regularly given training in how to recognise and deal with transactions and other activities which may be related to money laundering or terrorist financing.

Although, as noted above, barristers in independent practice tend to operate as individuals, nonetheless all barristers employ clerks: and it is therefore recommended that all clerks who deal with incoming work should be trained in the respects outlined in Regulation 21.

33. However, while clerks may have a part to play the Bar Council has concluded that it is inappropriate to delegate responsibility to them. What is important, however, is that a procedure is adopted:–

- (1) To ascertain whether the new instructions relate to non-contentious advisory work at a planning/execution stage, in relation to either (i) the buying or selling of real property or business entities; or (ii) the creation, operation or management of trusts, companies, or similar structures;
- (2) If the instructions do fall within that category, to ensure that appropriate customer due diligence is carried out and records maintained;
- (3) Thereafter, to seek to get the instructing solicitor to complete the suggested form in the Appendix; or to carry out other customer due diligence checks;
- (4) To open a file relating to the case, and maintain on it a record of the client identity checks and the details referred to in paragraph 24 above, for a period of 5 years following the completion of the work required of the barrister.

34. Finally, it should be noted that members of the bar face criminal sanctions for failures to comply not only with their primary duties under the regulations but also under the requirement to secure that their staff are properly trained. In this regard, it should be noted that the obligation to perform the relevant due diligence arises not only at the inception of a business relationship but also, on a risk sensitive basis, in relation to existing client relationships (and it is thought that this impinges particularly on those where there has been no contact with the client for a long period), also in any case where there is particular cause for concern and/or suspicion (Regulations 7 and 8). Those whose practices include giving transactional advice or advice on tax matters, even only in part, disregard the new Regulations at their peril.

Appendix 1

Bar Council Guidance on Money Laundering Regulations 2007

DECEMBER 2007

Money Laundering

1. Money laundering is the process whereby assets which are the proceeds of crime and the true ownership of those proceeds are changed or disguised so that they appear to come from a legitimate source.
2. There are three recognized phases to money laundering:
 - (1) Placement: when cash generated from crime is introduced into the financial system
 - (2) Layering: the money passes through a series of transactions, in order to obscure its origins
 - (3) Integration: once the origin of the funds has been obscured, they are invested in legitimate funds and assets.
3. Professionals are often targeted by criminals to assist them, whether wittingly or unwittingly, in money laundering schemes. There are several reasons for this:
 - (1) Most money laundering schemes will inevitably require the assistance of professionals of one type or another somewhere along the way: for example in the formation of corporate vehicles or trusts (through whose hands the proceeds of crime are then made to flow); or in the purchase of real estate; or in the drawing up of false accounts, to disguise the true nature of money flows or underlying transactions. For this purpose real estate and “real property” should be widely interpreted as including all interests in land and should not be given their technical English Law meaning, which would exclude leasehold property or interests in leaseholds..
 - (2) Many professionals, including solicitors and accountants, will operate client bank accounts through which the proceeds of crime can potentially be laundered. Monies passing through such client accounts, managed by firms of ostensibly reputable professionals, may appear to have an air of legitimacy and authenticity that they would not otherwise deserve.
 - (3) Some criminals appear to believe (quite wrongly) that the professional’s duties of client confidentiality may throw a cloak of secrecy around illicit transactions, which the state’s watchful gaze will be unable to penetrate.
4. Barristers need to be aware of the risk that they may find themselves caught up in money laundering schemes: and understand their legal responsibilities in such circumstances.

The legal framework

5. The background to the UK’s anti-money laundering legislation is two-fold:
 - (1) The 40+9 Recommendations published by the Financial Action Task Force (“FATF”). FATF is an inter-governmental body, created in 1989, whose purpose is the development and promotion of national and international procedures to combat money laundering and terrorist financing. The 40 Recommendations are concerned with anti-money laundering measures; the additional 9 Recommendations are concerned with anti-terrorist finance measures.
 - (2) The EU Money Laundering Directives. The First Money Laundering Directive was issued by the EU in 1991, and required member states to make money laundering a criminal offence. The Second Money Laundering Directive was issued in 2001. The Third Money Laundering Directive was issued in 2005.
6. The First Money Laundering Directive was incorporated into UK law by: (i) the Criminal Justice Act 1991; (ii) the Drug Trafficking Act 1994; and (iii) the Money Laundering Regulations 2003.
7. The Second Money Laundering Directive was incorporated into UK law by: (i) the Proceeds of Crime Act 2002; and (ii) the Money Laundering Regulations 2003.
8. The Third Money Laundering Directive has been incorporated into UK law by the Money Laundering Regulations 2007 (“the Regulations”) which came into force on 15 December 2007. The Regulations replace and repeal the Money Laundering Regulations 2003.
9. The Proceeds of Crime Act 2002 (as amended) (“POCA”) remains in force. The Bar Council has issued separate guidance on POCA, to which barristers are referred, which takes account of the important decision of the Court of Appeal in *Bowman v Fels* [2005] EWCA Civ 226, of which barristers should be aware. Amended guidance will be issued on POCA to take into account further amendments which will come into force on 26 December 2007
10. This guidance focuses on the responsibilities imposed on barristers pursuant to the new Regulations.

Potential application of the Regulations to barristers

11. Regulation 3(1) of the Regulations provides:

“...these Regulations apply to the following persons acting in the course of business carried on by them in the United Kingdom (“relevant persons”) –

- (a) credit institutions;
- (b) financial institutions;
- (c) auditors, insolvency practitioners, external accountants and **tax advisers**;
- (d) **independent legal professionals**;
- (e) trust or company service providers;
- (f) estate agents;
- (g) high value dealers;

- (h) casinos.”

Some barristers (and particularly members of the Chancery and Tax Bar) may fall within the category of “tax advisers”. to which reference should be made. It is conceivable that some barristers may also be “insolvency practitioners” or “trust or company service providers” as those terms are defined in the Regulation 3(6) and (10) but those activities would not form part of their practices as barristers and this guidance is not intended to cover any work done in any such capacity.

12. Most barristers in independent practice potentially fall within the category of independent legal professionals. However, this category is defined further in Regulation 3(9) as follows:

“ ‘Independent legal professional’ means a firm or sole practitioner who by way of business provides legal or notarial services to other persons, when participating in financial or real property transactions concerning –

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

and, for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction.”

13. The European Court of Justice has now confirmed that this list is intended to be exhaustive: see *Ordre des barreaux francophones et germanophone v Conseil des Ministres* Case C-305/05, 26th June 2007.

14. It follows from this that many barristers will NOT find themselves falling within the definition of “relevant persons” for the purpose of the Regulations. In particular:

- (1) Members of the employed bar are not “relevant persons”, since they are neither “independent”; nor do they offer their legal services “by way of business”.

- (2) Since barristers in independent practice are not permitted to undertake the management or conduct of their clients’ affairs, or handle client money (see the Bar Council’s Code of Conduct, Rules 401(b)(i) and 307(f)), they will not fall within the definition of “independent legal professional” pursuant to Regulation 3(9)(b), (c) or (d).

- (3) It follows that it is only barristers in independent practice who “assist in the planning or execution” of the types of transaction listed in Regulation 3(9)(a) and (e) who will be caught: i.e. those barristers who are asked to advise (at the planning or execution stage) in transactions which involve either:

- (i) the buying or selling of real property / business entities;

- (ii) the creation, operation, or management of trusts, companies or similar structures.
- (4) Moreover, given the emphasis in Regulation 3(9) on professionals “assisting in the planning or execution” of these transactions, barristers in independent practice who provide advice to clients AFTER a transaction has taken place, will not be “relevant persons” for the purposes of the Regulations.
- (5) In particular, barristers conducting litigation on behalf of clients arising out of the transactions referred to in Regulation 3(9)(a) and (e) will therefore fall outside the ambit of the Regulations. This is expressly confirmed (in the case of customer due diligence) by Regulation 11(2); and also (more generally) by the decision of the European Court of Justice in the *Ordre des barreaux francophones et germanophone* case referred to above.
15. It follows that, in practice, the members of the bar most likely to find themselves falling within the ambit of the Regulations are members of the Chancery bar involved in non-contentious advisory work: and in particular, those barristers in independent practice who are instructed to advise clients at the planning / execution stage of real property / business transactions; or in relation to setting up companies, trusts or similar structures. Whilst many contentious matters will conclude with a negotiated settlement that could arguably be considered to be transaction, the Bar Council considers that having regard to the reasoning of the courts in *Bowman v Fels* and *Ordre des barreaux francophones et germanophone*, advising or otherwise acting in connection with an agreement that is intended to compromise a genuine dispute will not fall within regulation 3(9)

Obligations imposed on barristers falling within the ambit of the Regulations

16. The requirements upon barristers who conduct relevant business are as follows :
- Customer due diligence – Regulations 5 - 9
 - Record-keeping procedures – Regulation 19
 - Procedures to forestall money laundering and training of staff – Regulations 20 - 21
17. These requirements are considered separately below. Failure to comply with these requirements is a criminal offence, punishable by way of fine or up to two years imprisonment: see Regulation 45.

Customer due diligence – Regulations 5 - 9

18. Pursuant to Regulation 7(1), where a barrister (a) is establishing a business relationship with a new client for the first time; (b) is carrying out a transaction to which the regulations apply and which involves a payment of more than 15,000 Euros by or to the client; (c) suspects money laundering or terrorist finance is taking place; or (d) has doubts about any prior identity checks that have been carried out on a particular client, then the barrister must conduct customer due diligence. Where the barrister suspects money laundering or terrorist financing then the barrister must also consider whether the reporting obligations such as those arising under section 330 POCA 2002 apply. Alternatively, he may wish to

make an authorized disclosure in order to obtain the appropriate consent, and so avoid liability for the money laundering offences created by sections 327 and 328 POCA.

19. Customer due diligence checks should be carried out on a risk sensitive basis: see Regulation 7(3). The litmus test as to what is appropriate, is that a barrister will have to be able to demonstrate to the Bar Council that the extent of the measures adopted were commensurate to the perceived risks in any given case.
20. Ordinary customer due diligence involves (see Regulations 5, 8 and 9 for the full detail):
 - (i) Identifying the client or beneficial owner (if different from the client) prior to the establishment of the business relationship, or the execution of the transaction
 - (ii) Obtaining information about the business relationship or transaction
 - (iii) Monitoring the business relationship on an ongoing basis
21. The meaning of “beneficial owner” is set out in Regulation 6, to which close attention should be paid in appropriate cases (namely cases where the client is a company, partnership or trust).
22. Sometimes the barrister need only carry out simplified due diligence, as set out in Regulation 13. This obviates the need for an initial client identity check, and instead simply requires the barrister to monitor the relationship on an on-going basis in the course of the barrister’s retainer to guard against the risk of money laundering. Simplified due diligence will apply whenever the client is: (i) a credit or financial institution, itself subject to the money laundering directive or an equivalent regulatory code; (ii) a publicly listed company, listed on an exchange within Europe or one which is similar to similar disclosure requirements; (iii) the beneficial owner of a pooled account held by an independent lawyer subject to similar anti-money laundering requirements; or (iv) a public authority in the UK.
23. Sometimes the barrister will need to carry out enhanced due diligence, as set out in the Regulation 14: and will need to do so particularly in the context of politically exposed persons (as defined under Schedule 2, para 4 of the Regulations); or when the client has not been physically present when identification checks were allegedly carried out (by the barrister or the person he is relying upon).
24. Helpfully, given the Bar’s nature as a referral profession, Regulation 17 confirms that a barrister may rely on certain third parties to carry out the relevant customer due diligence checks: always provided that the third party consents to this course of action. For practical purposes, relevant third parties are: (i) instructing solicitors; (ii) external accountants; and (iii) tax advisers. These third parties have to be based in the UK, EU or a country which imposes similar anti-money laundering measures on these professionals (such as another FATF member state). **It should be noted that, pursuant to Regulation 17(1)(b), the barrister will however remain liable for any failure by the third party to apply the relevant customer due diligence checks. Barristers accepting instructions from overseas solicitors etc need to take steps to satisfy themselves (i) as to what anti money laundering measures operate in the jurisdiction where the solicitor is based and (ii) that those measures are adequate for the purposes of Regulation 17 (i.e they at least comply with the requirements of the Third Money Laundering Directive**

and that the person on whom reliance is being placed is supervised for compliance in a manner equivalent to the requirements of the Directive.

25. A suggested form of words has been provided for the purpose of asking instructing solicitors to confirm that they have carried out the relevant customer due diligence checks, and will maintain appropriate records: and is annexed to this guidance at Appendix 1. **It should be noted that unlike the 2003 regulations the Regulations do not contain any exemption in respect of a solicitors' established clients (although solicitors will no doubt take a risk based approach in relation to such clients)**
26. If those instructing the barrister (i) do not fall within the categories of third party referred to above; (ii) are not prepared to consent to the barrister relying on their checks; and/or (iii) are not considered by the barrister to be trustworthy, the barrister should carry out his own customer due diligence checks before starting to act. Suggested methods for carrying out customer identification checks for various types of client can be found at Appendix 2 to this guidance.

Record-keeping Procedures – Regulation 19

27. Pursuant to Regulation 19, a barrister must maintain records for at least five years, relating to both the business relationships and transactions which are the subject of customer due diligence; and, where evidence of client identity has been obtained, either a copy of that evidence, or information as to where a copy of that evidence may be obtained.

Evidence of client identity

28. As regards evidence of client identity, in most cases, as set out above, a barrister will have sought confirmation from his instructing solicitor, using the certificate set out in Appendix 1. In such cases, retention of the certificate by the barrister for the requisite 5 year period should constitute the retention of information as to where a copy of the evidence of identity may be obtained.
29. Where no such confirmation from an instructing solicitor has been obtained, but the barrister has carried out his own independent identity checks, the barrister should retain those records for the relevant period.

Evidence of the business relationship / transaction

30. As regards records of the business relationship and transactions themselves, the certificate set out in Appendix 1 also requires the instructing solicitor to confirm that his or her firm has adopted a policy designed to achieve compliance with the record-keeping obligations imposed by the Money Laundering Regulations.
31. If a solicitor has given such confirmation, then the barrister can rely on it: and return any papers to his instructing solicitor for the latter to retain for the relevant period.
32. However, where no such confirmation from an instructing solicitor is forthcoming, the barrister must maintain procedures to ensure retention of relevant records: and these

should include a copy of the instructions; any written advice provided or notes of any conference held; and a full fee note detailing all work carried out.

Procedures to forestall money laundering, and training staff – Regulations 20 – 21

Procedures to forestall money laundering

33. Regulation 20 provides that:

“A relevant person must establish and maintain appropriate and risk-sensitive policies and procedures relating to –

- (a) customer due diligence measures and ongoing monitoring;
- (b) reporting;
- (c) record-keeping;
- (d) internal control;
- (e) risk assessment and management;
- (f) the monitoring and management of compliance with, and the internal communication of, such policies and procedures,

in order to prevent activities related to money laundering and terrorist finance.”

34. Barristers who are relevant persons for the purposes of the Regulations must ensure that they adopt such policies and procedures as part of their personal practices. In particular Chambers staff, including clerks, should be told that if they know or suspect or have reasonable grounds to suspect that a transaction involves money laundering, they must report it to the individual barrister instructed in the case who must then take such action as is appropriate.
35. Where a number of barristers who are relevant persons are working together as part of a team, those barristers should try to reach agreement as to the relevant anti-money laundering policies and procedures that they will adopt in relation to a particular transaction.
36. Regulation 20(2)(d) also requires a “nominated officer” to be appointed within the professional’s organisation to receive disclosures under Part 7 of POCA, or Part 3 of the Terrorism Act 2000. However, Regulation 20(2)(d) is expressly disapplied (by Regulation 20(3)) where the professional is an individual who neither employs nor acts in association within any other person.
37. Although barristers (through Chambers) employ clerks, and may work alongside other barristers as part of a team, nonetheless the Bar Council takes the view that barristers do not have an organisation within the terms envisaged by this part of the Regulations: and are instead individually responsible for their own professional practice. In those circumstances, although the wording of the exemption in Regulation 20(3) is not particularly felicitous when applied in the context of a barristers’ set of Chambers, it is not thought to be necessary for barristers within a Chambers to appoint a nominated officer, to whom other barristers must report any money laundering suspicions. Rather each barrister within a set of Chambers should consider for himself or herself whether or not to make any report directly to the state authorities.

Staff training

38. Regulation 21 provides:

“A relevant person must take appropriate measures so that all relevant employees of his are –

- (a) made aware of the law relating to money laundering and terrorist financing; and
- (b) regularly given training in how to recognise and deal with transactions and other activities which may be related to money laundering or terrorist financing.”

39. Although, as noted above, barristers in independent practice tend to operate as individuals, nonetheless all barristers employ clerks: and it is therefore recommended that all Chambers’ clerks should be trained in the respects outlined in Regulation 21.

40. All barristers and sets of chambers must ensure that they have in place and operate such general systems and procedures for ensuring compliance with the Regulations as may be appropriate to their areas of practice having regard to the likelihood that the barrister or a member of chambers will be instructed to carry out work that falls within the scope of the Regulations. Where no general procedure or system is adopted then barristers must always bear the requirements of the Regulations in mind and give consideration to whether any particular instruction is or may be caught by the Regulations.

Supervision

41. The Bar Standards Board is the relevant supervisory body for the purposes of monitoring barristers’ compliance with the Regulations: and will monitor Chambers’ and barristers’ compliance on a periodic basis, by way of questionnaires and/or audits.

42. The Bar Council expects all barristers to co-operate fully and effectively with it when carrying out such supervisory checks.

Section 330 Offence

See below – s.330 amended by SOCPA 2005 with effect from 1 July 2005.

43. Barristers entering the regulated sector as a result of the Money Laundering Regulations 2007 must be aware of the additional statutory burden placed upon them in addition to the requirements imposed by the Regulations. In addition to the money laundering offences under Sections 327, 328 and 329 of POCA, those in the regulated sector, who are relevant persons, may be caught by the failure to disclose offence contrary to Section 330 as amended by SOCPA 2005

44. A person commits an offence contrary to this section if four conditions are satisfied.

- a. These are firstly that he/she:

- i. knows or suspects, or
 - ii. has reasonable grounds for knowing or suspecting,
that another person is engaged in money laundering.
 - b. Secondly that the information or other matter
 - i. on which his/her knowledge or suspicion is based, or
 - ii. which gives reasonable grounds for such knowledge or suspicion,
came to him/her in the course of a business in the regulated sector.
 - c. The third condition is that he/she
 - 1. can identify the other person engaged in money laundering or the whereabouts of any of the laundered property, or
 - 2. he/she believes, or it is reasonable to expect him/her to believe, that the information or other matter mentioned above will or may assist in identifying that other person or the whereabouts of any of the laundered property.
 - d. The fourth condition is that he/she does not make the required disclosure to the appropriate recipients as soon as is practicable after the information or other matter came to him/her.
45. The appropriate recipients are ‘a nominated officer’ or a persons authorised by the Director General of the Serious Organised Crime Agency.
46. There is a privilege defence, which arises under Section 330(10). However, pursuant to Section 330(11), this defence does not apply “to information or other matter which is communicated or given with the intention of furthering a criminal purpose”.
47. The offence contrary to Section 330 includes an objective or negligence element. The offence may be committed by a member of the Bar conducting relevant business who did not know or suspect that his/her client was engaged in money laundering, but who had reasonable grounds for knowing or suspecting the same. The objective element places upon Counsel an especial burden closely to consider whether the circumstances of his/her instructions are such that they might give rise to reasonable grounds for knowing or suspecting that his/her client is engaged in money laundering.

Appendix 1

Suggested form of words for inclusion in Counsel's instructions from a UK solicitor or other regulated professional

We [name of firm], being subject to the Money Laundering Regulations 2007, confirm that:-

1. We have established the identity of our client [name] in accordance with Part 2 of the Regulations.
2. With regard to record-keeping and other procedures, it is the policy of this firm to maintain procedures which comply with Regulations 8, 19 and 20 of the Regulations.
3. We consent to your reliance on us to carry out the customer due diligence required under the Regulations

Signed:

Position within firm:

Appendix 2

Individuals

1. For these purposes an individual's identity comprises his/her name, date of birth and current address. Accordingly Counsel should obtain documentary evidence verifying all of these elements. Wherever possible verification should be carried out in a face to face meeting with the client, although it is recognised that this will not always be possible.
2. At a face to face meeting, Counsel should ask to see:
 - a. A current passport, official national identity card or driving licence with a photograph; and
 - b. A recent utility bill, council tax bill, bank or building society statement.
3. In all cases original documents should be examined. Counsel must then retain copies of the documents which have been produced to verify identity.
4. In the event that a face to face meeting is not possible prospective clients should not be asked to send original passports, national identity cards or driving licences with photographs through the post. Instead legally certified copies should be requested. Original documents, as set out in paragraph 2(b) above must be provided.
5. It is acknowledged that there may be cases where the prospective client has no official identity document such as a passport. In such cases some flexibility will be required and it is for Counsel to decide on the appropriate method of verification. In such cases one solution would be for an original photograph accompanied by a certificate from a professional such as a lawyer, accountant, doctor or a justice of the peace stating that he/she has known the client personally for at least 5 years and that the photograph is a true likeness of the person using the name of the client.
6. In cases falling within paragraph 5 above Counsel should keep a full note of the steps taken to verify identity and the reasons why he/she was satisfied as to the client's identity.

Clients acting in a representative capacity

7. Frequently, prospective clients will be acting on behalf of a company, partnership, unincorporated association or a trust. Where the client is effectively representing another person or entity Counsel will have to take additional verification procedures in order to comply with the Regulations.
8. Experience has shown that corporate entities, and in particular offshore companies with nominee directors, are popular vehicles for money laundering. The principal requirement therefore is to look behind the corporate identity to identify those who have control over the company's assets with particular reference to shareholders or others who have injected significant capital or provided financial support.

UK Registered Companies, LLPs etc

9. Counsel should ask for:
- (i) A certified copy of Certificate of Incorporation;
 - (ii) Evidence (such as an appropriate resolution) that the individual has the authority to act on behalf of the company.
10. No further steps need to be taken in cases where the company is quoted on the London Stock Exchange, another UK recognised investment exchange, is a member of a UK recognised investment exchange or a subsidiary of such a company: and simplified due diligence will then apply pursuant to Regulation 13.
11. In the case of a UK private company whose directors are not already known to Counsel the steps in paragraph 9 above should be taken but in addition the identity of sufficient of the directors/company secretary/shareholders should be verified in accordance with the procedures for personal clients in order to satisfy the barrister as to the identity of the persons by or on behalf of whom instructions are given. It may also be necessary to identify the “beneficial owner” of the company to the satisfaction of the barrister. Note, in this regard, the definition of beneficial owner given in Regulation 6(1). It may be necessary to carry out this exercise in relation to several companies or other bodies before the ultimate beneficial owner is sufficiently identified

Non-UK Companies

12. In the case of a company that is:
- (i) Quoted on a Recognised, Designated or Approved Investment Exchange in a country with equivalent legislation to the UK; or
 - (ii) A subsidiary of such a company;
 - (iii) A member of a UK Recognised Investment Exchange; or
 - (iv) A private company whose Directors are already known to Counsel;
- comparable documents to those required in paragraph 9 above will suffice; and simplified due diligence will then apply pursuant to Regulation 13 in the case of publicly listed companies falling within 12(i) above.
13. Where the company does not fall under paragraph 12 above, in addition to obtaining comparable documents to those listed in paragraphs 9 and 11, Counsel should obtain identification of the beneficial owner, having regard to the definition given in Regulation 6(1).
14. In the case of offshore companies with nominee directors, Counsel should seek to ascertain whether the company forms part of a trust structure. If so, Counsel must obtain details of the structure and for whose ultimate benefit the company is operated. Further, Counsel should take reasonable steps to ascertain that the company exists for a legitimate purpose. In such cases Counsel will need to consider the matters set out under TRUST structures in paragraph 15.

Trusts

15. Trusts, nominee and fiduciary structures are vehicles often used by criminals seeking to avoid identification procedures and to conceal the origin of the money they wish to launder. Particular care needs to be exercised when the structure has bank accounts in offshore localities with strict bank secrecy or confidentiality rules.
17. In cases covered by Regulation 17, (i.e. where Counsel has reasonable grounds to believe that the trustee is an independent legal professional in the UK / EU or a country whose law contains comparable provisions to those contained in the Money Laundering Directive), it is reasonable to accept a written assurance from the trustee, fiduciary or nominee that the beneficiary's identity has been recorded under procedures maintained by them. In such cases a certificate from the entity or person concerned will suffice.
18. In addition, Counsel should also obtain sight of the original trust deed or other document of appointment (or a legally certified copy) and any subsequent deed confirming the appointment of the trustees, fiduciary or nominee
19. An important factor to avoid laundering via trust nominee and fiduciary accounts is information as to the identity of the settlor and/or beneficial owner of the funds, who provided the funds, and of any controller or similar person having power to appoint or remove the trustees or fund managers. Counsel should therefore obtain written confirmation from the trustees/managers of the trusts that they are themselves aware of the true identity of the settlor, controller or similar person. Note the wide definition of beneficial owner given in Regulation 6(3).
20. In cases falling outside Regulation 17, Counsel will need to go further and verify the identity of all the trustees, settlors and named beneficiaries as well as obtaining sight of the documents set out in paragraph 18. Once again, note the wide definition of beneficial owner given in Regulation 6(3).

Unincorporated Businesses/Partnerships

21. Where the prospective client is representing a partnership or unincorporated association, the identity of at least two of the partners, controllers or principals should be verified in line with the requirements for individual clients. Note also the definition of beneficial owner as regards partnerships given in Regulation 6(2).
22. The nature of the partnership or business should be ascertained to ensure that it has a legitimate purpose. If there is a formal partnership arrangement Counsel should obtain sight of the relevant agreement. In addition formal confirmation that the prospective client is authorised to act on behalf of the business will be required.

Clubs and Societies

23. In the case of a prospective client representing a club or society, Counsel should verify the identity of the client and at least one other member of the committee or board running the club or society. Counsel should ascertain the nature of the organisation and be satisfied that it exists for a legitimate purpose by, for example, examining the

constitution or the rules. In addition, formal confirmation that the prospective client is authorised to act on behalf of the club or society will be required.

Local Authorities

24. In such a case Counsel will need confirmation that the prospective client is authorised to act on behalf of the authority in addition to establishing the identity of the person concerned. If there is a resolution or direction for legal advice to be taken Counsel should obtain a copy of such a document. Simplified due diligence will then apply.

SCHEDULE 2

[Chambers letterhead]

[date]

Dear Sirs

[name of matter]

As you know, barristers are like yourselves subject to the Money-Laundering Regulations 2007 (the “Regulations”) and I should be grateful for your help in enabling counsel to comply with the obligations imposed by the Regulations in relation to your instructions in this matter by completing the enclosed form.

It appears from the decision of the Court of Appeal in *Bowman v Fels* [2005] EWCA Civ 226 (on the comparable provisions of the Proceeds of Crime Act 2002) that the Regulations do not apply where advice is sought for the purposes of litigation which is on foot or in prospect or of seeking consensual resolution of disputes which could otherwise reasonably be expected to lead to such litigation. However, we do not consider that this applies to proceedings to approve a transaction (e.g. a scheme of arrangement or an arrangement varying trusts) where there is no dispute.

Assuming the matter is not related to litigation or dispute resolution, the Regulations will apply if the instructions may involve some or all of the following:–

- (i) the giving of tax advice
- (ii) assisting in the planning or completion of sales or purchases of real property or business entities
- (iii) assisting in the planning or completion of transactions relating to the creation operation or management of trusts companies or similar structures
- (iv) assisting in relation to the management of client money securities or other assets or in relation to the opening or management of bank accounts or other securities or securities accounts.

So far as I am aware this matter is not litigation-related, and it appears to involve some of the above. But if I am mistaken about either of these points, I should be grateful if you could complete the form accordingly.

Alternatively, I should be grateful if you could confirm that you or your firm have applied customer due diligence measures in relation to this matter and consent to being relied on by counsel to apply such measures in order to enable counsel to rely on Regulation 17.

As you know, there is an ongoing obligation for continuing customer due diligence and it would helpful if you could let us know whenever you comply with that obligation. Unless we hear from you we shall have to contact you again from time to time.

Thank you for your help.

Yours faithfully

Clerk to *[name of barrister]*

Money Laundering Regulations 2007

Name of matter:

- (a) Counsel is instructed for the purposes of litigation which is on foot or in prospect or of seeking consensual resolution of disputes which could otherwise reasonably be expected to lead to litigation

- (b) Counsel’s instructions do not involve any of the following:–
 - (i) the giving of tax advice
 - (ii) assisting in the planning or completion of sales or purchases of real property or business entities
 - (c) assisting in the planning or completion of transactions relating to the creation operation or management of trusts companies or similar structures
 - (iv) assisting in relation to the management of client money securities or other assets or in relation to the opening or management of bank accounts or other securities or securities accounts.

- (c) My firm or I have applied customer due diligence measures (including where applicable (i) identification and verification of “beneficial owners” and (ii) enhanced due diligence) in relation to this matter and consent to being relied on by counsel to apply such measures. On request we will confirm the identities of the “beneficial owners” where applicable

- (d) We intend to conduct continuing monitoring of our relationship with the lay client and will let you know whenever we do so

- (e) We have adopted a policy designed to achieve compliance with the record-keeping obligations imposed by the Regulations

Please tick as appropriate

The contents of this form are correct to the best of my knowledge and belief

Signed

.....

Name

.....

Firm

.....

Position

.....

Date

.....

