CHANCERY BAR

THE CHANCERY BAR ASSOCIATION MONEY LAUNDERING NOTE PART 2 THE MONEY LAUNDERING REGULATIONS 2007

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Introduction

1 This Guidance reflects the law at 30 May 2013. (Not all the provisions under the draft fourth EU Directive (below) are considered or cross-referenced because it remains to be seen how these will be given effect once the Directive becomes final. Most are foreshadowed by the Financial Action Task Force revised 40 Recommendations of 2012 which are considered in some detail.)

2 The purpose of this Note is to provide *outline* guidance to members of the Chancery Bar Association in independent practice as to their obligations under the Money Laundering Regulations 2007 (SI 2007/2157[1] "the Regulations") should their practices be of a nature so as to fall within the terms of the Regulations. That is to say, where they are a "relevant person" as that expression is defined under the Regulations. The Regulations only apply to individual practitioners whose practices come within the meaning of that expression. For reasons that are explained below, it is likely that the Regulations will only apply to a very limited number of members of the Association. The Note is further intended to give some further background to, and explanation of, the Regulations with particular emphasis on how these may engage with the individual practices of members of the Association. It is intended to be read in conjunction with Part 1 that provides an outline explanation of the general UK AML/CTF regime provided by the Proceeds of Crime Act 2002 (PoCA).

3 It is possible that the utility of this Note may be in making it clear that a member's practice or particular instructions *do not* fall within the scope of the Regulations. Where an individual's practice comes within the Regulations, the detailed requirements of the Regulations must be referred to and complied with.

4 The AML/CTF regulatory regime is in a state of some change as a consequence of revised International Standards published by the FATF in February 2012.[2] The International Standards update the former 40 Recommendations on AML plus 9 Recommendations on CTF. Both sets of Recommendations are now absorbed into the revised International Standards that consist of 40 (re-numbered) Recommendations being the International Standards on AML and CTF. The revised International Standards do not take immediate effect in law, but the FATF will begin its review of implementation in 2013. The most significant changes, so far as members of the Association whose practices fall or may fall within the Regulations are concerned, are:

(1) for the first time, predicate money laundering offences ("Designated categories of offences") are extended to include (serious)[3] tax crimes relating to both direct and indirect taxes.[4] (While this will not have significant impact domestically (because of the 'all crimes' definition under the PoCA s 340), it is widely expected to have considerable implications in some other jurisdictions and has long been sought.[5])

(2) A requirement for greater transparency in relation to both corporate and trust structures and beneficial ownership. (These recommendations are now under active review by the Council and Commission of the EU.)

(3) Politically exposed persons (PEPs) are recommended to be extended to

include domestically politically exposed persons, albeit to be subject to enhanced due diligence on a risk-based basis (foreign PEPs are subject to mandatory enhanced customer due diligence).

5 An important change to the structure of the revised International Standards is that these no longer draw a hard-edged theoretical distinction between money laundering and terrorist financing (a distinction that, in any event, may have been more linguistic than real).

6 Best practice suggests that early effect be given to the revised International Standards where this is reasonably practicable (for example, already, in practice, a sharp-edged distinction between foreign and domestic PEPs is understood not to be made).

Draft Fourth EU Money Laundering Directive (MLD4)

7 On 5 February 2013 the European Commission published a Proposal for Directive of the Parliament and Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.[6] The Explanatory Memorandum provides that:

> "5. The main modifications to the Third AMLD are:
>
> *Extension of the scope of the Directive*: two main changes are proposed to the scope:
>
> (a) the threshold for traders in high value goods dealing with cash payments be reduced from EUR 15 000 to EUR 7 500. Currently traders in goods are included in the scope of the Directive if they deal with cash payments of EUR 15 000 or more. After receiving information from Member States that this relatively high threshold was being exploited by criminals it is proposed to lower it to EUR 7 500. In addition, the new proposal requires traders to carry out customer due diligence when carrying out an occasional transaction of at least EUR 7 500, a reduction from the previous threshold of EUR 15 000. Both the definition and the threshold show a tightening of measures against the use of these traders for money laundering purposes across the EU;
>
> (b) the scope of the Directive includes "providers of gambling services" (in accordance with Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market[21]). The current Third AMLD and the revised FATF Recommendations require that only casinos be included in the scope of anti-money laundering/combating terrorist financing legislation. Evidence in the EU suggests that this leaves other areas of gambling vulnerable to miss-use by criminals.
>
> *Risk-based approach:* The Directive recognises that the use of a risk-based

approach is an effective way to identify and mitigate risks to the financial system and wider economic stability in the internal market area. The new measures proposed would require evidence-based measures to be implemented in three main areas, each of which would be supplemented with a minimum list of factors to be taken into consideration or guidance to be developed by the European Supervisory Authorities:

(a) Member States will be required to identify, understand and mitigate the risks facing them. This can be supplemented by risk assessment work carried out at a supra-national level (e.g. by the European Supervisory Authorities or Europol) and the results should be shared with other Member States and obliged entities. This would be the starting point for the risk-based approach, and would recognise that an EU-wide response can be informed by Member States' national experience;

(b) Obliged entities operating within the scope of the Directive would be required to identify, understand and mitigate their risks, and to document and update the assessments of risk that they undertake. This is a key element of the risk-based approach, allowing competent authorities (such as supervisors) within Member States to thoroughly review and understand the decisions made by obliged entities under their supervision. Ultimately, those adopting a risk-based approach would be fully accountable for the decisions they make;

(c) The proposal would recognise that the resources of supervisors can be used to concentrate on areas where the risks of money laundering and terrorist financing are greater. The use of a risk-based approach would mean that evidence is used to better target the risks.

Simplified and Enhanced Customer Due Diligence: in the proposal, obliged entities would be required to take enhanced measures where risks are greater and may be permitted to take simplified measures where risks are demonstrated to be less. With regard to the current (Third) AMLD, the provisions on simplified due diligence were found to be overly permissive, with certain categories of client or transaction being given outright exemptions from due diligence requirements. The revised Directive would therefore tighten the rules on simplified due diligence and would not permit situations where exemptions apply. Instead, decisions on when and how to undertake simplified due diligence would have to be justified on the basis of risk, while minimum requirements of the factors to be taken into consideration would be given. In one of the situations where enhanced due diligence should always be conducted, namely for politically exposed persons, the Directive has been strengthened to include politically exposed persons who are entrusted with prominent public functions domestically, as well as those who work for international organisations.

Information on the beneficial owner: the revised Directive proposes new measures in order to provide enhanced clarity and accessibility of beneficial ownership information. It requires legal persons to hold information on their own beneficial ownership. This information should be made available to both competent authorities and obliged entities. For legal arrangements, trustees are required to declare their status when becoming a customer and information on beneficial ownership is similarly required to be made available to competent authorities and obliged entities.

Third country equivalence: the revised Directive will remove the provisions relating to positive "equivalence", as the customer due diligence regime is becoming more strongly risk-based and the use of exemptions on the grounds of purely geographical factors is less relevant. The current provisions of the Third AMLD require decisions to be made on whether third countries have anti-money laundering/combating terrorist financing systems that are "equivalent" to those in the EU. This information was then used to allow exemptions for certain aspects of customer due diligence.

Administrative sanctions: in line with Commission policy to align administrative sanctions, the revised Directive contains a range of sanctions that Member States should ensure are available for systematic breaches of key requirements of the Directive, namely customer due diligence, record keeping, suspicious transaction reporting and internal controls.

Financial Intelligence Units: the proposal would bring in the provisions of Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information and further extend and strengthen cooperation.

European Supervisory Authorities (ESA): the proposal contains several areas where work by the ESA is envisaged. In particular, EBA, EIOPA and ESMA are asked to carry out an assessment and provide an opinion on the money laundering and terrorist financing risks facing the EU. In addition, the greater emphasis on the risk-based approach requires an enhanced degree of guidance for Member States and financial institutions on what factors should be taken into account when applying simplified customer due diligence and enhanced customer due diligence and when applying a risk-based approach to supervision. In addition, the ESAs have been tasked with providing regulatory technical standards for certain issues where financial institutions have to adapt their internal controls to deal with specific situations.

Data Protection: the need to strike a balance between allowing robust systems and controls and preventative measures against money laundering and terrorist financing on the one hand, and protecting the rights of data subjects on the other is reflected in the proposal.

> *Transposition measures:* Due to the complexity and scope of the proposal, Member States are required to transmit a correlation table of the provisions of their national law and the Directive."

8 As will be seen, none of the foregoing is especially surprising as to the general thrust of the provisions. The Proposal for what is sometimes referred to as 'MLD4' is explicitly intended to provide for a strengthened and enhanced AML regime (in large measure following the FATF Revised 40 Recommendations of 2012 (further below) but it is expressly intended to be less prescriptive and to that extent further embedding the risk-based approach that for some time has been adopted in the United Kingdom. The Explanatory Memorandum provides:

> "In parallel to the international process, the European Commission has been undertaking its own review of the European framework. A revision of the Directive at this time is complementary to the revised FATF Recommendations, which in themselves represent a substantial strengthening of the anti-money laundering and combating terrorist financing framework. The Directive itself further strengthens elements of the revised Recommendations, in particular in relation to scope (by including providers of gambling services and dealers in goods with a threshold of EUR 7500), beneficial ownership information (which is to be made available to obliged entities and competent authorities), and in the provisions on sanctions. It takes into account the necessity to increase effectiveness of AML measures by adapting the legal framework to ensure that risk assessments are carried out at the appropriate level and with the necessary degree of flexibility to allow adaptation to the different situations and actors. As a consequence of this, the Directive, while setting a high level of common standards, requires Member States, supervisory authorities and obliged entities to assess risk and take adequate mitigating measures commensurate to such risk. This results in the Directive being less detailed as regards concrete measures to be taken."

9 How exactly the Directive will be implemented of course remains to be seen, though some indicators can be discerned and are discussed below. One issue of importance, beyond the confines of AML law, is the increasing emphasis on transparency of beneficial ownership of trusts and companies following the FATF Revised 40 Recommendations (below). Another important issue that is likely to give rise to difficulty is the strictness of the carve-out from disclosure obligations owed by lawyers under Art. 33 (corresponding, broadly, with Art. 23.2 of the Third Directive) under legal privilege (below).

Limited application of the ML Regulations to barristers in independent practice

10 At the outset it can be said that relatively (very) few members of the Association are likely to be subject to the requirements imposed by the Regulations. Members of the Association most likely to find themselves subject to the requirements of the Regulations are those involved in

non-contentious advisory work, in particular, tax advisers and those instructed to advise at the planning or execution stage of the buying or selling of real property or business entities (*i.e. transactions*), or in relation to the setting-up, structuring, or management of companies or trusts (or similar structures). In practice it will be only in a very small minority of cases that an individual member will be required personally to comply with the due diligence requirements of the Regulations. A good part of this Note is relevant only should such an eventuality arise. In the usual case 'reliance' may reasonably be expected to be placed on a member's instructing solicitor as provided for by reg. 17.

11 While the Regulations are likely to affect only a limited number of members of the Association, it is nevertheless to be borne in mind that the money laundering offences under the Proceeds of Crime Act 2002 are of general application irrespective of whether or not an individual's practice falls within the scope of the Regulations. The reach of the criminal law, and the scope of money laundering offences, including their extra-territorial ambit, has recently been extended under the Bribery Act 2010.

12 The obligations imposed under the Regulations are fairly onerous. In general terms the obligations are: (i) to carry out customer due diligence (CDD); (ii) to have in place and maintain record keeping procedures; and (iii) to implement procedures, including staff training, to prevent money laundering/ and CTF.[7]

13 Infringement or non-compliance with the requirements of the Regulations (for the time being at least[8]) constitutes an offence. (This is under review and is expected to change substantially under the next set of regulations that will follow a Fourth EU Directive expected to be issued by the European Parliament and Council in autumn 2012.)

14 As is explained in more detail below, although reliance, where appropriate, may be placed on an instructing solicitor (or other relevant specified person under the Regulations (below)) that they comply with the requirements of the Regulations, and compliance by (for example) a solicitor does not require to be duplicated by a barrister, *liability* for any infringement/non-compliance is not avoided by such reliance. That is to say, although reliance is provided for where an instructing solicitor is subject to the Regulations (which will plainly apply where the barrister instructed is also subject to the Regulations), individual personal responsibility for compliance is non-delegable. It goes without saying that written confirmation of reliance, where it applies, should be sought, provided, and kept.

Bar Council Guidance

15 In 2008 the Bar Council published guidance on the Regulations[9] and this should be referred to. It is annexed to this Note under Appendix 1.

16 Paragraph 40 of the Bar Council guidance provides:

> *"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."*

17 Paragraph 34 of the guidance provides:

> "*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."*

18 It is also necessary that where individual practices are of a nature so as to fall within the Regulations staff (*i.e.* for present purposes, clerks) are given training as to what circumstances might reasonably give rise to suspicion (further below).

Supervision

19 For the purposes of reg. 23 of the Regulations the Bar Standards Board is the supervisory authority for the Bar.

20 Following the 2005 review by Sir Philip Hampton, the Regulators' Compliance Code was drafted which requires regulators to 'perform their duties in a business friendly way, by planning regulation and inspections in a way that causes least disruption to the economy'. One of the principles was that no inspection should take place without reason. In similar vein, the FATF Recommendation 28 (formerly 24) recommends a risk-based approach to supervision. The government in the annual Treasury 'Anti-Money Laundering and Counter Terrorist Financing Supervision Report' 2010-2011[10] noted that some supervisors assess the risk amongst the business they supervise as low enough not to warrant on-site inspection. To date it is understood that the BSB has not carried out any on-site inspections, but it is expected that AML/CTF compliance will be reviewed in 2012 under a wider review by the BSB under Chambers' questionnaires. The risk of members of the Bar being inadvertently used for money laundering purposes is, it would appear (correctly it is suggested), perceived to be low. Such a view is supported by reporting figures. In the year 2010-2011 no consent Suspicious Activity Reports ('SARs' – see Part 1) at all were made to SOCA by barristers (that is not say no authorised disclosures were made in connection with ss 327-328 of PoCA). There were a total of 4 SARs made by members of the Bar. That is to say, there were 4 reports made that may have been made as 'protected disclosures' under PoCA s 330. (If so these would necessarily have been made by those who considered themselves to be subject to the Regulations. That may, however, not necessarily be the case because a SAR may have been made simply out of caution and concern about the circumstances, despite these not falling within the category of

mandatory disclosures provided for by PoCA.) As against that figure, 4255 SARs were made by solicitors (of which 77% were consent SARs made under ss 327-329). The data for SARs (and the reporting regime generally) is available online.[11]

Background

21 The Regulations introduced in 15 December 2007 give effect to the EU Third Money Laundering Directive (2005/60/EC).[12] The Directive reflected the 40 + 9[13] 'Recommendations' of the Financial Action Task Force established by the then G7 in 1989. The Directive provided significantly more detailed provisions than the Second ML Directive (2003). In particular, the Directive and Regulations are significantly more prescriptive than previous Directives about the content of the requirement for customer due diligence (CDD) - the central organising principle of the Regulations (and the regulatory response to money laundering more generally). A significant change was the introduction of a 'risk-based approach' ('RBA') (sometimes referred to as a 'risk-sensitive' approach) to AML measures, an approach intended to facilitate proportionate AML measures appropriate to the nature of the *assessed risk* to a business that money laundering presents. Implementation of AML measures under the RBA continues to be a salient theme emphasised by the FATF under its revised International Standards. These continue to underpin the international response to money laundering/CTF generally. Indeed, the international AML/CTF structure represents a significant achievement in international co-operation through the FATF (and 'soft law') over a comparatively short period of time. The effect of being non-compliant or insufficiently compliant with the FATF Standards, until 2009, had catastrophic consequences for economies of states so listed ('blacklisted' as 'Non Cooperative Countries or Territories' - NCCTs). The FATF from 2009 FATF no longer 'blacklists' and from February 2012 has adopted a different approach to states that have not implemented the International Standards, adopting three lists.[14]

22 The importance attached by regulators to compliance with the requirements of the Regulations has recently been highlighted by penalties imposed on banks by the FCA for serious failures to comply with CDD requirements.[15] That having been said, the criminal provisions for default/infringement against the requirements of the Regulations have been rarely invoked and there is some doubt as to their utility, their being seen to take effect in causing some of those subject to the Regulations to adopt an unnecessarily defensive and sometime disproportionate response. The government has recently expressed concern to promote and encourage a co-operative response to AML/CTF by financial services firms and DNFBPs (see further Part 1).

23 Apart from the criminalization of money laundering, and the measures for the purpose of enhancing international co-operation, the FATF 40 Recommendations are principally concerned with creating a regime of procedures and controls applied to a specific group of financial businesses and non-financial businesses and professions (the latter generically referred to as 'designated non-financial businesses and professions' or DNFBPs), that collectively are designated "the regulated sector" under PoCA and "relevant persons" under the regulations.

24 Each of the EU three money laundering Directives is concerned with the '…prevention of the use of the financial system for the purpose of money laundering'. Successively, the Directives were implemented under the Money Laundering Regulations of 1993, 2001, 2003, and 2005.

In their most recent version, following the introduction of PoCA, the Regulations are principally concerned with the measures intended to (i) prevent and (ii) detect money laundering and terrorist financing.

25 The Regulations place onerous duties on persons to whom they apply. Essentially these obligations are:

- to apply customer due diligence measures (CDD) (giving effect to the principle 'know your customer' or KYC);
- to undertake on-going monitoring of a business relationship;
- to keep specified records;
- to put in place and maintain AML/CTF policies and procedures in order to prevent money laundering and terrorist financing;
- to increase the awareness of employees about money laundering and terrorist financing and to train them;
- to make a suspicious activity report (SAR) if money laundering or terrorist financing is suspected.

26 The scope of the requirements and how these are required to be implemented is described under reg. 20 which refers to the implementation of '…appropriate and risk-sensitive policies and procedures...' that a 'relevant person' must establish and maintain in order to manage and monitor the money laundering and terrorist financing risk. The concept of risk-sensitivity was a new concept under the Regulations in 2007 that was introduced in response to the fact that the cost of compliance with the regime, and the far-reaching changes brought about under the PoCA frequently had the effect of making compliance with AML/CTF requirements disproportionately expensive[16] relative to the risk to particular businesses, a risk that was frequently in practice low, if not negligible.

27 The importance of compliance is underscored by the criminal offence, carrying a maximum penalty of two years' imprisonment, constituted by default in compliance with the majority of the various statutory requirements. (Whether this is really required is open to question and it has been noted by the government that the criminal sanctions have rarely been invoked[17]).

28 Banks and other financial institutions remain the primary focus of the regulated sector, reflecting the overarching concern to deny the financial system to criminal funds. The remainder of the 'relevant persons' subject to the regulations constitute a diverse group the common feature of which is that the businesses that they conduct or the professional services that they provide are thought to be susceptible to money laundering or terrorist financing. Those whose businesses make them "relevant persons" are considered to be particularly at risk of being used for the purpose of laundering criminal or terrorist property. So far as the professions are concerned, these are generally at the perimeter or fringe of the regulated sector and are perceived as functioning as 'gatekeepers' to the financial system so far as

lawyers and accountants are seen[18] as being routinely involved in the planning and execution of significant financial and property transactions.

29 For the list of 'relevant persons' see reg. 3, Sch. 1 and reg. 4. The FCA provides a 'Perimeter Enquiry' enquiry service for resolving questions as to scope of the Regulations.

Recent developments

30 In February 2012, following an extensive three-year consultation and review, the FATF published revised International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. The International Standards are available online.[19]

31 The FATF standards continue to underpin the international co-ordinated approach to AML, and in due course the amendments and revisions to the Recommendations will be implemented through both European and domestic legislation.

High risk/non-compliant jurisdictions

32 At the same time the FATF published a statement of high risk and non-compliant AML/CTF jurisdictions that provides the current list of jurisdictions that are considered to be either insufficiently compliant or which present an active threat. In the latter category are Iran and North Korea. The FATF considers Iran presents a serious risk to the integrity of the financial system (despite previous engagement with FATF) and the Democratic People's Republic of Korea is considered to present a similar risk. FATF recommends that governments apply counter-measures to both jurisdictions. FATF identifies 17 states as non-compliant with the International Standards. The Treasury has responded by its Notice of 5 March 2012: *Statement on Money Laundering controls in Overseas Jurisdictions.*[20]

33 The list of non-compliant countries identified by the FATF, apart from Iran and North Korea, which are also designated 'high risk' jurisdictions is: Cuba; Bolivia; Ethiopia; Ghana; Indonesia; Kenya; Myanmar; Nigeria; Pakistan; São Tomé and Príncipe; Sri Lanka; Syria; Tanzania; Thailand; Turkey.

34 Further, at the time when this Note was drafted, the European Commission has published on 11 April 2012 a report "on the application of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing".[21]

35 The draft fourth Directive further extends and reinforces the 'risk-based' approach to regulation and, among other things, further extends the reach of money laundering law in relation to (serious) revenue offences in jurisdictions where this was not already the case. While unlikely to have any significant effects domestically, these changes may have significant effects in some other jurisdictions.[22] The European Parliament's Resolution of 15 September 2011 called for rules to "make the fight against anonymous shell companies in secrecy jurisdictions (…) a key element of the upcoming reform of the Anti-Money Laundering Directive". It is also clear from the Commission's April 2012 report that serious consideration

is to be given to lowering the threshold test for beneficial ownership to below 25% (see further below under 'Beneficial interest').

Licensed and direct access[23]

36 Any member of the ChBA undertaking licensed or direct access work, who necessarily therefore does not have an instructing solicitor, so far as the work undertaken is of a nature so as to engage the Regulations, must personally comply with the regulatory requirements unless their instructions are received from a person listed under reg. 17(2) (effectively, themselves be subject to the Regulations or an equivalent, and be supervised for compliance, further see paragraph 110 below). Unless instructions are received from a person within reg. 17 there will be no scope for 'reliance' (further below).

37 The Bar Council has recently (March 2010) published *Guidance for Clerks Regarding Public Access Work*[24] for members of the Association who undertake licensed or direct access work. The guidance for such work is online and includes reference to AML.[25]

Key terms under the Regulations

38 Substituting, where appropriate, 'member' for 'person'; 'practice' for 'business'; and 'client' for 'customer' where appropriate, key expressions used in the Regulations include:

relevant person	**This is the gateway definition for regulation of a member:** a member of the ChBA whose business comes within reg. 3(1). Unless a member of the ChBA has a practice or is given instructions of a kind to bring them within the meaning of this expression the Regulations will have no application. **[**Where convenient "member of the Association" (etc.) is substituted for "relevant person" in this Note and as should be clear from the context.]
business relationship	A professional relationship between a member of the ChBA which is expected by the barrister concerned, at the time when contact is established, to have an element of duration.
customer	The person to whom/which CDD is applied under the Regulations. (For present purposes and convenience, where appropriate, references to 'customer' are substituted by 'client' in this Note and as should appear from the context.)

customer due diligence (CDD)	This entails (reg. 5): (a) identifying the client and verifying the client'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 client, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the barrister 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.
enhanced customer due diligence (ECDD)	(reg. 14) Required on a risk-sensitive basis in any situation where there is a higher risk of money laundering or terrorist financing but *always* required where the client has not been physically present for CDD purposes in which case additional measures must be taken (reg. 14(2)). Also required for PEPs.
independent legal professional	A member of the ChBA who in their practice provides legal services to a client when participating in financial or real property transactions concerning the matters set out in reg. 3(9).
money laundering	An offence within the meaning of s 340(11) of the PoCA (essentially offences under ss 327-329 of PoCA and cognate accessory and inchoate offences).
occasional transaction	A transaction (carried out other than as part of a business relationship) amounting to €15,000 or more, whether the transaction is carried out in a single operation or several operations which appear to be linked.

on-going monitoring	Of a business relationship (reg. 8) means: (a) the scrutiny of transactions undertaken throughout the course of the relationship including, where necessary, the source of funds, to ensure that the transactions are consistent with the barrister's knowledge of the client, his business and risk profile; and (b) keeping the documents, data or information obtained for the purpose of applying customer due diligence measures up-to-date.
participate	A person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction (reg. 3(9)) (emphasis supplied).
politically exposed person (**PEPs**)	A person within reg. 14(5) and in respect of whom ECDD will be required together with enhanced monitoring of any business relationship.
real property transaction	A term adopted in the Regulations that is derived from the third European Directive (Art. 2 (3)(b)). It seems that this probably should be given its narrow technical meaning rather than any broader concept so as to encompass civil law entities such as *anstalts*, *stiftungs* and foundations. (While Art 2 itself unhelpfully adopts separately the terms "real estate" and "real property" reg. 3(9) adopts 'real property' (below)). See also the **Ordre des barreaux francophones et germanophone** case referred to further below.
risk-based approach	Regulation 7(3): "A relevant person must— determine the extent of customer due diligence measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction" (emphasis supplied).
simplified customer due diligence	Reduced CDD when the client falls within one

(SCDD)	of the categories of person under reg. 13.
reliance	A member of the ChBA (regs. 3(9) and 17(1)) may rely on an independent legal professional (reg. 17(2)(b)) to apply any customer due diligence measures so long as the person consents (reg. 17(1)(a)) but does not thereby cease to be liable for any failure to apply such measures: reg. 17(1)(b) (emphasis supplied).
tax adviser	A member of the ChBA whose practice includes providing advice about the tax affairs of a client (reg. 3(8)).
terrorism	*q.v.* the Terrorism Act 2000 (as amended). Section 1 provides: "(1) In this Act "terrorism" means the use or threat of action where- (a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause. (2) Action falls within this subsection if it- (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system. (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section-

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(e) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation."

terrorist financing

See Sch. 7 Part 1 para 2 to the Counter Terrorism Act 2008:

"Terrorist financing" means—

(a) the use of funds, or the making available of funds, for the purposes of terrorism, or

(b) the acquisition, possession, concealment, conversion or transfer of funds that are (directly or indirectly) to be used or made available for those purposes."

terrorist property

Defined widely: *q.v.* the TA 2000 s 14:

"(1) In this Act "terrorist property" means-

(a) money or other property which is likely to be used for the purposes of terrorism (including any resources of a proscribed organisation),

(b) proceeds of the commission of acts of terrorism, and

(c) proceeds of acts carried out for the purposes of terrorism.

(2) In subsection (1)

(a) a reference to proceeds of an act

includes a reference to any property which wholly or partly, and directly or indirectly, represents the proceeds of the act (including payments or other rewards in connection with its commission) and

(b) the reference to an organisation's resources includes a reference to any money or other property which applied or made available, or is to be applied or made available, for use by the organisation."

Application of the ML Regulations to Chancery Practice

39 By reg. 3(1) the relevant persons to whom the Regulations apply include insolvency practitioners, tax advisers and *independent legal professionals*.

40 By reg. 3(8) of the Regulations a tax adviser is someone who by way of business provides advice about the tax affairs of other persons.

41 An "independent legal professional" is defined under reg. 3(9) as:

> "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." (Emphasis supplied)

42 The following points may be made:

(a) The categories under reg. 3(9)(a) to (e) are exhaustive: **Ordre des barreaux**

francophones et germanophone and Ordre français des avocats du barreau de Bruxelles Case 305/05 (June 2007).[26]

(b) Because barristers in independent practice are ordinarily not permitted to undertake the management or conduct of their clients' affairs, or handle client money (Bar Code of Conduct, Rules 401(b)(i) and 307(f)), they will not fall within the definition of "independent legal professional" within reg. 3(9)(b), (c) or (d).

(c) (b) above may be qualified in connection with those instructed under the licensed and public access schemes.

(d) *Thus, ordinarily, it will be only those members of the Association in independent practice who act as tax advisers (reg. 3(8)) or who otherwise "assist in the planning or execution" of the types of transaction listed in Regulation 3(9)(a) and (e) who will be subject to the Regulations. That is to say, members of the Association will be subject to the Regulations, other than where tax advisers, where they are instructed to advise at the planning or execution stage of transactions that entail either:*

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

(ii) the creation, operation, or management of trusts, companies or similar structures.

(e) Given the reference to "assisting in the planning or execution" of such transactions, post-transaction advice will not, it would appear, fall within the activities covered by reg. 3(9).

43 The Bar Council's view is that advising or acting in the compromise by agreement of a genuine dispute will not fall within reg. 3(9) by analogy with the reasoning of the Court of Appeal in **Bowman v Fels** [2005] 1 WLR 3083. It is submitted that reliance on that reasoning is appropriate and that the conclusion is correct. The Regulations are not intended to apply to the ordinary conduct of litigation or the ordinary settlements of disputes that might foreseeably result in litigation. In the context of privilege see the judgment of the European Court (Grand Chamber) to similar effect in **Ordre des barreaux francophones et germanophone**:

> "[33] As was pointed out in paragraph 22 above, it is clear from Article 2a(5) of Directive 91/308 that the obligations of information and cooperation apply to lawyers only in so far as they advise their client in the preparation or execution of certain transactions — essentially those of a financial nature or concerning real estate, as referred to in Article 2a(5)(a) of that directive — or when they act on behalf of and for their client in any financial or real estate transaction. As a rule, the nature of such activities is such that they take place in a context with no link to judicial proceedings and, consequently, those activities fall outside the scope of the right to a fair trial. [Emphasis supplied]
>
> [34] Moreover, as soon as the lawyer acting in connection with a transaction as referred to in Article 2a(5) of Directive 91/308 is called upon for assistance in defending the client or in representing him before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings, that lawyer is exempt, by virtue of the second subparagraph of Article 6(3) of the directive, from the obligations laid down in Article 6(1), regardless

> of whether the information has been received or obtained before, during or after the proceedings. An exemption of that kind safeguards the right of the client to a fair trial."

44 Advising on insolvency, trust or company law does not make a member of the ChBA an insolvency practitioner, or a trust or company provider, within the meaning of the Regulations. It is believed that no member of the Association falls within the definition of insolvency practitioners as an office holder or as a trust or company service provider, that is to say, a person engaged in the formation of companies, or who acts in the course of their business as a company officer or trustee. This Note, in any event, does not apply to such persons.

45 The Regulations adopt the expression "real property" (reg. 3.9(a)). The previous ChBA guidance provided that this does not mean real property in its technical sense but is to be understood as a broader concept that is likely to encompass civil law entities such as *anstalts*, *stiftungs* and foundations. That view is respectfully dissented from. Regulation 9(14) provides that under Scots law "heritable property" is to be substituted for "real property" in reg. 3(9). It is understood that in Scots law "heritable property" is immoveable property analogous to "real property" in its technical sense under English law.

46 As explained in Part 1, the *ordinary* conduct of litigation (including arbitration and ADR), including the compromise of litigation on foot or reasonably in prospect, will not engage the AML provisions under PoCA. Similarly, those activities will not be regulated activities under the Regulations.

47 Some court proceedings are not, however, in the nature of a dispute but may commonly relate to, for example, approval of a transaction. It follows that some forms of court proceedings in which members of the Association are instructed, such as those relating to trusts and companies, will fall into this category. Such proceedings will not fall within the litigation exception under **Bowman v Fels** so that the AML/CTF regime has no application as a matter of principle. Nevertheless, it will be necessary to carefully consider whether the substance of the matter is of a *financial or real property transaction* to determine whether the circumstances fall within reg. 3(9) (and see further, the judgment of the Court in **Ordre des barreaux francophones et germanophone**).

48 It follows that members of the Chancery Bar Association with tax, trust, banking, company or property practices are likely to be affected by the Regulations. Accordingly, so far as they do accept instructions/undertake work within regs. 3(8) or 3(9)(a) or (e), they must ensure that the requirements of the Regulations are satisfied.

49 While it is clear that it only where members of the Association *participate* in real property or financial transactions (or are otherwise acting as tax advisers) that the Regulations are engaged, the concept of 'participation' is given a meaning under reg. 3(9) that extends to *assisting in the planning* of a transaction. Thus 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.

Legal privilege – protection and recent European developments

50 Some of the difficulties with balancing the obligation of confidentiality with competing duties of disclosure are outlined in Part 1. Some recent developments are considered here because these are seen in recent draft EU legislation that will be given effect under a new set of domestic ML regulations. How this will be done, for reasons outlined below, remains unclear.

51 One of the most intractable problems for lawyers lies in identifying where the obligation to report suspicion of money laundering overrides obligations of confidentiality owed by reason of the circumstances being, on the face of it, privileged. Whether the circumstances are *in fact* privileged may not be known until much later (see Note on the substantive law). For lawyers in firms the problem is ameliorated by the role of an MLRO. For the Bar there is no such protection and the question for the individual concerned is whether to report or not. The strictness of the regime and the draconian nature of the penalties for committing a reporting offence will always tend, in the case of doubt, to point towards disclosure. (It is elsewhere discussed that an implied term will protect against breach of contract (**Shah v HSBC Private Bank**), no such protection would appear to be available for breach of confidence.) Recent European developments suggest that this position may be as unsatisfactory as a matter of law (lacking the requisite protection or degree of assurance) as it may be at a purely practical level.

52 In December 2012 the ECHR considered a challenge to the reporting obligations imposed on lawyers in the case of **Michaud v France** (Case 12323/11) (6 December 2012). A French lawyer, Patrick Michaud (a member of the Paris Bar's ruling council), appealed to the European Court of human rights, challenging an alleged lack of conformity with Convention rights in relation to certain French standards of reporting of suspicion (and associated sanctions for non-compliance) and obligations of lawyer/client confidentiality. It is the first case before the ECHR on the compatibility between the obligations imposed on lawyers under EU law and the possible infringement of Arts. 8, 7 and 6 (in that order) of the Convention. The reasoning of the court on two issues, which focused on the Art. 8 point, in finding the interference proportionate is of particular interest and importance:

> "126 Lastly, and above all, two factors are decisive in the eyes of the Court in assessing the proportionality of the interference.
>
> 127. Firstly, as stated above and as the Conseil d'Etat noted, the fact that lawyers are subject to the obligation to report suspicions only in two cases: where, in the context of their business activity, they take part for and on behalf of their clients in financial or property transactions or act as trustees; and where they assist their clients in preparing or carrying out transactions concerning certain defined operations (the buying and selling of real-estate or goodwill; the management of funds, securities or other assets belonging to the client; the opening of current accounts, savings accounts, securities accounts or insurance contracts; the organisation of the contributions required to create companies; the formation, administration or management of companies; the formation, administration or management of trusts or any other similar structure; the setting up or management of endowment funds). The obligation to report suspicions therefore only concerns tasks performed by lawyers

which are similar to those performed by the other professions subjected to the same obligation, and not the role they play in defending their clients.

Furthermore, the Monetary and Financial Code specifies that lawyers are not subjected to the obligation where the activity in question "relates to judicial proceedings, whether the information they have was received or obtained before, during or after said proceedings, including any advice given with regard to the manner of initiating or avoiding such proceedings, nor where they give legal advice, unless said information was provided for the purpose of money laundering or terrorist financing or with the knowledge that the client requested it for the purpose of money laundering or terrorist financing" (Article L. 561-3 of the Monetary and Financial Code; see paragraph 32 above).

128. The obligation to report suspicions does not therefore go to the very essence of the lawyer's defence role which, as stated earlier, forms the very basis of legal professional privilege.

129. *The second factor is that the legislation has introduced a filter which protects professional privilege: lawyers do not transmit reports directly to Tracfin[27] but, as appropriate, to the President of the Bar Council of the Conseil d'Etat and the Court of Cassation or to the chairman of the Bar of which the lawyer is a member. It can be considered that at this stage, when a lawyer shares information with a fellow professional who is not only subject to the same rules of conduct but also elected by his or her peers to uphold them, professional privilege has not been breached. The fellow professional concerned, who is better placed than anybody to determine which information is covered by lawyer-client privilege and which is not, transmits the report of suspicions to Tracfin only after having ascertained that the conditions laid down by Article L. 561-3 of the Monetary and Financial Code have been met (Article L. 561-17 of the same Code; see paragraph 38 above). The Government pointed out in this regard that the information is not forwarded if the chairman of the Bar considers that there is no suspicion of money laundering or it appears that the information reported was received in the course of activities excluded from the scope of the obligation to report suspicions.*

130. *The Court has already pointed out that the role played by the chairman of the Bar constitutes a guarantee when it comes to protecting legal professional privilege*. In the André judgment it specified that the Convention did not prevent domestic law from allowing for the possibility of searching a lawyer's offices as long as proper safeguards were provided; more broadly, it emphasised that, subject to strict supervision, it was possible to impose certain obligations on lawyers concerning their relations with their clients, in the event, for example, that there was plausible evidence of the lawyer's involvement in a crime and in the context of the fight against money laundering. It then took into account the fact that the search had been carried out in the presence of the chairman of the Bar, which it saw as a "special procedural guarantee" (§§ 42 and 43). Similarly, in the Roemen and Schmit judgment cited above (§ 69) it noted that the search of the lawyer's premises had been accompanied by "special procedural safeguards", including the presence of the President of the Bar Council. Lastly, in the case of Xavier Da Silveira, cited above (see in particular §§ 37 and 43), it found a violation of

Article 8, in part because there had been no such safeguard when a lawyer's premises were searched." [Emphasis supplied]

53 The arrangements in France which interpose the chairman of the relevant bar between the reporter and the state law enforcement agencies (*Tracfin* – the financial intelligence unit or FIU) and who performs a filtering role seen as protecting and guaranteeing privilege and the contrast with the position in the United Kingdom where the individual lawyer (i.e. member of the Bar in independent practice who has a direct reporting obligation) is striking.

54 The point above is given added force when viewed against the recitals to the draft Proposal for the fourth Directive published in February 2013, recital 27 providing that:

"(27) Member States should have the possibility to designate an appropriate self-regulatory body of the professions referred to in Article 2(1)(3)(a),(b), and (d) as the authority to be informed in the first instance in place of the FIU. In line with the case law of the European Court of Human Rights, a system of first instance reporting to a self-regulatory body constitutes an important safeguard to uphold the protection of fundamental rights as concerns the reporting obligations applicable to lawyers." [Emphasis supplied]

55 Whether this will give rise to a new and additional role for the Bar Council or BSB remains to be seen. The draft Directive, however, clearly envisages such an arrangement. The relevant provisions are under articles 32 and 33 (that provides the carve-out for legal privilege). Art. 33 is clearly a legislative codification of the ECHR decision in **Michaud**. The role for a second line of protection, or a sort of firewall, for the maintenance of privilege is emphasised.

Article 32

1. Member States shall require obliged entities, and where applicable their directors and employees, to cooperate fully:

   (a) by promptly informing the FIU, on their own initiative, where the institution or person covered by this Directive knows, suspects or has reasonable grounds to suspect that funds are the proceeds of criminal activity or are related to terrorist financing and by promptly responding to requests by the FIU for additional information in such cases;

   (b) by promptly furnishing the FIU, at its request, with all necessary information, in accordance with the procedures established by the applicable legislation.

2. The information referred to in paragraph 1 of this Article shall be forwarded to the FIU of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated in accordance with the procedures provided for in Article 8(4) shall forward the information.

Article 33

1. By way of derogation from Article 32(1), Member States may, in the case of the persons referred to in Article 2(1)(3)(a), (b), and (d) designate an appropriate self-regulatory body of the profession concerned as the authority to receive the information referred to in Article 32(1).

   Without prejudice to paragraph 2, the designated self-regulatory body shall in cases referred to in the first subparagraph forward the information to the FIU promptly and unfiltered.

2. Member States shall not apply the obligations laid down in Article 32(1) to notaries, other independent legal professionals, auditors, external accountants and tax advisors *only to the strict extent that such exemption relates to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings*, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.

[emphasis supplied]

Reporting obligation under PoCA s 330 and TA s 21A

56 It is to be noted that any member of the ChBA whose practice falls within the terms of the Regulations so as to become a 'relevant person' will, additionally, be subject to the reporting obligation imposed under PoCA s 330 and the provision to similar effect under s21A of the Terrorism Act 2000, as to which see further Part 1.

57 Detailed guidance on risks of terrorist financing (even though a hard-edged distinction is no longer adopted by the FATF) is beyond the scope of this Note. The FATF on 27 April 2012 updated its guidance on the financing of terrorism and this is available online[28] (note that references to the Recommendations are to the earlier 2004 Recommendations not the 2012 revised Standards). The guidance provided by the JMLSG to the financial services sector may be referred to.[29] The risk of members of the Association being used for transactions involving terrorist financing, on the face of it, would appear to be low.

58 The Treasury website contains general guidance on the implementation of financial sanctions and various electronic versions of the Consolidated List to assist with compliance with CTF, as well as regime-specific target lists, details of all Notices updating the Consolidated List and News Releases issued by the Treasury, together with links to other useful websites. The Treasury may also be contacted direct to provide guidance and to assist with any concerns regarding financial sanctions: Asset Freezing Unit[30], HM Treasury, London SW1, Tel: 020 7270 5454.

The risk-based approach to AML/CTF regulatory compliance Regulation 7(3)

59 *The 'risk-based approach' (RBA) to AML/CTF has no application to the substantive money laundering provisions under PoCA ss 327-329 (and cognate offences under s 340) and s 330, nor to the tipping off provisions under PoCA s 333.*

60 The principal application of a risk-based approach is in relation to CDD.[31]

61 As the FATF has pointed out in its February 2012 revised International Standards, the RBA does not apply to the circumstances in which CDD is required but may be used to determine the *extent* of such measures. It is fundamental that the RBA can only be applied where a relevant person is afforded a degree of discretion in the way that the obligation is performed. It is thus applicable to the *nature and extent* of the measures taken in compliance with the provisions under the Regulations for the purpose of preventing money laundering and where measures taken should be *proportionate* to the *assessed* risk.

62 Following the adoption by of RBA in 2007, in October 2008 the FATF published 'RBA Guidance for Legal Professionals'[32] which provides an explanation of how the RBA, where adopted, is intended to apply to and to be given effect by lawyers. The FATF emphasized that the RBA was not mandatory. Since 2007 the RBA has gained increasing salience as an aspect of government AML policy (see for example the government (Treasury) response to consultation on money laundering[33]). In June 2011 the government stated: "The risk-based approach is central to the UK anti-money laundering regime."[34]

63 FATF Recommendation 10 (formerly 5), dealing with CDD and record-keeping, requires that regulated sector institutions should apply the specified measures: "*….but should determine the extent of such measures using a risk-based approach (RBA) in accordance with the Interpretative Notes to this Recommendation and Recommendation 1."* The guidance is a development and continuation of guidance on this issue that was first promulgated by the FATF in June 2007.

64 Art. 8 of the Third Directive adopts similar language to the former FATF Recommendation 5 (now 10) and requires that the institutions and persons covered by the Directive shall apply each of the specified customer due diligence measures: "... but may determine the extent of such measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction."

65 Regulation 20(1) sets out the broad requirement that a relevant person must establish and maintain appropriate and risk-sensitive policies and procedures relating to all aspects of the regulatory requirements, including risk assessment and management.

66 The way in which the risk-based approach is to be applied to CDD is set out in Regulation 7(3):

> "(3) A relevant person must—
>
> (a) determine the extent of customer due diligence measures on a

risk-sensitive basis depending on the type of customer, business relationship, product or transaction; and

(b) be able to demonstrate to his supervisory authority[35] that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing."

67 The (Treasury approved) JMLSG Guidance (2011) for the financial services industry provides a description of the risk-based approach in practice: (Part 1 at § 4.2, 4.3):

> *"4.2 A risk-based approach takes a number of discrete steps in assessing the most cost effective and proportionate way to manage and mitigate the money laundering and terrorist financing risks faced by the firm. These steps are to:*
>
> - *identify the money laundering and terrorist financing risks that are relevant to the firm;*
> - *assess the risks presented by the firm's particular*
> - *customers;*
> - *products;*
> - *delivery channels;*
> - *geographical areas of operation;*
> - *design and implement controls to manage and mitigate these assessed risks;*
> - *monitor and improve the effective operation of these controls; and*
> - *record appropriately what has been done, and why.* [emphasis supplied]
>
> *4.3 No system of checks will detect and prevent all money laundering or terrorist financing. A risk-based approach will, however, serve to balance the cost burden placed on individual firms and their customers with a realistic assessment of the threat of the firm being used in connection with money laundering or terrorist financing. It focuses the effort where it is needed and will have most impact."*

68 The foregoing is guidance that is specifically addressed to financial institutions, but the thrust and general effect of the advice is clear and, it is suggested, of general application.

69 The recent revised FATF International Standards issued in February 2012 include, under the Interpretative Note to Recommendation 10 (formerly 5), a useful and fairly detailed enumeration of some factors that *may* be seen to go to risk, and thus inform the appropriate response. The examples are for guidance only. For convenience, and because these represent the most recent FATF statement on the issue of the RBA (and are the most detailed guidance available) they are repeated here *verbatim*:

"H. RISK BASED APPROACH

[14.] The examples below are not mandatory elements of the FATF Standards, and are included for guidance only. The examples are not intended to be comprehensive, and although they are considered to be helpful indicators, they may not be relevant in all circumstances.

Higher risks

[15.] There are circumstances **where the risk of money laundering or terrorist financing is higher** [emphasis supplied]**,** and enhanced CDD measures have to be taken. When assessing the money laundering and terrorist financing risks relating to types of customers, countries or geographic areas, and particular products, services, transactions or delivery channels, examples of potentially higher-risk situations (in addition to those set out in Recommendations 12 to 16) include the following:

(a) Customer risk factors:

- The business relationship is conducted in unusual ircumstances (e.g. significant unexplained geographic distance between the financial institution and the customer).
- Non-resident customers.
- Legal persons or arrangements that are personal asset-holding vehicles.
- Companies that have nominee shareholders or shares in bearer form.
- Business that are cash-intensive.
- The ownership structure of the company appears unusual or excessively complex given the nature of the company's business.

(b) Country or geographic risk factors:

- Countries identified by credible sources, such as mutual evaluation or detailed assessment reports or published follow-up reports, as not having adequate AML/CFT systems.
- Countries subject to sanctions, embargos or similar measures issued by, for example, the United Nations.
- Countries identified by credible sources as having significant levels of corruption or other criminal activity.
- Countries or geographic areas identified by credible sources as providing funding or support for terrorist activities, or that have designated terrorist organisations operating within their country.

(c) Product, service, transaction or delivery channel risk factors:

- Private banking.
- Anonymous transactions (which may include cash).
- Non-face-to-face business relationships or transactions.
- Payment received from unknown or un-associated third parties"

Lower risks

[16.] There are circumstances where the risk of money laundering or terrorist financing may be lower. In such circumstances, and provided there has been an adequate analysis of the risk by the country or by the financial institution, it could be reasonable for a country to allow its financial institutions to apply simplified CDD measures.

[17.] When assessing the money laundering and terrorist financing risks relating to types of customers, countries or geographic areas, and particular products, services, transactions or delivery channels, examples of potentially lower risk situations include the following:

(a) Customer risk factors:

- Financial institutions and DNFBPs – where they are subject to requirements to combat money laundering and terrorist financing consistent with the FATF Recommendations, have effectively implemented those requirements, and are effectively supervised or monitored in accordance with the Recommendations to ensure compliance with those requirements.
- Public companies listed on a stock exchange and subject to disclosure requirements (either by stock exchange rules or through law or enforceable means), which impose requirements to ensure adequate transparency of beneficial ownership.
- Public administrations or enterprises.

(b) Product, service, transaction or delivery channel risk factors:

- Life insurance policies where the premium is low (e.g. an annual premium of less than USD/EUR 1,000 or a single premium of less than USD/EUR 2,500).
- Insurance policies for pension schemes if there is no early surrender option and the policy cannot be used as collateral.
- A pension, superannuation or similar scheme that provides retirement benefits to employees, where contributions are made by way of deduction from wages, and the scheme rules do not permit the assignment of a member's interest under the scheme.
- Financial products or services that provide appropriately defined and limited services to certain types of customers, so as to increase access for financial inclusion purposes.

(c) Country risk factors:

- Countries identified by credible sources, such as mutual evaluation or detailed assessment reports, as having effective AML/CFT systems.
- Countries identified by credible sources as having a low level of corruption or other criminal activity.

In making a risk assessment, countries or financial institutions could, when appropriate, also take into account possible variations in money laundering and terrorist financing risk between different regions or areas within a country.

[18.] Having a lower money laundering and terrorist financing risk for identification and verification purposes does not automatically mean that the

same customer is lower risk for all types of CDD measures, in particular for ongoing monitoring of transactions.

Risk variables

[19.] When assessing the money laundering and terrorist financing risks relating to types of customers, countries or geographic areas, and particular products, services, transactions or delivery channels risk, a financial institution should take into account risk variables relating to those risk categories. These variables, either singly or in combination, may increase or decrease the potential risk posed, thus impacting the appropriate level of CDD measures.

Examples of such variables include:

- The purpose of an account or relationship.
- The level of assets to be deposited by a customer or the size of transactions undertaken.
- The regularity or duration of the business relationship.

Prohibited or restricted countries and entities

70 Under reg. 18 the Treasury may prohibit firms from forming, or require them to terminate, relationships with customers situated in a given country to which the FATF has required counter-measures to be applied. At present (May 2012) the countries against which such measures are specified by FATF are Iran and North Korea. These measures take effect through the Regulations. For financial institutions, the risks of infringing against international sanctions are significant.

71 Apart from the Regulations and the provision under reg. 18, the UN, the European Union, and United Kingdom each designate persons and entities subject to prohibitions and financial sanctions. Such sanctions normally include a comprehensive freeze of funds and economic resources, together with a prohibition on making funds or economic resources available to the subject of such sanctions. A Consolidated List[36] of all countries and entities to which financial sanctions apply is maintained by the Treasury.[37] This includes all individuals and entities that are subject to financial sanctions in the UK.

72 There are a large number of entities that may not be dealt with. The main prohibitions are under:

- ‘Directions’ given under the Anti-Terrorism Act 2008 Sch. 7. Note that ‘directions’ may only be given to persons in the financial sector.
- UN Sanctions resolutions 1267 (1999), 1373 (2001), 1333 (2002), 1390 (2002) and 1617 (2005).
- EC Regulation 2580/2001, 881/2002 (as amended), 423/2007 and 1110/2008.
- Terrorism Act, 2000, Sch. 2.

- Terrorism (United Nations Measures) Orders 2006 and 2009.
- Al-Qa'ida and Taliban (United Nations Measures) Order 2006.
- HM Treasury Sanctions Notices and News Releases.

73 Most financial services businesses utilise proprietary software systems to review transactions subject to sanctions or restrictions. It is probably unlikely that a member of the Association will be in a position where instructions are received in circumstances where the application of prohibitions, restrictions or sanctions will have to be considered and reviewed by the member concerned. It is, nonetheless, important that the existence and source of restrictions, in general terms, be known.

74 Good practice on CDD on restricted prohibited persons/countries should be informed by reference to the FATF revised International Standards.[38] Recommendation 10 (Customer due diligence) is subject to an extensive Interpretative Note. The JMLSG guidance[39] (December 2011) under Chapter 5 contains extensive and detailed guidance for the requirements of CDD, including restrictions and sanctions, applicable to the financial services sector. Further information on prohibited entities and countries, as noted above, may be obtained from the Treasury.

Customer due diligence - Regulations 5 and 7

75 Regulation 5 describes what customer due diligence is and reg. 7 defines the circumstances in which due diligence is to be applied. Between the two, reg. 6 is concerned with beneficial ownership (below).

76 CDD may be seen to be the core organising principle of the Regulations. Anonymous transactions and those carried out through nominees inhibit oversight and effective supervision and obviously have the potential to facilitate money laundering. One of the objects of the FATF is to preclude transactions of this kind by requiring clients to be identified and verified, together with the beneficial ownership of persons and entities where such clients are not individuals. The new revised FATF Internatinal Standards recommend measures specifically aimed at securing enhanced transparency.

77 CDD is an AML/CTF specific, and rather narrower application of the 'know your customer' or 'KYC' principle developed by the Basel Committee on Banking Supervision[40] the aim of which is to protect the integrity of the banking and financial system on somewhat wider prudential grounds that include, but are not limited to, preventing financial crime.

78 In practice the potential benefits of CDD requirements under the Regulations can be significant. For example, following the revolution in Libya, it became possible for banks and other financial institutions to distinguish between sovereign and private funds with the consequence that sovereign funds were capable of being unfrozen relatively quickly following the change in regime.

79 The CDD requirements are extensive and detailed and these, and related provisions, are provided under Part 2 of the Regulations from regs. 5 to 18 inclusive. These apply to all *relevant persons*[3] and are intended primarily as preventative measures, to make it less easy for a person to engage and use the services of the regulated sector, including, where applicable, solicitors and members of the Bar, for the purposes of money laundering or terrorist financing.

80 The core obligations under CDD are, in outline, to:

- carry out prescribed CDD measures for all customers not covered by exemptions;
- have systems in place that include dealing with identification issues in relation to clients who cannot produce the standard evidence;
- apply enhanced customer due diligence (ECDD) to take account of the greater potential for money laundering in higher risk cases, specifically when the client is not physically present when being identified, and in respect of PEPs;
- not deal with some persons/entities;
- not proceed with instructions (a business relationship) if satisfactory evidence of identity is not obtained;
- have a system for keeping customer information up to date.

81 Regulation 5 defines CDD measures and the scope of the obligation placed on 'relevant persons' (i.e. a member of the Association subject to the Regulations) to:

- identify the lay client and verify their identity on the basis of documents, data, or information obtained from a reliable and independent source;
- identify, where there is a beneficial owner who is not the lay client, who the beneficial owner is and to take adequate measures, on a risk-sensitive basis, to verify the identity of such an owner so that the barrister concerned is satisfied that they know the identity of the beneficial owner. This includes, in the case of a legal person, trust or similar legal arrangement, taking appropriate measures to understand the ownership and control structure of the person, trust or arrangement; and
- obtain information on the purpose and intended nature of the intended business relationship.

82 It will be immediately obvious that, in some circumstances, satisfying all of these requirements may present significant, if not formidable, difficulties. This is especially so where beneficial ownership is concerned. This will most obviously apply where entities have their seat/are registered in jurisdictions that, for whatever reason, do not facilitate transparency in the

ownership of trusts and/or companies. The revised FATF International Standards are intended to address such (well recognised) difficulty and it is likely that further clarification will be provided in connection with the requisite measures by both FATF and the EU.

83 **Where a member of the ChBA is unable to apply CDD measures that otherwise are required, the requirement is to cease transactions (i.e. to cease acting on instructions that fall within the Regulations): reg. 11(1).**

84 Regulation 7 sets out the times and circumstances in which CDD measures are to be applied by a member of the Association to new and existing lay clients:

> "(1) Subject to regulations 9, 10, 12, 13, 14, 16(4) and 17, a relevant person must apply customer due diligence measures when he—
>
> (a) establishes a business relationship;
>
> (b) carries out an occasional transaction;
>
> (c) suspects money laundering or terrorist financing;
>
> (d) doubts the veracity or adequacy of documents, data or information previously obtained for the purposes of identification or verification.
>
> (2) Subject to regulation 16(4), a relevant person must also apply customer due diligence measures at other appropriate times to existing customers on a risk-sensitive basis."
>
> [emphasis supplied]

85 The establishing of a business relationship is an expression explained in reg. 2(1) as including a professional relationship that the person subject to the Regulations expects, at the time when contact is established, to have an element of duration.

86 An 'occasional transaction' is a defined term being a transaction carried out other than as part of a business relationship and amounting to €15,000 or more, whether the transaction is carried out in a single operation or several operations which appear to be linked. Accordingly, a member of the ChBA does not need to apply CDD measures when he carries out a transaction, whether carried out in a single operation or several linked operations, that is not part of a business relationship if it involves less than €15,000. This limitation is perhaps unlikely to be of practical significance.

87 Plainly, where there is suspicion of money laundering additional steps must be taken under PoCA because an SAR will be required (subject to considerations of privilege and the nature of the material upon which suspicion is based, see generally Part 1).

88 It follows from reg. 7(3) and the risk-based approach referred to above, that a member of the

Association must:

(a) determine the extent of CDD measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction; and

(b) be able to demonstrate to the BSB that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing.

89 Separate from the requirement to apply CDD measures is the requirement to conduct 'ongoing monitoring'. Where reg. 7 requires CDD measures to be applied at the start of a business realtionship, once such a relationship is established reg. 8 imposes a duty to continue to scrutinize *transactions* (to ensure these are consistent with a client's risk profile and business) and to keep relevant data up to date. Regulation 8(1) requires that: 'A relevant person must conduct ongoing monitoring of a business relationship.' "Ongoing monitoring" of a business relationship, by reg. 8(2), means:

(a) scrutiny of transactions undertaken throughout the course of the relationship (including, where necessary, the source of funds) to ensure that the transactions are consistent with the relevant person's knowledge of the customer, his business and risk profile; and

(b) keeping up-to-date the documents, data or information obtained for the purpose of applying CDD measures.

90 A member of the Association subject to the Regulations must determine the extent of on-going monitoring on a risk-sensitive basis depending on the type of client and the nature of the instructions and the relevant *transaction*. He must also be able to demonstrate to the BSB that the extent of the on-going monitoring is appropriate in view of the risks of money laundering and terrorist financing.

Simplified due diligence Regulation 13

91 The term CDD is adopted under the Regulations to refer to CDD generally and also to 'simplified' customer due diligence, or SCDD, and also 'enhanced' customer due diligence, or ECDD.

92 An important aspect of the risk-based approach is that reg. 13 provides for the circumstances in which a member of the Association need not apply full standard CDD measures.

93 A member of the Association is not required to apply standard CDD measures under reg. 7(l)(a), (b) or (d) where he has reasonable grounds for believing that the client, transaction [or product related to such transaction] falls within one of eight specified categories, relating to *customers* (i.e. clients) (paragraphs (2)-(6)) [or to *products* (paragraphs (7) to (9))]. These are customers (and products) that are considered to present a low risk of money laundering or terrorist financing. In these circumstances a member of the Association is not required to apply (standard) CDD measures when establishing a business relationship or carrying out an

occasional transaction. Instead, the barrister may apply simplified due diligence. Those circumstances are when the member concerned has reasonable grounds for believing that the lay client is (in general terms):

- itself a credit or financial institution subject to the requirements of the Money Laundering Directive;
- a credit or financial institution situate in a non EEA state with equivalent AML requirements and is supervised for compliance;
- a company whose securities are listed on a regulated market subject to specified disclosure obligations;
- an independent legal professional operating a client account (and where operating in a non EEA state where there are AML requirements consistent with the International Standards and the professional is subject to supervision for compliance;
- a public authority in the United Kingdom (or certain non-UK public authorities entrusted with public functions pursuant to the Treaty on **the** European Union, the Treaties on the European Communities or Community secondary legislation [these latter by Sch. 2 para 2]).

Enhanced customer due diligence (ECDD) Regulation 14

94 In some circumstances, a member of the Association *must* apply enhanced CDD and enhanced ongoing monitoring under reg. 14:

> "(1) A relevant person must apply on a risk-sensitive basis enhanced customer due diligence measures and enhanced ongoing monitoring—
>
> (a) in accordance with paragraphs (2) to (4);
>
> (b) in any other situation which by its nature can present a higher risk of money laundering or terrorist financing."

95 Regulation 14(2) is the most important provision for present purposes; it requires that whenever a client is not present for identification purposes ECDD must be adopted. (Regulation 14(3) concerns correspondent banking relationships and reg. 14(4) concerns circumstances where a business relationship or occasional transaction with a PEP is intended.)

96 Regulation l4(l)(a) provides that a member subject to the Regulations must apply both ECDD and enhanced ongoing monitoring in three circumstances:

(a) where the lay client has not been physically present for identification purposes;
(b) where a member proposes to have a business relationship or carry out an occasional transaction with a politically exposed person (PEP);

(c) in any other situation which by its nature may present a higher risk of money laundering or terrorist financing.

Beneficial ownership – Regulations 5(b) and 6

97 By reg. 5(b), a member is required to verify the identity of the beneficial owner, and, where that is a legal person, trust or 'similar arrangement', to take measures to understand the ownership and control structure of that entity.

98 The implementation of the obligations in relation to beneficial owners under Art. 8.1(b) of the third EU Directive could not, without being adapted, be transposed into English law because of the distinctive character of English trusts. Originally it was proposed merely that guidance be provided by supervisory bodies. In the event the meaning of 'beneficial owner' was clarified by reg 6.

99 Regulation 6 separately refers to beneficial ownership in contexts including those of a body corporate, partnership and trust. In any other case reg. 6(9) provides that beneficial owner means the individual who ultimately owns or controls the lay client or on whose behalf a transaction is being conducted. Where the person behind a particular transaction is not an individual it is clearly a possibility that that there may be a number of persons beneficially interested. Regulation 6 provides (headings in square brackets are not part of the regulation):

[Corporation]

"6.—(1) In the case of a body corporate, "beneficial owner" means any individual who—

(a) as respects any body other than a company whose securities are listed on a regulated market, ultimately owns or controls (whether through direct or indirect ownership or control, including through bearer share holdings) more than 25% of the shares or voting rights in the body; or

(b) as respects any body corporate, otherwise exercises control over the management of the body.

[Partnership other than LLP]

(2) In the case of a partnership (other than a limited liability partnership), "beneficial owner" means any individual who—

(a) ultimately is entitled to or controls (whether the entitlement or control is direct or indirect) more than a 25% share of the capital or profits of the partnership or more than 25% of the voting rights in the partnership; or

(b) otherwise exercises control over the management of the partnership.

[Trust]

(3) In the case of a trust, "beneficial owner" means—

(a) any individual who is entitled to a specified interest in at least 25% of the capital of the trust property;

(b) as respects any trust other than one which is set up or operates entirely for the benefit of individuals falling within

sub-paragraph (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.

(4) In paragraph (3)—

"specified interest" means a vested interest which is—

(a) in possession or in remainder or reversion (or, in Scotland, in fee); and

(b) defeasible or indefeasible;

"control" means 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 beneficiaries;

(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).

(5) For the purposes of paragraph (3)—

(a) where an individual is the beneficial owner of a body corporate which is entitled to a specified interest in the capital of the trust property or which has control over the trust, the individual is to be regarded as entitled to the interest or having control over the trust; and

(b) an individual does not have control solely as a result of—

(i) his consent being required in accordance with section 32(1)(c) of the Trustee Act 1925(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 on him 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 exercisable collectively at common law to vary or extinguish a trust where the beneficiaries under the trust are of full age and capacity and (taken together) absolutely entitled to the property subject to the trust (or, in Scotland, have a full and unqualified right to the fee).

[Other entity or arrangement]

(6) In the case of a legal entity or legal arrangement which does not fall within paragraph (1), (2) or (3), "beneficial owner" means—

(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;

(c) any individual who exercises control over at least 25% of the property of the entity or arrangement.

(7) For the purposes of paragraph (6), where an individual is the beneficial owner of a body corporate which benefits from or exercises control over the property of the entity or arrangement, the individual is to be regarded as benefiting from or exercising control over the property of the entity or arrangement.

(8) In the case of an estate of a deceased person in the course of administration, "beneficial owner" means—

(a) in England and Wales and Northern Ireland, the executor, original or by representation, or administrator for the time being of a deceased person;

(b) in Scotland [ ].

(9) In any other case, "beneficial owner" means the individual who ultimately owns or controls the customer or on whose behalf a transaction is being conducted.

(10) In this regulation—

"arrangement", "entity" and "trust" means an arrangement, entity or trust which administers and distributes funds;

"limited liability partnership" has the meaning given by the Limited Liability Partnerships Act 2000."

100 Where a member is required to apply CDD measures in relation to a trust, legal entity (other than a body corporate), or a legal arrangement (other than a trust), and the class of persons in whose main interest the trust, entity, or arrangement is setup or operates is identified as a beneficial owner, the relevant person is not required to identify *all* the members of the class: reg. 7(4).

101 If an individual member of the Association is required to undertake CDD in relation to beneficial ownership, the Law Society Practice Note at Chapter 4 under para 4.7 helpfully provides extensive and detailed commentary and this may be referred to.

Beneficial ownership - FATF revised International Standards February 2012

102 The FATF Recommendations are not binding until given effect. The European Commission is already in the process of implementing the 2012 revised International Standards and it is expected that the new Directive will be issued before 2013.

103 A key concern of the FATF under the revised International Standards has been to facilitate identification of beneficial ownership of legal entities. The new revised International Standards at Recommendations 24 and 25 provide as follows:

"E. TRANSPARENCY AND BENEFICIAL OWNERSHIP OF LEGAL PERSONS AND ARRANGEMENTS

24. Transparency and beneficial ownership of legal persons *[41]

Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective measures to ensure that they are not misused for money laundering or terrorist financing. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.

25. Transparency and beneficial ownership of legal arrangements *

Countries should take measures to prevent the misuse of legal arrangements for money laundering or terrorist financing. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, that can be obtained or accessed in a timely fashion by competent authorities. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22."

104 The Recommendations are the subject of extensive and detailed Interpretative Notes that run to 6 pp. While beyond the scope of this Note, the following are of particular relevance:

(a) under the Intepretative Note to Recommendation 24 it is provided that:

"B. BENEFICIAL OWNERSHIP INFORMATION

7. Countries should ensure that either: (a) information on the beneficial ownership of a company is obtained by that company and available at a specified location in their country; or (b) there are mechanisms in place so that the beneficial ownership of a company can be determined in a timely manner by a competent authority.

8. In order to meet the requirements in paragraph 7, countries should use one or more of the following mechanisms:

(a) Requiring companies or company registries to obtain and hold up-to-date information on the companies' beneficial ownership;

(b) Requiring companies to take reasonable measures43 to obtain and hold up-to-date information on the companies' beneficial ownership;

(c) Using existing information, including: (i) information obtained by financial institutions and/or DNFBPs, in accordance with Recommendations 10 and 2244; (ii) information held by other competent authorities on the legal and

> beneficial ownership of companies (e.g. company registries, tax authorities or financial or other regulators); (iii) information held by the company as required above in Section A; and (iv) available information on companies listed on a stock exchange, where disclosure requirements (either by stock exchange rules or through law or enforceable means) impose requirements to ensure adequate transparency of beneficial ownership."

(b) Under paragraph 15, under the heading "Obstacles to Transparency" the Note provides:

> "Countries should take measures to prevent the misuse of nominee shares and nominee directors, for example by applying one or more of the following mechanisms: (a) requiring nominee shareholders and directors to disclose the identity of their nominator to the company and to any relevant registry, and for this information to be included in the relevant register; or (b) requiring nominee shareholders and directors to be licensed, for their nominee status to be recorded in company registries, and for them to maintain information identifying their nominator, and make this information available to the competent authorities upon request."

(c) Similarly, the Interpretative Note to Recommendation 25 (Transparency and Beneficial Ownership of Legal Arrangements) at paragraphs 1-2 provides:

> "1. Countries should require trustees of any express trust governed under their law to obtain and hold adequate, accurate, and current beneficial ownership information regarding the trust. This should include information on the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust. Countries should also require trustees of any trust governed under their law to hold basic information on other regulated agents of, and service providers to, the trust, including investment advisors or managers, accountants, and tax advisors.
>
> 2. All countries should take measures to ensure that trustees disclose their status to financial institutions and DNFBPs when, as a trustee, forming a business relationship or carrying out an occasional transaction above the threshold. Trustees should not be prevented by law or enforceable means from providing competent authorities with any information relating to the trust; or from providing financial institutions and DNFBPs, upon request, with information on the beneficial ownership and the assets of the trust to be held or managed under the terms of the business relationship."

While these Recommendations (and their Interpretative Notes) are yet to become law, they include important developments, the effects of which may be fairly far-reaching, particularly in some circumstances and jurisdictions where transparency as to beneficial ownership of companies and/or trusts is limited or non-existent.

105 The European Commission's Internal Security Strategy has also highlighted this issue and suggested, "in the light of discussions with its international partners in the Financial Action Task Force, revising the EU Anti-Money Laundering legislation to enhance the transparency of legal persons and legal arrangements".[42] Likewise the European Parliament's Resolution of 15th

September 2011 called for rules to "make the fight against anonymous shell companies in secrecy jurisdictions (…) a key element of the upcoming reform of the Anti-Money Laundering Directive.[43]

Beneficial ownership under the draft fourth Directive

106 Following the FATF recommendations, the draft fourth Directive specifies the information that is required to be provided under draft Articles 29 and 30:

"CHAPTER III

BENEFICIAL OWNERSHIP INFORMATION

Article 29

1. Member States shall ensure that corporate or legal entities established within their territory obtain and hold adequate, accurate and current information on their beneficial ownership.

2. Member States shall ensure that the information referred to in paragraph 1 of this Article can be accessed in a timely manner by competent authorities and by obliged entities.

Article 30

1. Member States shall ensure that trustees of any express trust governed under their law obtain and hold adequate, accurate and current information on beneficial ownership regarding the trust. This information shall include the identity of the settlor, of the trustee(s), of the protector (if relevant), of the beneficiaries or class of beneficiaries, and of any other natural person exercising effective control over the trust.

2. Member States shall ensure that trustees disclose their status to obliged entities when, as a trustee, the trustee forms a business relationship or carries out an occasional transaction above the threshold set out in points (b), (c) and (d) of Article 10.

3. Member States shall ensure that the information referred to in paragraph 1 of this Article can be accessed in a timely manner by competent authorities and by obliged entities.

4. Member States shall ensure that measures corresponding to those in paragraphs 1, 2 and 3 apply to other types of legal entity and arrangement with a similar structure and function to trusts."

Timing of verification under CDD Regulation 9

107 The identification of both the customer and any beneficial owner, together with verification of identity, must generally take place before establishing a business relationship or carrying out an occasional transaction. (This is at present under review, following representations from interested constituencies, including lawyers.) Regulation 9 nevertheless allows for relaxation of the timing of *verification of the identity* of a lay client or beneficial owner where a member establishes a business relationship or carries out an occasional transaction.

108 It would appear that reg. 9(3) is likely to permit barristers to provide advice under urgent instructions because otherwise normal business may be interrupted. However a view must be taken and assessment made as to whether there is real risk of money laundering or terrorist financing (in which case advice should not be given and if there is suspicion of laundering or terrorist financing, subject to other issues being carefully evaluated, a SAR should be made, most obviously perhaps under PoCA s. 330 or TA s. 21A). Client verification must in any event be completed as soon as possible.

109 Where, in relation to any client, a member of the Association is unable to apply customer due diligence measures in accordance with reg. 11, the regulation requires that they:

- must not carry out a transaction with or for the lay client;
- must not establish a business relationship or carry out an occasional transaction with the customer;
- must terminate any existing business relationship with the customer;
- must consider whether he is required to make an SAR under Part 7 of the Proceeds of Crime Act 2002 (most obviously under s. 330) or Part 3 of the Terrorism Act 2000 (the equivalent provision under TA s 21A).

110 But the requirement to cease transactions, by reg. 11(2), does not apply to a barrister where they are engaged in:

- ascertaining the legal position for their client; or
- defending or representing that client in, or concerning, legal proceedings, including advice on the institution or avoidance of proceedings; or
- defending or representing that client in, or concerning, legal proceedings, including advice on the institution or avoidance of proceedings.

Politically Exposed Persons (PEPS) Regulation 14(5)

111 The rationale for special measures (ECDD) in relation to politically exposed persons is provided under the Preamble to the Third EU ML Directive (the requirements are given effect under reg.

14(4)-(6) and Sch. 2 para 4.):

> "[24] ... Community legislation should recognise that certain situations present a greater risk of money laundering or terrorist financing. Although the identity and business profile of all customers should be established, there are cases where particularly rigorous customer identification and verification procedures are required.
>
> [25] This is particularly true of business relationships with individuals holding, or having held, important public positions, particularly those from countries where corruption is widespread. Such relationships may expose the financial sector in particular to significant reputational and/or legal risks. The international effort to combat corruption also justifies the need to pay special attention to such cases and to apply the complete normal customer due diligence measures in respect of domestic politically exposed persons or enhanced customer due diligence measures in respect of politically exposed persons residing in another Member State or in a third country."

112 Regulation 14(5) defines "politically exposed person" (further see Sch. 2 para 4(1)(a)):

> "(5) In paragraph (4), "a politically exposed person" means a person who is—
>
> (a) an individual who is or has, at any time in the preceding year, been entrusted with a prominent public function by—
>
> (i) a state other than the United Kingdom;
>
> (ii) a Community institution; or
>
> (iii) an international body,
>
> including a person who falls in any of the categories listed in paragraph 4(1)(a) of Schedule 2;
>
> (b) an immediate family member of a person referred to in sub-paragraph (a), including a person who falls in any of the categories listed in paragraph 4(1)(c) of Schedule 2; or
>
> (c) a known close associate of a person referred to in sub-paragraph (a), including a person who falls in either of the categories listed in paragraph 4(1)(d) of Schedule 2."

113 A barrister must apply, on a risk-sensitive basis, ECDD measures where they propose to have a business relationship or carry out an occasional transaction with a politically exposed person.

114 Regulation 14(4) sets out the specific requirements. The first of these is approval from senior management for establishing the business relationship with the PEP and which would appear to have no application. The other requirements are:

(a) to take adequate measures to establish the source of wealth and source of funds which are involved in the proposed business relationship or

occasional transaction; and

(b) to conduct enhanced on-going monitoring of the relationship.

115 A 'primary PEP' is an individual who is or has, at any time in the preceding year, been entrusted with a prominent public function by a state other than the United Kingdom, by a Community institution, or by an international body (including a person who falls in any of the categories listed under Sch. 2 para 4(1)(a)). That Schedule provides an illustrative list of categories of individuals who are or have been entrusted with prominent public functions including:

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

(ii) members of parliaments;

(iii) members of supreme courts, of constitutional courts or of other high-level judicial bodies whose decisions are not generally subject to further appeal, other than in exceptional circumstances;

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

(v) ambassadors, *charges d'affaires* and high-ranking officers in the armed forces; and

(vi) members of the administrative, management or supervisory bodies of state-owned enterprises.

116 After primary PEPs there are secondary PEPs and reg.14(5) includes the families or associates of PEPs. This may be brought into play in unexpected circumstances, for example where a PEP is a trustee or member of the management council of a charity. Whether a person is a 'close associate' need be determined only by reference to material in the possession of the member concerned or else that is publicly known: reg. 14(6).

117 It will be seen that it may by no means be straightforward identifying whether or not a person is a PEP. In February 2012 the FATF has stated its intention, in order to facilitate private sector efforts in implementing the PEP requirements, to develop and provide further guidance that will include guidance on how to identify a PEP, his/her family members and close associates.

118 The new (February 2012) FATF Revised 40 International Standards extend the obligations on financial institutions to conduct enhanced due diligence to cover domestic PEPs, PEPs from international organisations and the family and close associates of PEPs. These new recommended measures are imposed in relation to increased international concerns on corruption. Unlike the requirements in relation to foreign PEPs who are always deemed high risk, and thus required to be subject to enhanced CDD, the new measures are to be implemented on a RBA.

Reliance upon a third party's [including an instructing solicitor's] compliance, Regulation 17

119 Duplication of effort is contrary to the *proportionate* approach to AML/CTF encouraged by both

the FATF and the EU and given effect under the 2007 Regulations. Ordinarily it should be possible to rely upon compliance by a member's instructing solicitor and which may be done by an appropriately worded letter, as to which see Appendix 2 to this Note (that must be kept on file). Regulation 17 provides:

> "17. (1) A relevant person may rely on a person who falls within paragraph (2) (or who the relevant person has reasonable grounds to believe falls within paragraph (2)) to apply any customer due diligence measures provided that—
>
> (a) the other person consents to being relied on; and
>
> (b) notwithstanding the relevant person's reliance on the other person, the relevant person remains liable for any failure to apply such measures.
>
> (2) The persons are—
>
> (a) a credit or financial institution which is an authorised person;
>
> (b) a relevant person who is—
>
> (i) an auditor, insolvency practitioner, external accountant, tax adviser or independent legal professional;[44] and
>
> (ii) supervised for the purposes of these Regulations by one of the bodies listed in Part 1 of Schedule 3;
>
> (c) a person who carries on business in another EEA state who is—
>
> (i) a credit or financial institution, auditor, insolvency practitioner, external accountant, tax adviser or independent legal professional;
>
> (ii) subject to mandatory professional registration recognised by law; and
>
> (iii) supervised for compliance with the requirements laid down in the money laundering directive in accordance with section 2 of Chapter V of that directive; or
>
> (d) a person who carries on business in a non-EEA state who is—
>
> (i) a credit or financial institution (or equivalent institution), auditor, insolvency practitioner, external accountant, tax adviser or independent legal professional;
>
> (ii) subject to mandatory professional registration recognised by law;
>
> (iii) subject to requirements equivalent to those laid down in the money laundering directive; and
>
> (iv) supervised for compliance with those requirements in a manner equivalent to section 2 of Chapter V of the money laundering directive.
>
> (3) In paragraph (2)(c)(i) and (d)(i), "auditor" and "insolvency practitioner" includes a person situated in another EEA state or a non-EEA state who provides services equivalent to the services provided by an auditor or insolvency practitioner.

> (4) Nothing in this regulation prevents a relevant person applying customer due diligence measures by means of an outsourcing service provider or agent provided that the relevant person remains liable for any failure to apply such measures.
> (5) In this regulation, "financial institution" excludes money service businesses."

120 It will be seen that it is necessary to obtain consent for a member of the Association to rely upon an instructing solicitor (or other professional or institution within reg. 17) as having complied with the regulatory requirements.

121 Further, despite consent to reliance by a solicitor (or other person within reg. 17) a member will nevertheless remain liable for any failure in compliance by the person relied upon. It follows that it is essential that the nature of compliance, and thus the requirements of the Regulations, be clearly understood.

122 A suggested *pro forma* letter intended to take advantage of the provision under reg. 17 is provided under Appendix 2.

123 Note that in-house lawyers or accountants do not qualify for the purpose of reg. 17. Nor do many of the others who are now able to instruct counsel under licensed access arrangements. Still less do members of the public who instruct Counsel under public access arrangements qualify.

CDD where 'reliance' is not available

124 In what will be the comparatively unusual circumstance of a member of the Association being unable to rely, for any reason, upon their instructing solicitor (or other person or entity) for the purposes of reg. 17, the individual concerned will have to undertake CDD measures themselves and must personally comply with the other requirements of the Regulations. For reasons that will be clear, undertaking CDD is onerous and may give rise to difficulties, particularly so far as identification of beneficial interest is concerned. Whereever possible 'reliance' on a third party should be sought pursuant to reg. 17 if reasonably practicable.

Guidance

125 A variety of CDD guidance is available. The following, in particular, may be referred to:

- outline guidance on customer identification checks under Appendix 2 to the Bar Council's guidance.[45]
- Extensive and detailed guidance under the Law Society AML Practice Note (October 2011)[46]
- JMLSG guidance.[47]

The second and third of these have Treasury approval.

What follows is necessarily only an outline of what CDD will entail when dealing with: (i) individuals, (ii) corporations; (iii) partnerships and unincorporated associations; and (iv) trusts. The circumstances will inevitably vary and be fact-specific.

CDD natural persons

126 A barrister should obtain the following information in relation to a client who is a natural person:

- full name;
- residential address;
- date of birth.

Verification

127 Verification of the information obtained must be based on reliable and independent sources - which might be a document or documents produced either by the client, or electronically by the barrister, or a combination of both. Where business is conducted face-to-face, a member of the ChBA should see originals of any documents involved in the verification.

Documentary verification

128 If documentary evidence of an individual's identity is to provide a high level of confidence, it will typically have been issued by a government department or agency, or by a court, because of the probability that the existence and characteristics of the persons concerned will have been officially checked. In cases where such documentary evidence of identity may not be available to an individual, other evidence of identity may give reasonable confidence in the lay client's identity, but this should be weighed against the risks involved.

129 Non-government issued documentary evidence complementing identity should normally only be accepted if it originates from a public sector body or from a solicitor or a regulated financial services firm, or is supplemented by knowledge that a member has of the person or entity (which should be documented). If identity is to be *verified* from documents, this should be based on:

- a government-issued document which incorporates: the lay client's full name and photograph, and either his residential address or his date of birth.

or

- a government-issued document without a photograph which incorporates the client's full name, supported by a second official document (government, judicial/legal, public sector body or authority, or regulated utility company or other FCA regulated firm) that incorporates the client's full name and either residential address or date of birth.

130 In practical terms this means that for face-to-face verification production of a valid passport or photocard driving licence (so long as the photograph is in date) should enable most individuals to meet the identification requirement for AML/CTF purposes.

CDD clients other than natural persons

131 Depending on the nature of the client, instructions from a lay client who is not a natural person may be received in the lay client's own name, or in that of specific individuals or other entities on its behalf. Beneficial ownership may of course rest with others.

132 In deciding who the beneficial owner is in relation to a lay client who is not a natural person, the barrister's objective must be to know who has ownership or control over the client or constitute the controlling mind.

133 *Verifying the identity of the beneficial owner(s) will be carried out on a risk-based approach* and must take account of the number of individuals, the nature and distribution of their interests in the entity and the nature and extent of any business, contractual or family relationship between them.

134 As noted above, a barrister who comes within the Regulations may possibly, additionally, have obligations under the UK financial sanctions regime. A current list is provided by the Treasury[48] Reference may also be made to Part III section 4 of the JMLSG Guidance: *Compliance with the UK financial sanctions regime.*[49]

135 Certain other information about the entity should be obtained as a standard requirement. Thereafter, on the basis of the assessed risk of money laundering/terrorist financing risk, a member of the Association should decide the extent to which the identity of the entity should be verified.

Regulated financial services firms subject to the ML Regulations (or equivalent) reg. 13(2)

136 In respect of financial services firms (including their nominee or trustee subsidiaries) which are subject to the Regulations or equivalent, and which are regulated in the UK by the FCA, or in the EU or an equivalent jurisdiction, by an equivalent regulator, simplified customer due diligence (SCDD) may be applied (below).

137 It is necessary, however, to have reasonable grounds for believing that the lay client qualifies for SCDD. Reasonable grounds might involve, for example, one of the following:

- checking with the home country relevant supervisory body;
- checking with another office, subsidiary or branch or correspondent bank in the same country;
- checking with a regulated correspondent bank of the overseas institution; or obtaining from the relevant institution evidence of its licence or authorisation.

Corporate clients (other than regulated firms)

138 Control over companies may be exercised through a direct shareholding or through intermediate holding companies. Control may also rest with those who have power to manage funds or transactions without requiring specific authority to do so, or who would be in a position to override internal procedures and control mechanisms. A member should make an evaluation of the effective distribution of control in each case. What constitutes control for this

purpose will depend on the nature of the company, the distribution of shareholdings, and the nature and extent of any business or family connections between the beneficial owners.

139 To the extent consistent with the risk assessment, the barrister should ensure that they fully understand the company's legal form, structure and ownership, and must obtain sufficient additional information on the nature the company's business, and the reasons for the instructions given.

140 Corporate clients may be publicly accountable in several ways. Some public companies are listed on stock exchanges or other regulated markets and are subject to market regulation and to a high level of public disclosure in relation to their ownership and business activities. Other public companies are unlisted, but are still subject to a high level of disclosure through public filing obligations. Private companies are not generally subject to similar disclosure requirements, though they often have public filing obligations. In their verification processes, a member of the Association should obviously take account of the availability of public information in respect of different types of company.

141 The structure, ownership, purpose and activities of many corporate entities will be clear and understandable. Corporate clients can use complex ownership structures, this may increase the steps that need to be taken to be reasonably satisfied as to their identities.

142 Additionally, a member should obtain the following for the company concerned in relation to private or unlisted companies:

- names of all directors (or equivalent);
- names of individuals who own or control of 25% of its shares or voting rights;
- names of any individual(s) who otherwise exercise control over the management of the company.

143 A barrister should verify the existence of the company from:

- *either* confirmation of the company's listing on a regulated market; or
- a search of the relevant company registry.

144 It goes without saying that a member should be reasonably satisfied that the person giving instructions is properly authorised by the client.

Companies listed on regulated markets (EEA or equivalent)

145 Corporate clients whose securities are admitted to trading on a regulated market in an EEA state or one in an equivalent jurisdiction are publicly owned and generally accountable.

146 Where the barrister has satisfied himself that the client is a company which is listed on a regulated market (within the meaning of MiFID) in the EEA, or on a non-EEA market that is subject to specified disclosure obligations; or a majority-owned and consolidated subsidiary of such a listed company,. simplified due diligence may be applied: reg. 13(3).

Other publicly listed companies

147 Companies that are listed on a regulated market that is not equivalent and thus not eligible for SCDD are still subject to some degree of accountability and transparency. As part of their risk-based approach, therefore, a member may have regard to the listing conditions that apply in the relevant jurisdiction and the level of transparency and accountability to which the company is subject in determining the level of checks required and the extent to which the client should be treated as a private company.

148 In applying the risk-based approach, barristers may take into account the potentially lower risk presented by companies whose shares are traded as this makes them less likely to be established for money laundering purposes. However, the barrister should, for markets that allow listed companies to have dominant shareholders (especially where also directors), ensure that such cases are examined more closely.

Private and unlisted companies

149 Unlike publicly quoted companies, the activities of private or unlisted companies are often carried out for the profit/benefit of a small and defined group of individuals or entities. Such companies are also subject to a lower level of public disclosure than public companies. In general, however, the structure, ownership, purposes and activities of many private companies will be clear and understandable.

150 Where private companies are well known, reputable organisations, with long histories in their industries and substantial public information about them, the standard evidence may well be sufficient to meet the barrister's obligations. Where a higher risk of money laundering is associated with the business however, ECDD (and enhanced monitoring) must be applied (below).

151 In the UK, a company registry search will confirm that the applicant company has not been, or is not in the process of being, dissolved, struck-off or wound up. In the case of non-UK companies, a member of the Association should make similar search enquiries of the registry in the country of incorporation of the applicant for business.

152 Standards of control over the issue of documentation from company registries vary between different countries. Attention should be paid to the jurisdiction the documents originate from and the background against which they are produced.

153 Whenever faced with less transparency, less of an industry profile, or less independent means of verification of the client entity, a member should consider the money laundering or terrorist financing risk presented by the entity, and therefore the extent to which, in addition to the standard evidence, they should verify the identities of other shareholders and/or controllers. It is important to know and understand any associations the entity may have with other jurisdictions (headquarters, operating facilities. branches, subsidiaries, etc) and the individuals who may influence its operations (political connections, etc).

154 Following the barrister's assessment of the money laundering or terrorist financing risk presented by the company, he or she may decide to verify the identity of one or more directors, as appropriate, in accordance with the guidance for private individuals. In that

event, verification is likely to be appropriate for those who have authority to operate an account or to give instructions relating to the transfer of funds or assets, but might be waived for other directors. A company may, of course, already be required to identify a particular director as a beneficial owner if the director owns or controls more than 25% of the company's shares or voting rights.

Beneficial owners Regulations 6

155 As part of the standard evidence, the barrister will know the names of all individual beneficial owners owning or controlling more than 25% of the company's shares or voting rights, (even where these interests are held indirectly) or who otherwise exercise control over the management of the company. A barrister must take risk-based and adequate measures to verily the identity of those individuals.

Signatories

156 A member of the Association is likely to require a list of those authorised to give instructions for the movement of funds or assets.

CDD partnerships and unincorporated bodies

157 Partnerships and unincorporated businesses are likely to have a different money laundering or terrorist financing risk profile from that of an individual.

158 For identification purposes, Scottish partnerships and limited liability partnerships should be treated as corporate clients.

159 For limited partnerships, the identity of general partners should be verified whilst other partners should be treated as beneficial owners.

160 As referred to further above, the beneficial owner of a partnership is (defined under the Regulations) as any individual who ultimately is entitled to or controls (whether the entitlement or control is direct or indirect) more than a 25% share of the capital or profits of the partnership, or more than 25% of the voting rights in the partnership, or who otherwise exercise control over the management of the partnership.

Obtain standard evidence

161 The barrister should obtain the following in relation to the partnership or unincorporated association:

- full name;
- business address;
- names of all partners/principals who exercise control over management
- names of individuals who own or control over 25% of its capital or profit, or of its voting rights.

162 Given the wide range of partnerships and unincorporated businesses, in terms of size, reputation and numbers of partners/principals, a member of the Association must make an

assessment of where a particular partnership or business lies on the associated risk spectrum.

163 The barrister's obligation is to verify the identity of the client using evidence from a reliable and independent source. Where partnerships or unincorporated businesses are well known, reputable organisations, with long histories in their industries, and with substantial public information about them and their principals and controllers, confirmation of the lay client's membership of a relevant professional or trade association is likely to be able to provide such reliable and independent evidence. This does not obviate the need to verify the identity of the partnership's beneficial owners.

164 As part of the standard evidence, the barrister will know the names of all individual beneficial owners owning or controlling more than 25% of the partnership's capital or profit, or its voting rights or who otherwise exercise control over the management of the partnership. The barrister must take risk-based and adequate measures to verify the identity of those individuals.

165 Other partnerships and unincorporated businesses will have a lower profile and will generally comprise a much smaller number of partners or principals. In verifying the identity of such clients, it is necessary to have regard to the number of partners or principals. Where these are relatively few, the client should be treated as a collection of private individuals and CDD should follow procedures for individuals. Where numbers are larger, the barrister concerned should decide whether he should continue to regard the client as a collection of private individuals, or whether he can be satisfied with evidence of membership of a relevant professional or trade association. In either circumstance, there is likely to be a need to see the partnership deed (or other evidence in the case of sole traders or other unincorporated businesses), to be satisfied that the entity exists, unless an entry in an appropriate national register may be checked.

166 A barrister should take appropriate steps to be reasonably satisfied that the person the firm is dealing with is properly authorised by the client.

167 Most partnerships and unincorporated businesses are smaller, less transparent, and less well known entities, and are not subject to the same accountability requirements that apply to corporate bodies. Whenever faced with less transparency, less of an industry profile, or less independent means of verification of the client entity, a member must consider the money laundering or terrorist financing risk presented by the entity, and therefore the extent to which, in addition to the standard evidence, additional precautions should be taken.

CDD trusts

168 Trusts and nominee and fiduciary structures are vehicles often used by criminals seeking to avoid identification procedures and to conceal the origin of the funds/assets they may wish to launder.

169 The original trust deed or other document of appointment or a legally certified copy should be seen together with any subsequent deed confirming the appointment of the trustees, fiduciary or nominee.

170 A member is required to take particular care when the structure has bank accounts in offshore localities with strict bank secrecy or confidentiality rules (see recent FATF Recommendations above).

171 In cases covered by reg. 17, that is to say where a member of the Association 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 the provisions of the 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 should be sufficient.

172 Money laundering through nominee and fiduciary trust accounts will be inhibited or prevented by securing:

- information as to the identity of the settlor and/or beneficial owner (above) of the funds;
- information as to who provided the funds;
- information about the identity of any controller or similar person having power to appoint or remove the trustees or fund managers.

A member 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.

173 In circumstances that fall outside reg. 17, a member of the Association will need to go further and identify and verify the identity of all the trustees, settlors and named beneficiaries. Once again best practice, until amendments are introduced under a new AML Directive and new set of Regulations, will be to act in accordance, so far as is practicable, with the FATF revised International Standards together with their Interpretative Notes.

Equivalent arrangements

174 The third EU Directive, whilst setting out under Arts. 6-9 the obligation on firms to carry out specific CDD measures, by Art. 11 allows SCDD diligence in respect of entities subject to the provisions of the Directive, and reliance (Art. 16) on other entities subject to the provisions of the directive so that CDD measures may be undertaken on a person's behalf. The Directive also extends these derogations to regulated entities in third countries in jurisdictions where a person is subject to legal obligations that are 'equivalent' to those laid down in the Directive, and where they are supervised for compliance. The draft fourth Directive removes provisions relating to positive equivalence because the CDD regime is becoming more strongly

risk-based and geographical factors accordingly less relevant.

175 The 2007 Regulations provide (reg. 13) that a 'relevant person' may apply SCDD where the customer is itself a credit or financial institution which is subject to the requirements of the money laundering directive, or is situated in a non-EEA state which imposes requirements equivalent to those laid down in the Directive. By reg. 17, as noted above, the Regulations also permit reliance on a person subject to the Regulations (or requirements equivalent to those laid down in the Directive, and where they are (additionally) supervised for compliance with those requirements) to carry out CDD on a person's behalf.

176 Countries that meet the provisions in Regulations 13 and 17 are described as "equivalent jurisdictions".

177 So far as non-EEA countries are concerned there is obvious difficulty in knowing how far a territory does impose "equivalent" requirements. This calls for knowledge, not only of the relevant local requirements and supervisory arrangements but also of the requirements of the Directive. In February 2012 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 reg. 13, but the UK accepts that it is valid for reg. 17 purposes.

178 The current list (as at June 2012) is:—

Australia

Brazil

Canada

Hong Kong

India

Japan

South Korea

Mexico

Singapore

Switzerland

South Africa

The United States of America

These third countries are currently considered as having equivalent AML/CFT systems to the EU. The list may be reviewed, in particular in the light of public evaluation reports adopted by the FATF, FATF-style regional bodies (FSRBs) (of which there are eight), the IMF or the World Bank, according to the revised FATF Recommendations and Methodology.

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 Aruba, Curacao, Sint Maarten, Bonaire, Sint Eustatius and Saba. Those countries and territories are not members 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."

179 It should be noted that the list does not override the need to continue to operate the risk-based approach. The fact that a financial institution is based in a third country featuring on the list only constitutes a rebuttable presumption of the application of simplified CDD. Moreover, the list does not override the obligation under Art. 13 of the Directive to apply enhanced customer due diligence measures in all situations which by their nature can present a higher risk of money laundering or terrorist financing, when dealing with credit and financial institutions as customers, based in an equivalent jurisdiction.

180 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.

181 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.

182 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).

Record Keeping

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

184 By reg. 19, a member of the ChBA subject to the Regulations 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.

Policies and procedures

185 Regulation 20 provides:

> **"20.**—(1) A relevant person must establish and maintain appropriate and risk-sensitive policies and procedures relating to—
>
> (a) customer due diligence measures and on-going 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 financing.
>
> (2) The policies and procedures referred to in paragraph (1) include policies and procedures—
>
> (a) which provide for the identification and scrutiny of—
>
> (i) complex or unusually large transactions;
>
> (ii) unusual patterns of transactions which have no apparent economic or visible lawful purpose; and
>
> (iii) any other activity which the relevant person regards as particularly likely by its nature to be related to money laundering or terrorist financing;
>
> (b) which specify the taking of additional measures, where appropriate, to prevent the use for money laundering or terrorist financing of products and transactions which might favour anonymity;
>
> (c) to determine whether a customer is a politically exposed person;
>
> (d) under which—
>
> (i) an individual in the relevant person's organisation is a nominated officer under Part 7 of the Proceeds of Crime Act 2002(1) and Part 3 of the Terrorism Act 2000(2);
>
> (ii) anyone in the organisation to whom information or other matter comes in the course of the business as a result of which he knows or suspects or has reasonable grounds for knowing or suspecting that a person is engaged in money laundering or terrorist financing is required to comply with Part 7 of the Proceeds of Crime Act 2002 or, as the case may be, Part 3 of the Terrorism Act 2000; and
>
> (iii) where a disclosure is made to the nominated officer, he must consider it in the light of any relevant information

which is available to the relevant person and determine whether it gives rise to knowledge or suspicion or reasonable grounds for knowledge or suspicion that a person is engaged in money laundering or terrorist financing.

(3) Paragraph (2)(d) does not apply where the relevant person is an individual who neither employs nor acts in association with any other person."

186 The obligations under reg. 20 are imposed on individual barristers, though as the Bar Council has noted, in practice it is expected that these will be discharged on a Chambers-wide basis.

187 Chambers' staff, including clerks, must 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.

188 Regulation 21 provides that:

"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."

189 Barristers in independent practice tend to operate as individuals; nonetheless, all barristers employ clerks and it is therefore essential that where a barrister's practice is such as may engage the requirements of the Regulations clerks who deal with incoming work should be given the training required under reg. 21.

190 While clerks may have a part to play the Bar Council has stated that it is inappropriate to delegate responsibility to them. What is important, however, is that a *procedure* is adopted:

(a) To ascertain whether the new instructions relate to:

(i) **tax advice**: reg. 3(8); or

Assisting in the planning or execution or otherwise acting for the client in:

(ii) **buying or selling real property or business entities**: reg. 3(9)(a)); or

(iii) **the creation, operation or management of trusts, companies, or**

similar structures: reg 3(9)(e).

(b) If the instructions do fall within any of those categories, to ensure that appropriate CDD is carried out and records maintained whether by the individual barrister or, preferably, by 'reliance' upon the instructing solicitor as provided for under reg. 17.

(c) To request that the instructing solicitor agree to 'reliance' and provide written confirmation in a form similar to the draft under Appendix 2 (otherwise the member themselves must carry out other CDD).

(d) To open a file relating to the case, and maintain on it for 5 years from completion of the relevant work (i) a record of the confirmation of agreement to reliance and otherwise (ii) documents evidencing compliance with the requirements of the Regulations.

No requirement for MLRO

191 Regulation 20(2)(d) requires that a "nominated officer" be appointed within the professional's organisation to receive disclosures under Part 7 of POCA, or Part 3 of the Terrorism Act 2000. That is expressly disapplied by reg. 20(3) where the professional is an individual who neither employs nor acts in association with 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 but instead are individually responsible for their own professional practice. It is not therefore necessary for barristers within a set of chambers to appoint a 'nominated officer' (i.e. MLRO) to whom other barristers must report any money laundering suspicions.

Appendix 1 Bar Council ML Guidance
Appendix 2 Draft letter under reg. 17

§§§

NOTES

1 http://www.legislation.gov.uk/uksi/2007/2157/contents/made and as amended.
2 The revised International Standards include recommendations concerning proliferation and the financing of weapons of mass destruction. These are not considered further under this Note.
3 Definitional provisions – 'General Glossary' and Recommendation 3.
4 The EU Commission has noted that the FATF does not explain or provide further guidance on

how this should apply. The Commission is undertaking its own review.

5 The EU Commission is actively considering how effect is to be given to the expansion of FATF designated offences to include tax crimes, including whether the "all serious crimes" approach under the Directives continues to be appropriate (the fact of which has been given some emphasis in responses to the revised International Standards, in particular in relation to tax offences as predicate for money laundering. (Not, it is to be noted, under English law which has 'gold plated' the requirements under the Directives and adopts an 'all crimes' approach, whether or not serious, in any event).

6 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0045:FIN:EN:HTML

7 In addition, there are reporting obligations where suspicion of money laundering exists but the general law in relation to suspicion of money laundering in any event applies in such circumstances.

8 in June 2011 the Treasury indicated that the majority of criminal offences were likely to be abolished under the next ML Regulations. Whether this continues to remain the position in the light of the 11 April 2012 EU Commission report (see Part 1) remains to be seen.

9 http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/guidance-on-the-professional-conduct-of-barristers/money-laundering-regulations-2007/

10 http://www.hm-treasury.gov.uk/d/amlctf_supervision_report_201011.pdf

11 http://www.soca.gov.uk/about-soca/library/cat_view/82-library

12 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:en:PDF

13 The 9 were specific terrorist financing Recommendations which have now been absorbed into the revised 40.

14 Under its revised International Standards off February 2012 FATF adopts 3 types of lists:

- High-risk and non-cooperative jurisdictions that have strategic AML/CFT deficiencies and to which counter-measures apply
- High-risk and non-cooperative jurisdictions with strategic AML/CFT deficiencies that have not made sufficient progress in addressing the deficiencies or have not committed to an action plan developed with the FATF to address the deficiencies.
- Jurisdictions with strategic AML/CFT deficiencies that have provided a high-level political commitment to address the deficiencies through implementation of an action plan developed with the FATF.

15 In March 2012 Coutts Bank was subject to fine £8.75 million by the FCA for systemic and long term failures to operate effective CDD: http://www.fsa.gov.uk/library/communication/pr/2012/032.shtml The FCA has also recently fined Habib Bank AG Zurich £525,000 and its former Money Laundering Reporting Officer £17,500 for failure to take reasonable care to establish and maintain adequate anti-money laundering (AML) systems and controls.

16 *q.v.* the KPMG Report of 2005 and, further, Part 1.

17 Treasury consultation on the Regulations 2011.

18 A view robustly expressed under the Cabinet PIU Report which set out the policy view behind PoCA.

19 at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%20approved%20February%202012%20reprint%20March%202012.pdf

20 http://www.hm-treasury.gov.uk/d/financial_sector_advisory_march2012.pdf

21 http://ec.europa.eu/internal_market/company/docs/financial-crime/20120411_report_en.pdf

22 see generally the OECD reports under the Global Forum on Transparency and Exchange of Information for Tax Purposes.

[23] http://www.barcouncil.org.uk/instructing-a-barrister/licensed-access/

[24] http://www.barcouncil.org.uk/media/119603/public_access_guidance_for_clerks_-_mar_2010_as_at_25_oct_2011.pdf

[25] see generally the Bar Council Guidance on Direct (now Licensed) Access: http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/public_access_guidance_for_barristers_2.pdf

[26] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0305:EN:HTML

[27] The relevant FIU

[28] http://www.fatf-gafi.org/documents/guidance/guidanceforfinancialinstitutionsindetectingterroristfinancing.html

[29] http://www.jmlsg.org.uk/industry-guidance/article/jmlsg-guidance-current

[30] mailto:AFU@hmtreasury.gsi.gov.uk

[31] see the Draft fourth Directive at recital 14 ff

[32] http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf

[33] http://www.hm-treasury.gov.uk/d/consult_money_launder_regs2007_gov_response.pdf

[34] *Ibid* para 4.1.

[35] *i.e.* to the BSB for present purposes.

[37] www.hm-Treasury.nov.uk/financialsanctions

[38] http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%20approved%20February%202012%20reprint%20March%202012.pdf

[39] http://www.jmlsg.org.uk/industry-guidance/article/jmlsg-guidance-current

[40] See the Basel Committee paper at: http://www.bis.org/publ/bcbs85.pdf

[41] asterisks under the revised International Standards indicate that there is an accompanying Interpretative Note.

[42] Commission Communication: "The EU Internal Security Strategy in Action: Five steps towards a more secure Europe", COM(2010)673 final. See generally Commission Report 11 April 2012 at 2.6.3. http://ec.europa.eu/internal_market/company/docs/financial-crime/20120411_report_en.pdf

[43] European Parliament Resolution 15 September 2011 on EU efforts to combat corruption.

[44] a solicitor must themselves be within reg. 3(9) for reliance to be available.

[45] http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/guidance-on-the-professional-conduct-of-barristers/money-laundering-regulations-2007/

[46] at paragraph 4.6: http://www.lawsociety.org.uk/productsandservices/practicenotes/aml/4995.article#h4client

[47] http://www.jmlsg.org.uk/industry-guidance/article/jmlsg-guidance-current

[48] http://www.hm-treasury.gov.uk/fin_sanctions_currentindex.htm

[49] http://www.jmlsg.org.uk/industry-guidance/article/jmlsg-guidance-current