Addendum of amendments to the Part 2a LSAG guidance FAQs and additional typologies on real property

This document is an addendum to the 2021 edition of the Legal Sector Affinity Group, Part 2a Specific Guidance for Barristers and Advocates. It is provided as an update prepared by the Bar Council of England and Wales, the Bar Council of Northern Ireland, the Faculty of Advocates in Scotland and the Bar Standards Board and is issued by the Legal Sector Affinity Group. The update illustrates how our attitude towards regulation is developing over time. The changes below are currently pending approval by HM Treasury and, if accepted, will be integrated into the text of the main guidance. Until approval by HMT, this addendum is supplementary to the main Part 2a guidance and does not supersede it. It is not for your supervisor to provide specific legal advice and/or confirmation on the application of the money laundering regulations (MLRs) or other regulation or legislation. You must satisfy yourself on your legal/regulatory obligations under the MLRs and that you have complied with them. While care has been taken to ensure that this addendum is accurate, up to date and useful, members of the LSAG will not accept any legal liability in relation to it.

Our proposed amendments to the approach set out in the Part 2a guidance FAQs, which include changes to the FAQs on customer due diligence and real property, and additional FAQs on proliferation financing and enfranchisement, are as follows. Two additional typologies on real property have also been drafted and included in this addendum. While this does not supersede the HM Treasury-approved LSAG guidance, we suggest that the following is an appropriate interpretation.

In the following:

• text which is struck through is a proposed deletion.

• text in bold is a proposed addition.

Annex 2 – AML FAQs

Working Within the Regulations

~~3. I am instructed by a solicitor. Do I have to do CDD or can I rely on them to do it?~~

~~The obligation to comply with your CDD obligations is personal to you and you must ensure that you have met the requirements of the Regulations.~~

~~Where you act upon the instructions of a professional client such as a solicitor it may be possible, with their consent, to rely on the CDD that they have carried out.~~

~~However, even if your instructing solicitor permits you to rely upon their CDD, that does not absolve you of the obligation to meet your CDD requirements:~~

~~you remain liable for "any failure to apply such [CDD] measures" (Regulation 39(1)).~~

~~Simply obtaining copies of the CDD material obtained by the person instructing you does not meet the 'Reliance' requirements of Regulation 39. You must satisfy yourself that you have obtained the necessary information to meet your CDD obligations. To do this, you will need to undertake a risk-based review of the CDD materials provided to you.~~

3. I am instructed in a matter within the Regulations. Should I carry out CDD?

The obligation to comply with your CDD obligations is personal to you and you must ensure that you have met the requirements of the Regulations.

i) Who should be the subject of my CDD enquiries?

If you are being instructed by solicitors, you will need to carry out CDD on your instructing solicitors and the lay client themselves, as each of them are your clients and therefore your customers for the purposes of the Regulations.

If your client is a direct public access client you will need to carry out CDD on that client.

ii) What level of CDD should be applied? What factors should I consider to evaluate that?

CDD must be applied on a risk-sensitive basis.

If the person instructing you is a solicitor it will be sufficient to satisfy your CDD obligation in relation to them by making a check of the SRA's database, see [134] of the Guidance. In relation to your lay clients, the level of CDD that you apply will need to be proportionate to your assessment of the risk that the transaction involves money laundering or terrorist finance. The greater that risk, the greater the level of CDD you need to apply.

If the person instructing you is a direct public access client then again the level of CDD that you apply will need to be proportionate to your assessment of the risk that the transaction involves money laundering or terrorist finance. The greater that risk, the greater the level of CDD you need to apply.

i) Is it possible to rely upon the CDD that my instructing professional clients, such as a solicitor, has carried out?

It may be possible to do so, with their consent. However, even if your instructing solicitor permits you to rely upon their CDD, that does not absolve you of the obligation to meet your CDD requirements as you remain liable for "any failure to apply such [CDD] measures" (Regulation 39(1)).

Simply obtaining copies of the CDD material obtained by the person instructing you does not meet the 'Reliance' requirements of Regulation 39. You must satisfy yourself that you have obtained the necessary information to meet your CDD

obligations. To do this, you will need to undertake a risk-based review of the CDD materials provided to you.

4. What do the Regulations mean by a "risk assessment"? How do I carry it out?

Where you undertake work within the scope of the Regulations you are required by reg. 18 to undertake and maintain a risk assessment of your practice. This is essential so that you can understand the level of AML/CTF**/CPF** risk that you face and apply the appropriate measures to meet and mitigate those risks, i.e. to take a risk-based approach to your AML/CTF**/CPF** obligations.

Practice-Based Risk Assessment

You should know and understand the level of AML/CTF**/CPF** risk that is associated with the nature of your practice and the instructions that you receive. That risk assessment should be specific to your practice, recorded in writing and reviewed in order to keep it up to date. You should keep a written record of the dates that it is reviewed and the actions taken.

To assess the level of risk you should consider all the relevant AML/CTF**/CPF** risk factors as they are apparent to you in your practice and the instructions that you receive. Those factors must include the following mandatory matters under reg. 18(2) **and 18A(2)**.

Client Risk (Regulation 18(2)(b)(i) **and 18A(2)(b)(i))**

What is the risk profile of your clients? Consider what you know of them. Who are they and where are they based? For example, are any of your clients based in, or drawing funds from a country that itself represents a money laundering risk, e.g. a "high-risk third country" (per reg. 33(1)(b) and see this Guidance above in relation to Enhanced Due Diligence)? Are they a Politically Exposed Person? A convicted criminal or someone under investigation? Does either what you have been instructed about your clients or what you have discovered about them make them more likely to be a source of criminal property? Does your client's behaviour give you cause for suspicion? For example, are they unwilling to meet you in person where that is important or being evasive as to an aspect of their identity? Do they operate in a high-risk sector or operate a heavily cash-based business?

Geographic Risk (Regulation 18(2)(b)(ii) **and 18A(2)(b)(ii))**

Does the country or geographic area in which your clients are based or your instructions relate to represent or indicate a risk of money laundering, or terrorist financing **and proliferation financing**? Are they operating in a "high-risk third country"? If, as is most likely, you are being asked to act within England and Wales, consider that the UK, as a nation that offers financial stability, a mature and sophisticated financial market and high quality professional support services, is a target for those seeking to launder the

proceeds of crime. This profile enhances the level of risk in any financial or property transaction.

Service/Sector Risk (Regulation 18(2)(b)(iii) **and 18A(2)(b)(iii))**

The HM Treasury and Home Office 2020 AML/CTF National Risk Assessment, December 2020 ("**AML/CTF** NRA 2020") **and HM Treasury 2021 CPF National Risk Assessment, September 2021 ("CPF NRA 2021")** concluded that the risk of abuse of legal services for money laundering purposes remains "high overall". **In terms of proliferation financing, the financial services industry, particularly the banking and insurance sectors and the ease of establishing companies in the UK, are especially at risk.**

Whilst a small number of barristers do act as TCSPs, the services regarded as highest risk are not generally provided by the Bar, for example conveyancing and the provision of client accounts. You should be aware of and consider the view of the investigative authorities that the provision of certain legal services within the regulated sector contains an inherently high-risk of money laundering.

The **AML/CTF** NRA 2020 found no evidence to suggest that its finding in the previous, 2017, National Risk Assessment ("NRA 2017") that barristers were "exposed to lower risks" had changed (**AML/CTF** NRA 2020, §10.14 & NRA 2017, §7.4).

In relation to terrorist financing, AML/CTF NRA 2020 found that "legal services are not attractive for terrorist financing and there remains no evidence of these services being abused for terrorist financing purposes". The risk of terrorist financing through the legal sector was assessed to be "low" (§10.16).

In the CPF NRA 2021, no mention is made of barristers and their risk exposure.

You should ask yourself, to what extent do the professional services that you provide to your clients entail a risk of participating in or facilitating money laundering, **terrorist financing or proliferation financing**? What is the nature of the legal service that you are providing? For example, are you assisting in the creation of a corporate structure for an offshore investment? Or, by way of contrast, are you providing legal assistance in relation to a specific issue such as the impact of a restrictive covenant upon a potential property transaction?

Transaction Risk (Regulation 18(2)(b)(iv) **and 18A(2)(b)(iv)**)

Some transactions are inherently more at risk of misuse for money laundering purposes **rather than, say, terrorist financing or proliferation financing**. You should consider the nature of the transaction or arrangement in relation to which you are being instructed. There is for example a distinction to be drawn between advising upon the pension scheme of a local authority as opposed to the creation of a merger between a series of Money Service Bureaus.

~~Consider the nature of the transactions and/or business arrangements that you are instructed in relation to in your practice.~~

Delivery Channel Risk (Regulation 18(2)(b)(v) **and 18A(2)(b)(v))**

What is the means by which your legal assistance is being given, e.g. an SRA- regulated solicitor? Do you know who your ultimate client is? Have you met them? Are you being asked to advise a non-professional intermediary instead?

Miscellaneous

Are there any other factors indicative of AML/CTF**/CPF** risk?

Assessing the Overall Risk

Having considered all of the different risk factors you should then assess what you consider to be the overall level of AML**/CTF/CPF** risk involved in your practice.

Weighting

In reaching that decision you will need to consider what weight to apply to the differing factors that you have applied. For example, you might conclude that whilst there is a low professional service, country or product risk, there is a risk associated with the identity of your client. The fact that only one risk factor is relevant to the situation does not mean that it should then be discounted. You should consider what weight needs to be assigned to those factors. If your lay client is, for example, a high-level PEP suspected of corruption, or a convicted drug trafficker, that alone may outweigh all other considerations as to what the level of risk is.

Decision

Once you have undertaken that process you should reach a decision as to what the level of risk is as applied to your practice. Having reached this decision you should be in a position to determine the extent of CDD measures that are required and the steps that you need to take to meet those requirements.

Record

You should make a written record of that decision and the process by which it was reached (Regulation 18(4) **and 18A(4)**). Retain a copy of that record in a secure place. By virtue of Regulation 18(6) **and 18A(5)** you will be obliged to provide the assessment and the information on which it was based to your supervisory authority if requested.

Report

If necessary in a specific case, make an authorised disclosure within the meaning of s.338 of POCA (see [172] of the Guidance re making a Suspicious Activity Report).

Monitor

Keep your decision as to risk level within your practice under review. In relation to any specific case also keep your assessment of the level of risk within that matter under review throughout the lifetime of your instructions. If the risk factors change, then refresh your decision, record it and act accordingly.

The above assessment cannot be guaranteed to prevent every risk of money laundering or terrorist financing being identified and addressed. However, it will act to mitigate such risks and permit you to demonstrate to your supervisory and any investigative authority that you assessed and understood the appropriate level of risk of money laundering or terrorist financing and took the required AML/CTF**/CPF** measures.

Client/Instruction Risk Assessment

In addition to your practice-based risk assessment you must carry out a documented (i.e. written) risk assessment for each set of instructions that fall within the scope of the Regulations (reg. 18**(**~~-~~1**) and 18A(1)**). That risk assessment should identify and assess the risk of money laundering~~, and~~ terrorist financing **and proliferation financing** within your instructions and the work that you are asked to undertake.

In making the assessment of the level of risk for a specific client or set of instructions you should consider all the relevant AML/CTF**/CPF** risk factors as they are apparent to you. Those factors must include the mandatory matters under reg. 18(2) **and 18A(2)** that were included in your practice-based risk assessment as set out above.

Real Property FAQs

~~18. If I advise on a property issue such as whether a client company with the benefit of a right of way to land which has always been used for offices would be entitled to use that right of way for commercial deliveries and visits by customers if shops were built on that land in place of the offices, am I required to undertake CDD in relation to the company?~~

~~No.~~

~~When providing legal services to a client you will only be subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).~~

~~In the example given you are instructed to advise in relation to a right of way and not to assist the client in the planning or execution of a transaction or otherwise acting for or on behalf of the client in a transaction.~~

18. Potential property instructions relating to existing interests in land

i) I am asked to advise on the proper interpretation of a right of way/restrictive covenant, and whether a new proposed use would be within its language. Am I within

the ambit of the Regulations and do I have to undertake CDD in relation to my client(s)?

No. When providing legal services to a client you will only be subject to the Regulations where, pursuant to reg. 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [20] above).

Here you are instructed to advise in relation to an existing interest, and not to assist the client in the planning or execution of a transaction or otherwise acting for or on behalf of the client in a transaction.

You are not within the ambit of the Regulations. You will not therefore need to undertake CDD.

ii) Would it make any difference if I was aware my client was considering selling the site depending on the proper interpretation of the right of way/restrictive covenant?

No. Although there is now a transaction in contemplation, your role has not changed. You are instructed to provide legal advice in relation to an existing interest, and not to assist the client in the planning or execution of a transaction.

You are still not within the ambit of the Regulations. You will not therefore need to undertake CDD.

iii) Would it make any difference if the client now wishes to instruct me to review and re-draft, as appropriate, the terms of the sale contact itself?

Yes. Your advice now constitutes assisting in the planning or execution of a particular transaction.

When providing legal services to a client you are subject to the Regulations where, pursuant to reg. 12(1), you are "assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction", and the transaction is a "financial or real property transaction" concerning "the buying and selling of real property" (see [20] above).

You will now need to undertake CDD.

~~19. Would it make any difference if I was aware my client was considering selling the site depending on whether the right of way could or could not be so used?~~

~~No.~~

~~Your role has not changed: you are instructed to provide legal advice in relation to a right of way and not to assist the client in the planning or execution of a transaction.~~

~~You are not within the ambit of the Regulations and you do not have to undertake CDD.~~

19. Potential property instructions relating to a dispute over land

I am asked by the solicitors for the contracted buyer of a piece of land to advise in relation to a possible misrepresentation by the vendor of the land. Is that work to which the Regulations apply and do I need to undertake CDD in relation to the buyer?

No. When providing legal services to a client you will be subject to the Regulations where, pursuant to reg. 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [20] above).

In this case, you are being asked to advise in relation to a dispute over a transaction rather than the transaction itself. Accordingly, you are not "assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction" or "acting for or on behalf of a client in the transaction".

The same is true if the buyer wishes to rescind the contract such that any interest in the land passes back to the vendor. Because rescission is a court-ordered process rather than a consensual process, it does not amount to a "transaction" for the purposes of the Regulations.

As such the obligations under the Regulations do not apply. You will not therefore need to undertake CDD.

~~20. Would it make any difference if the owner of the land over which the right of way runs had suggested the right of way was limited to use for residential purposes so that it could not be used to serve a retail development?~~

~~No.~~

~~Again, your role has not changed: you are instructed to provide legal advice in relation to a right of way and not to assist the client in the planning or execution of a transaction.~~

~~You are not within the ambit of the Regulations and you do not have to undertake CDD.~~

20. Potential property instructions relating to contracts for the sale of land

I am asked by the intended buyers of a piece of land to advise on the enforceability of, and draft, an indemnity clause to be inserted in the contract for the purchase of the land. Is that work to which the Regulations apply and do I need to undertake CDD in relation to the buyer?

Yes. When providing legal services to a client you are subject to the Regulations where, pursuant to reg 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).

The provision of legal advice by a barrister or advocate, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.

However, as you are also being asked to advise upon and, if required, to prepare a clause of an agreement in relation to a real property transaction, you are going beyond the provision of advice. It is likely therefore that you are undertaking work that falls within the ambit of the Regulations as it concerns "the buying…of real property".

Accordingly, you would be required to undertake CDD.

~~21. If planning permission for commercial development of the land had been granted and a sale of it had been agreed subject to contract, but before the contract was executed I was asked to advise one or other of the parties in relation to whether the right of way would enable the use of the land for commercial deliveries and by customers if the development was carried out, or whether a restrictive covenant that was in place would prevent such use, would I then have to undertake CDD in relation to the client?~~

~~No. Although a transaction is in contemplation, you are not instructed to assist the client in the planning or execution of the transaction but to provide legal advice upon the ambit of the right of way and the restrictive covenant You have not been asked to consider whether the transaction should proceed or to be involved in structuring it or anything of that sort, but to give legal advice in relation to the right of way and the restrictive covenant.~~

~~Your instructions do not therefore bring you within the ambit of the Regulations and you do not have to undertake CDD.~~

21. Potential Property Instructions relating to the compulsory purchase of land

The Secretary of State has made a compulsory purchase order ("CPO") against your client's land. Your client wishes to challenge the CPO or in any event to increase the value of the compensation paid for it. Is that work to which the Regulations apply and do I need to undertake CDD in relation to my client?

No. When providing legal services to a client you are subject to the Regulations where, pursuant to reg 12(1), you are "assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction" which is a "financial or real property transaction concerning the buying and selling of real property" (see [21] above).

A "transaction" involving "buying and selling" implies a consensual transaction between a willing buyer and a willing seller. The acquisition of land under a CPO is not a consensual transaction involving a willing seller, but is a compulsory acquisition. Neither resisting nor challenging a CPO, nor seeking to increase the value of the compensation to be paid in respect of it, would therefore appear to be within reg. 12(1).

A CPO is a public law process initiated by the Secretary of State or other authorized entity that is an administrative action on the part of the state. It does not fall within the scope of the Regulations and you will not therefore need to undertake CDD.

However, you should also be aware that disputes over CPOs will sometimes be resolved by settlements involving a sale at a higher price or on different terms. Such a settlement will be a consensual transaction concerning the buying and selling of real property. It is likely therefore that you may then be undertaking work that falls within the ambit of the Regulations as it concerns "the buying…of real property". If this is the case, this may be work to which the Regulations will apply and you should undertake CDD.

The identity of the counterparty (a public body) and the evident purpose of the transaction gives an indication of a lower level of risk of money laundering and that should be taken into account when you make your CDD risk assessment.

~~22. If I am asked by the solicitors for the contracted buyers of a piece of land to advise in relation to a possible misrepresentation by the vendor of the land, is that work to which the Regulations apply and do I need to undertake CDD in relation to them?~~

~~No.~~

~~When providing legal services to a client you will be subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).~~

~~In this case, you are being asked to advise in relation to a dispute over a purchase rather than the purchase itself. You are not being asked to provide legal advice in relation to a real property transaction that falls within the ambit of the Regulations as concerning "the buying…of real property". As you are not being asked to give advice in relation to the~~

~~transaction, or its planning or execution, you are not "acting for or on behalf of a client in the transaction". As such the obligations under the Regulations do not apply. You will not therefore need to undertake CDD.~~

22. Potential Property Instructions relating to taxation of land

i) If I advise a client on taxes, including capital gains tax (CGT) and stamp duty land tax (SDLT), rateable values and council tax relating to a particular property transaction or the ownership of a particular property, is that work to which the Regulations apply?

Yes.

Where you undertake work as a tax adviser within the meaning of reg. 11(d) you are within the scope of the Regulations (unless reg. 31 is applicable in respect of a contentious matter (see below)). You should note that the definition of a "tax adviser" in reg. 11(d) is particularly wide. A "firm or sole practitioner who by way of business provides material aid, or assistance or advice, in connection with the tax affairs of other persons, whether provided directly or through a third party, when providing such services" is a tax adviser (see [20] above).

Providing advice on taxes relating to a particular real property transaction including CGT, SDLT, rateable values and council tax, is work to which the Regulations apply as it is providing advice "in connection with the tax affairs of other persons" within reg. 11(d).

In addition, where pursuant to reg. 12(1), you are "assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction", and the transaction is a "financial or real property transaction" concerning "the buying and selling of real property" (see [21] above) you are subject to the Regulations. Advising your client on appropriately tax structuring the transaction in light of transaction taxes such as CGT and SDLT falls within this test.

Accordingly, you will be within the ambit of the Regulations. You will need to conduct CDD.

If you are unable to conduct CDD, the general rule is that you should cease to act. However, there is an exception for contentious matters. Reg. 31(3) provides that the requirement to cease to act does not apply where an "independent legal professional or other professional adviser is in the course of ascertaining the legal position for a client or performing the task of defending or representing that client in, or concerning, legal proceedings, including giving advice on the institution or avoidance of proceedings." However, you cannot go beyond the scope of 31(3) into giving non-contentious tax advice, without conducting CDD. It should also be noted

that Reg 31(3) also applies to an "other professional adviser" which means an auditor, external accountant or tax adviser who is a member of a professional body within reg.31(4).

ii) If I provide advice on taxes, including CGT, SDLT, rateable values and council tax which do not relate to a particular transaction, but which relate to the ownership of property more generally, is this work to which the Regulations apply?

Yes.

This is because it is still providing advice "in connection with the tax affairs of other persons" within reg. 11(d) and it would be prudent to conduct CDD. However, reg.31(3) (see above) will be relevant where you are advising a person on a tax investigation and/or a tax appeal, as opposed to assisting in the tax aspects of a particular transaction that could be used for money-laundering purposes.

~~23. If I am asked by the intended buyers of a piece of land to advise on the enforceability of, and draft, an indemnity clause to be inserted in the contract for the purchase of the land, what do I need to consider in order to decide whether I am required to undertake CDD in relation to them?~~

~~When providing legal services to a client you are subject to the Regulations where, pursuant to Regulation 12(1), you are assisting a client in the planning or execution of a transaction or otherwise acting for or on behalf of a client in a transaction, and the transaction is a financial or real property transaction (see [21] above).~~

~~The provision of legal advice by a barrister or advocate, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.~~

~~However, as you are being asked to advise upon and, if required, to prepare a clause of an agreement in relation to, a real property transaction you are going beyond the provision of advice. It is likely therefore that you are undertaking work that falls within the ambit of the Regulations as it concerns "the buying…of real property".~~

~~You should consider with care whether a particular piece of work in which you are instructed falls within the scope of the Regulations.~~

~~A failure to comply with the Regulations can amount to a criminal offence.~~

~~24. Who should be the subject of my CDD enquiries in such a case?~~

~~You will need to carry out CDD on your instructing solicitors and the buyers themselves as each of them are your clients (professional and lay respectively) and therefore your customers for the purposes of the Regulations.~~

~~25. What level of CDD should be applied? What factors should I consider to evaluate that?~~

~~CDD must be applied on a risk-sensitive basis.~~

~~As the person instructing you is a solicitor it will be sufficient to satisfy your CDD obligation in relation to them by making a check of the SRA's database, see [134] of the Guidance.~~

~~In relation to your lay clients, the level of CDD that you apply will need to be proportionate to your assessment of the risk that the transaction involves money laundering or terrorist finance. The greater that risk, the greater the level of CDD you need to apply.~~

[ADDITIONAL FAQ] **Counter Proliferation Financing**

28. What is Counter Proliferation Financing (CPF) and what am I required to do?

Proliferation Financing is the act of providing funds or financial services for use in the manufacture, acquisition, development, export, trans-shipment, brokering, transport, transfer, stockpiling of, or otherwise in connection with the possession or use of, chemical, biological, radiological or nuclear weapons (CBRN) including the provision of funds or financial services in connection with the means of delivery of such weapons and other CBRN-related goods and technology [Para 5 of the Executive Summary]. A full definition and further explanation of PF is given at 5.3.1 of the LSAG Part 1 Guidance.

Examples of key PF risks include:

a. Exposure to Iran or North Korea, including through entities or individuals;

b. Provision of trust or company services which help to create the impression of a reputable company and facilitate increased anonymity in order to mask the objectives of proliferation actors; and

c. Involvement with exporters or manufacturers of defence, dual-use or other proliferation goods.

As a result, and reflective of the size and nature of your practise, you must undertake an appropriate assessment of PF risk under Regulation 18A which takes into account the HM Treasury PF National Risk Assessment as well as the PF risk factors related

to your client, the countries or geographic areas in which your client operates, the products and services provided by you and how you provide them [see 54 to 56 above].

Following on from your PF risk assessment, you must establish and maintain policies, controls and procedures (PCPs) under Regulation 19(A) to mitigate and manage effectively the risks of PF. These PCPs must include risk management practices, internal controls and the monitoring and management of compliance with, and the internal communication of, such PCPs. In addition, it would be prudent to have a PCP for CDD, reliance and record-keeping [see 26, 27, 28, 29 and 31 above].

Where you are instructed in a matter that brings you within the scope of PF you must then complete CDD [see 57 to 15 above]. It would also be prudent to first approach business relationships with actors or sectors who have a connection with chemical, biological, radiological or nuclear (CBRN) and other CBRN-related goods and technology, as one that poses the greatest risk of PF.

BSB entities should, in addition, ensure that they have communicated their policies, controls and procedures, at least, within the entity [see 32 and 33 above].

[ADDITIONAL FAQS] **FAQS - Enfranchisement**

29. You are asked to advise P, a proposed purchaser of a leasehold house owned by V, whether it is capable of enfranchisement. P will rely on your advice in deciding whether to buy.

CDD is not required as the 2017 Money Laundering Regulations are not engaged. Although a transaction is contemplated, you are not assisting in its planning or execution, or acting on behalf of P in the transaction.

30. You asked by P to draft a rider to the contract of sale providing (i) for the service of a notice of claim by V, on the landlord, to initiate an enfranchisement claim and (ii) the assignment of the benefit of the notice of clam by V to P.

CDD is required. You are subject to the 2017 MLRs because, in drafting the rider, you are acting for P in the transaction and assisting in its execution.

31. Not having previously been involved in drafting the contract of sale, you are instructed by P to draft the notice of claim, which under the existing contract of sale is to be served by V on the landlord to initiate the enfranchisement claim.

CDD is required. You are subject to the 2017 MLRs because, in drafting the notice of claim, you are assisting in the execution of the transaction as the service of a notice of claim is an important part of the transaction.

32. You are instructed after completion of the sale from V to P and asked by P to draft proceedings against the landlord relating to the validity of the notice of claim. If the claim is successful, the landlord will be obliged to transfer the freehold of the house to P.

CDD is not required. You are not subject to the 2017 MLRs. Although you are assisting P in the proceedings and the result of a successful claim would be that the landlord would be obliged to transfer the freehold, you are engaged in the "ordinary conduct of litigation" and are within the Bowman v Fels [2005] 1 WLR 3083 exemption. Advising on the consensual settlement of the proceedings would also be exempt.

[ADDITIONAL TYPOLOGY] **Typology – Real Property**

Topics Covered: Real Property – Advice – "Transactions"

Headline questions

1. When am I required to undertake CDD?

You act for O. O owns a piece of land. The land is subject to a right of way.

In January, O asks for your advice about the proper interpretation of the right of way so it can understand its obligations to the dominant landowner.

In February, O tells you it is considering selling the land and asks for your advice about the effect of the right of way on the land's value.

In March, O tells you it has found a potential buyer for the land, P, and informal discussions have begun. It would like more detail in your advice about the right of way.

In April, O tells you that it has prepared a contract for the sale to P. O is not asking you to advise on the contract, but would like still more detail in your advice about the right of way to give it comfort in the warranties it is giving in the transaction.

In May, O asks you for tax advice on its council rate obligations prior to the sale, and its CGT obligations after the sale.

In June, O says that P is worried about the right of way, and is seeking an indemnity over legal risks associated with it. O asks you to draft the indemnity.

In July, the sale completes. However, O becomes convinced that the contract has been induced by P's fraudulent misrepresentation. O asks you to advise on and act for it in proceedings against P, seeking to rescind the sale.

O succeeds. However, in August, the government notifies O that it is considering issuing a compulsory purchase order (CPO) against the land. O asks you to resist the order.

In September, O and the government settle their dispute. Under the proposed settlement agreement, the government purchases the land for a higher price than under the CPO. O asks you to draft the settlement agreement.

Q1. When am I subject to the money-laundering regulations?

You are only subject to the money-laundering regulations in two circumstances:

- **First, under regulation 12(1), when you are participating in certain financial or real property transactions, including those concerning "the buying and selling of real property or business entities". For these purposes, "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".**

- **Second, under regulation 11(d), when you are "providing tax advice about the affairs of other persons" – whether or not in relation to a particular transaction.**

In January, you are not subject to the money-laundering regulations. You are providing non-tax legal advice without a particular transaction in mind.

In February to April, you are not subject to the money-laundering regulations. Although a transaction is now contemplated, you are not assisting in its planning or execution, or acting on behalf of O in the transaction – simply giving non-tax legal advice about an existing interest. The provision of legal advice by a barrister, instructed to advise or give an opinion in relation to specific aspects of a transaction and not otherwise carrying out or participating in the transaction, would not generally be viewed as participation in a financial transaction for the purposes of the Regulations. This guidance is consistent with the interpretation previously approved by HM Treasury.

In May, you are subject to the money-laundering regulations because you are giving tax advice. This is so whether the advice relates to a particular transaction (such as CGT) or to the ownership of the land without any particular transaction in mind (such as council rates).

In June, you are subject to the money-laundering regulations because, in drafting the indemnity, you are acting for O in the transaction and assisting in its execution.

In July, you are not subject to the money-laundering regulations. Although you are assisting O in its proceedings which seek to recover the land, this is not a "transaction" for the purposes of the regulations. A "transaction" means a consensual transaction, but rescission is a court-ordered process.

In August, you are not subject to the money-laundering regulations. Again, this is not a "transaction" in the sense of a consensual transaction, but a mandatory process. Neither resisting nor challenging a CPO, nor seeking to increase the value of the compensation to be paid in respect of it, are within the regulations.

In September, you are subject to the money-laundering regulations. This settlement is a consensual transaction, and you are acting for O in the transaction and assisting in its execution.

[ADDITIONAL TYPOLOGY] **Typology – Real Property**

Topics Covered: Real Property – Advice – Risk-based approach

Headline questions

1. What does CDD require?

You are establishing a business relationship with two new clients, A Ltd and Alpha, each represented by the same solicitor.

A Ltd is a well-known blue-chip company with strong internal corporate governance procedures. It is instructing you to assist it with the sale of a piece of land to B Ltd. The commercials of the arrangement are straightforward: B Ltd will be better able to develop the land than A Ltd, in light of B Ltd's development expertise and larger capital reserves.

Alpha is the brother of the Ruritanian Minister for Public Procurement. Alpha wishes to instruct you in relation to the sale of a piece of land. The proposed transaction is quite complicated, involving back-to-back transfers of the land between various offshore trustee companies, all in exchange for cash, ending in the transfer of the land back to Alpha. The transaction does not have any obvious commercial rationale. When you ask Alpha about this, Alpha laughs and says he'll worry about the commercials – he just wants your advice on the execution of the transfer. Alpha emphasises that the transfers must be legally valid so that each offshore trustee company can list them as its source of funds

Q2 What does CDD require?

Under regulation 27(1)(a), you are required to undertake customer due diligence measures when establishing a business relationship with both your professional client (your solicitor) and your lay clients (A Ltd and Alpha).

Under regulation 28, the core of customer due diligence is verifying the customer's identity (including verifying the identity and authority of a person purporting to act on behalf of the legal entity), and assessing the purpose and intended nature of the

business relationship or transaction. The obligation is ongoing, and includes scrutiny of the transactions undertaken in the course of the relationship.

However, under regulation 28(12), the way in which you undertake customer due diligence must reflect your risk assessment of the relevant person and the level of risk in a particular case, and may well differ from case to case.

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

(a) Any information made available to you by your supervisory authority;

(b) Risk factors specific to your practice including factors relating to:

(i) your customer;

(ii) the country or geographic area in which you are practising;

(iii) the service that you are providing;

(iv) the relevant transaction; and

(v) the delivery channels through which your service is being provided (Regulation 18(2) & (3)).

(c) For barristers in England and Wales, the current BSB AML/CTF Risk Assessment, in relation to which see [27] above.

In particular, regulation 33 provides that enhanced due diligence measures apply to manage and mitigate risks arising from particular types of transactions, including transactions identified as having a high risk of money laundering; where the customer is a politically-exposed person (PEP); where the transaction is complex and unusually large, and has no apparent economic or legal purpose; or where the person is established in a high-risk third country. The enhanced due diligence measures include as far as reasonably possible, examining the background and purpose of the transaction, and increasing the degree and nature of monitoring of the business relationship in which the transaction is made to determine whether that transaction or that relationship appear to be suspicious.

In relation to your solicitor, it will be sufficient to satisfy your obligations by making a check of the SRA Solicitor's Register Database. See [134] of the Guidance.

In relation to A Ltd, the risk of money laundering appears to be low in light of A Ltd's status as a well-known blue-chip company, and the obvious commercial purpose of the transaction. Accordingly, customer due diligence may involve relatively limited verification steps.

You may be able to rely upon the CDD carried out by your instructing solicitors. However, even if they consent to you doing so, you should ensure that you are satisfied that they have applied the appropriate level and degree of due diligence. Simply obtaining copies of the CDD material obtained by the person instructing you does not meet the 'Reliance' requirements of Regulation 39. You must satisfy yourself that you have obtained the necessary information to meet your CDD obligations. To do this, you will need to undertake a risk-based review of the CDD materials provided to you. Even where you do rely upon the CDD of the person who instructs you, you remain liable for "any failure to apply such [CDD] measures" (Regulation 39(1)).

In relation to Alpha, the risk of money laundering is plainly much higher. Several of the regulation 33 flags are apparent in Alpha's status as a relative of a PEP and the complexity and lack of commercial purpose in the transaction. It may be that there is a perfectly understandable commercial rationale for the transaction, that Alpha simply wishes to keep private. However, it is incumbent on you to understand the purpose and nature of the intended relationship in order to act. Where you are unable to satisfy yourself in relation to your CDD obligations you must cease to act. A failure to comply with the Regulations can amount to a criminal offence.

You must keep an up-to-date written record of all steps taken in carrying out the risk assessment, and provide this, together with the risk assessment and any information on which that assessment was based, to your supervisory authority on request (Regulation 18(4) & (6)).

For further assistance in relation to CDD, see the Basic Guide to Customer Due Diligence at Annex 1 to the Guidance.