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Index Reference :

Regulations: Legal Practitioners Ordinance, Practice Directions and Rules

CIRCULAR 08-59 (SD) **5 February 2008**

ANTI-MONEY LAUNDERING

1. Practice Direction P incorporating a set of guidelines on anti-money laundering and terrorist financing was issued on 3 December 2007. Please click **here** for a copy of Practice Direction P.

2. The Practice Direction consists of, inter alia:-

   (a) a table of mandatory requirements for law firms on client identification and verification, client due diligence exercises, record keeping;

   (b) a summary of the current relevant legislation on money laundering and terrorist financing;

   (c) basic policies and procedures required of law firms;

   (d) relevant legal issues on legal professional privilege, client confidentiality, litigation, civil liability and confidentiality agreements;

   (e) examples of suspicious transaction indicators and risk areas; and

   (f) suspicious transaction reporting.

3. Every file opened for each client must record the steps taken by the firm for client identification and client due diligence and those records must be retained. The Law Society has recommended the preservation of files for a specified period. In order to minimize the administration of closed files, the period for which the records are to be retained is to be the same as that for closed files namely:-

   (a) conveyancing matters – 15 years
   (b) tenancy matters – 7 years
   (c) other matters, except criminal cases – 7 years; and

(d) criminal cases – 3 years from expiration of any appeal period.

4. The full content of Practice Direction P takes advisory effect from the date of issue on 3 December 2007. It was initially intended that Table A and paragraphs 18 – 28 of the Practice Direction would take mandatory effect from 1 March 2008**.** To allow members more time to make the necessary adjustments to ensure compliance with the mandatory provisions, the Council resolved to postpone the effective date from 1 March 2008 to **1 July 2008.**

5. With effect from 1 July 2008, any law firm, solicitor or foreign lawyer practising in Hong Kong who fails to comply with the mandatory provisions may face disciplinary proceedings (see Chapter 16 of The Hong Kong Solicitors' Guide to Professional Conduct). In addition, firms which do not comply with the provisions in Practice Direction P will be exposed to additional risk of being involved in money laundering and terrorist financing activities, with severe consequences of criminal prosecution and significant loss of reputation.

6. Circular 07-726 is superceded.

PRACTICE DIRECTION P

GUIDELINES

ON

ANTI-MONEY LAUNDERING

AND

TERRORIST FINANCING

CONTENTS

A. Table of mandatory requirements

Mandatory Requirements	
1. Client identification and verification	▪ **Objective**:- Take reasonable measures to obtain basic information on the identity of the client and verify the client's identity. ▪ **Applicable situations**:- Applicable to all cases including cases for the same client ▪ **When**:- (i) Establishing business relationship; or (ii) Carrying out occasional transactions; (iii) In exceptional or urgent circumstances where it is not practicable to verify client's identity at the time of instructions, verification should be made as soon as practicable after preliminary client identification. ▪ **How**:- to conduct identification and verification is set out in paragraphs 85 – 97.
2. Client due diligence	▪ **Applicable situations**:- When acting for a client (new or existing) in any of the following activities:- (i) Financial transactions (e.g. buying and selling of real estate, business, company, securities and other assets and property) (ii) Managing client money[1], securities or other assets; (iii) Management of bank or securities accounts; (iv) The formation, structure, re-organisation, operation or management of companies and other entities; (v) Insolvency cases and tax advice; (vi) Other transactions involving custody of funds as stakeholder or escrow agent or transfer of funds through their bank accounts. ▪ **How**:- (i) Obtain information on the nature and intended purpose of the transaction; (ii) Obtain information on the business relationship between the client and other interested parties to the transaction;

[1] Simply operating a solicitor's client account would not generally be regarded as "managing client money". However, where a solicitor acts as an attorney of a client, it may be considered as "managing client money".

	(iii) Obtain information on the source of funding; and (iv) Where appropriate, check new client's name against the published list of terrorist suspects. **Firms should adopt a risk-based approach in determining the level of information to be obtained.**
3. Enhanced client due diligence	▪ **Applicable situations:-** (i) When handling complex, unusually large transactions, or an unusual patterns of transactions, which have no apparent economic or lawful purpose; or (ii) When acting for clients considered as "high risk", for example:- - Overseas companies where corporate information is not readily accessible or with nominee shareholders or a significant portion of capital in the form of bearer shares; or - Politically exposed persons ("**PEP**")[2] and persons, companies and government organisations related to them; or - Persons or entities from or in non-cooperative countries and territories ("**NCCT**")[3] identified by the Financial Action Task Force ("**FATF**")[4] or such other jurisdictions (e.g. Iran) known to have insufficiently complied with FATF Recommendations; or (iii) When preliminary interview leads to:- - Suspicion of money laundering; or - Doubt about the veracity or adequacy of previously obtained client identification data. ▪ **How:-** to conduct enhanced due diligence is set out in paragraphs 104 – 107.

[2] PEPs are individuals entrusted with prominent public functions, such as heads of state or of government, senior politicians, senior government, judicial or military officials, senior executives of public organisations and senior political party officials. The concern is that they may abuse their public powers for their own illicit enrichment through the receipt of bribes etc., particularly in countries where corruption is widespread.

[3] The current list of NCCTs can be found on the FATF website at www.fatf-gafi.org. Currently FATF has not identified any NCCT.

[4] The FATF was established in 1989 in an effort to thwart attempts by criminals to launder the proceeds of crime through the financial system. Hong Kong has been a full member of FATF since March 1991 and has the obligation to implement the FATF Recommendations, which include the 40 Recommendations of the FATF on Money Laundering and the 9 Special Recommendations of FATF on Terrorist Financing.

4. Simplified client due diligence	▪ **Applicable situations:-** When acting for :- - public companies that are subject to regulatory disclosure requirements; or - financial institutions regulated by competent authorities, e.g. the Securities and Futures Commission, the Hong Kong Monetary Authority or an equivalent authority in a jurisdiction that is a FATF member[5].
5. Timing for conducting client due diligence	▪ **When:-** (i) Establishing solicitor / client relationship; or (ii) Carrying out occasional transactions; (iii) In exceptional or urgent circumstances where it is not practicable to conduct client due diligence at the time of instructions, due diligence should be made as soon as practicable after preliminary client identification. **Nevertheless, law firms should determine the risks involved in acting for a client considered as "high risk" before completing due diligence.** (iv) Ongoing review is required for any client considered as "high risk", or where there are changes to instructions or relationship between a client and relevant party(ies) which give rise to suspicions.
6. Record keeping	Files including records for client identification and due diligence should be kept for the period as follows:- (i) Conveyancing matters - 15 years; (ii) Tenancy matters - 7 years; (iii) Other matters, except criminal cases - 7 years; and (iv) Criminal cases - 3 years from expiration of any appeal period. Records of a transaction which is subject to a suspicious transaction report and investigation should be kept until the relevant authority has confirmed that the case has been closed.

[5] The current list of FATF members and observers can be found on the FATF website at www.fatf-gafi.org. A list of the FATF members and observers as at 14 November 2007 is enclosed as Annexure 7 hereunder.

7. Staff awareness and training	(i) Make the Guidelines and the firm's internal policies and procedures (as supplemented and updated from time to time) available to new and existing employees; and (ii) Provide ongoing training to staff on how to recognise and deal with suspicious transactions and to keep them up-to-date on relevant legal provisions and on trends of money laundering and terrorist financing techniques.

B. Introduction

8. In July 2004, the Law Society set up a Working Party on Anti-Money Laundering to consider the impact of the revised Forty Recommendations in relation to measures against money laundering developed by the FATF. Given the complexity and importance of the issues, the Working Party was converted into a full Committee in November 2004. In late 2006, the Law Society on the recommendation of the Committee on Anti-Money Laundering resolved to publish a comprehensive set of Guidelines relating to anti-money laundering and terrorist financing for use by law firms, solicitors and foreign lawyers practising in Hong Kong.

9. These Guidelines supersede Circular 97-280, Circular 03-428 and Circular 05-291 (SD) on Money Laundering.

10. These Guidelines apply to all law firms, solicitors and foreign lawyers practising in Hong Kong and aim to:-

    10.1 provide general guidance on the subjects of anti-money laundering and terrorist financing,

    10.2 summarise the relevant legislative provisions on anti-money laundering and terrorist financing;

    10.3 require compliance by practitioners of prescribed requirements to prevent money laundering and terrorist financing;

    10.4 offer useful general guidelines to law firms for developing their own procedures on anti-money laundering and terrorist financing appropriate to their businesses; and

    10.5 highlight issues which would affect the practice of law in Hong Kong.

11. These Guidelines do not have the force of law and should not be interpreted as such. However, where provisions are specified as mandatory herein (currently paragraphs 18 – 28), any law firm, solicitor or foreign lawyer practising in Hong Kong that fails to comply with such provisions may face disciplinary action (see Chapter 16 of The Hong Kong Solicitors' Guide to Professional Conduct ("**Guide to Professional Conduct**")). In addition, firms which do not comply with these Guidelines will be exposed to additional risks of being involved in money laundering and terrorist financing activities, with severe consequences of criminal prosecution and significant loss of reputation.

12. These Guidelines will be kept under review and revised from time to time.

C. Legislation on money laundering and terrorist financing

13. There are 3 main items of legislation in Hong Kong that are concerned with money laundering and terrorist financing, namely:-

13.1 Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) ("**DTRPO**");

13.2 Organized and Serious Crimes Ordinance (Cap. 455) ("**OSCO**"); and

13.3 United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) ("**UNATMO**").

14. It is important for solicitors to raise their awareness of these provisions and to comply with them to minimise the risk of becoming involved inadvertently in criminal offences under this legislation by:-

14.1 assisting persons known or suspected to be laundering money generated by drug trafficking or any indictable offence, or providing or collecting funds used to commit terrorist acts or making funds available to terrorists or terrorist associate(s);

14.2 failing to report a suspicious case of money laundering or terrorist financing;

14.3 tipping off clients who were subject to investigation for an offence of money laundering or terrorist financing; or

14.4 failing to comply with court orders for the purpose of investigation of crime and to make information available.

15. Summaries on the key provisions of the legislation are set out in Annexure 2.

D. Basic policies and procedures required of law firms

16. In support of the international initiatives to combat money laundering and terrorist activities, there is a need for awareness and vigilance on the part of legal practitioners and their staff. Law firms should therefore have in place appropriate policies and procedures of internal control for identifying and (where appropriate) reporting suspicious transactions. These Guidelines could be adopted by law firms as such policies and procedures until they have developed their own policies and procedures appropriate to their business.

Mandatory Requirements

17. Every law firm carrying on business in Hong Kong is required to comply with the requirements outlined in paragraphs 18 – 28 below when they act for clients in any matter.

Client identification, verification and due diligence

18. As a basic requirement, law firms must make reasonable efforts to identify and verify the true identity of all clients (new or existing) requesting the firm's services. Each firm should carefully consider whether financial transactions should be conducted with clients who fail to provide satisfactory evidence of their identities. Recommended procedures and policies on client identification and verification are set out in paragraphs 85 – 97.

19. In general, law firms should satisfy themselves with the identity of the client and the beneficial owner(s) of a client which is not a natural person at the time of the instruction. In exceptional or urgent circumstances where this is not reasonably practicable, the verification procedure should be made as soon as practicable after the preliminary identification.

20. In addition to the basic client identification and verification measures, law firms are required to carry out different levels of client due diligence as set out in the Table of mandatory requirements under Section A when instructed to act in any of the following activities:-

    20.1 financial transactions such as buying and selling of real estate, business, company, securities and other assets and property;

    20.2 managing client money, securities or other assets;

    20.3 management of bank or securities accounts;

    20.4 the formation, structure, re-organisation, operation or management of companies and other entities;

    20.5 insolvency cases and tax advice;

    20.6 other transactions involving custody of funds by law firms as stakeholder or escrow agent or transfers of funds through their bank accounts.

21. The timing required for conducting client due diligence is similar to that required for client identification and verification (i.e. at the time of the instruction). However, in exceptional or urgent circumstances where this is not practicable, it would be permissible to have the due diligence process completed as soon as practicable after accepting the instruction. Nevertheless, **where the client is considered as "high risk", the firm should carefully determine the risks involved in acting for such client before completing the due diligence process.**

22. Where a solicitor is unable to verify the identity of a client or is suspicious of the relevant transaction after conducting due diligence, the solicitor should carefully evaluate the risks involved and determine whether he should continue to act for the client and, if appropriate, report any suspicion on money laundering or terrorist financing activities to an authorised officer. In this respect, care must be taken to ensure that he would not inadvertently commit the offence of tipping off (see paragraphs 71 – 72 and 82 – 83).

Record keeping

23. Law firms should also make reasonable efforts in keeping the records of their existing clients updated from time to time and conducting periodic reviews on the risk profile of the clients.

24. All files, including all documents relating to the transactions and records obtained or compiled for client identification and due diligence, should be retained in order to facilitate the retrieval of information relating to client identification and due diligence. The recommendations contained in the existing Circular 02-384 should be observed. The retention period for the following types of transactions is as follows:-

24.1 conveyancing matters – 15 years;

24.2 tenancy matters – 7 years;

24.3 other matters, except criminal cases – 7 years; and

24.4 criminal cases – 3 years from expiration of any appeal period.

25. Such records should be kept in such a way that the law firm can swiftly comply with any information requests from a competent authority.

26. Records of a transaction which is the subject of a suspicious transaction reporting and investigation should be kept until the relevant authority has confirmed that the case has been closed.

Staff Awareness and Training

27. These Guidelines and the firm's internal policies and procedures (as supplemented and updated from time to time) are to be made available to new and existing employees to raise awareness of money laundering and terrorist financing and facilitate recognition and (where appropriate) reporting of suspicious transactions.

28. Further, each law firm has to provide ongoing training to staff on recognition, reporting and handling of suspicious transactions and on the updated legislation and trends of money laundering and terrorist financing techniques.

Recommended Measures

29. Solicitors are reminded that the effort in combating money laundering and terrorist financing does not end at the point of accepting instructions and care must be taken at all times to identify suspicious transactions.

Examples of suspicious transaction indicators and risk areas are provided in Annexure 4.

30. Law firms should develop and implement policies and procedures of internal control appropriate to the nature and scope of their business for identifying and (where appropriate) reporting money laundering and terrorist financing transactions.

31. In establishing such policies and procedures, law firms should take a risk based approach. The guiding principle is that objective reasonable steps should be taken to detect and prevent money laundering and terrorist financing activities and transactions. Recommended procedures and policies for recognition and reporting of suspicious transaction are provided in Annexure 5. A standard report form is provided in Annexure 6.

32. Such procedures should be communicated in writing to all solicitors and staff of the firm and be reviewed and updated on a regular basis to ensure their effectiveness.

33. Law firms should co-operate with law enforcement authorities to the extent permitted by law or contractual obligations relating to client confidentiality.

E. Relevant legal issues

Legal Professional Privilege ("LPP")

34. Special privilege from disclosure, known as LPP, is rendered to communications made:-

34.1 between a legal adviser and his client for the purpose of giving legal advice to the client; and

34.2 between a legal adviser and his client and any other person in connection with or in contemplation of legal proceedings and for the purposes of such proceedings.

35. LPP does not exist for communications or documents which are held with the intention of furthering a criminal purpose.

36. In recognition of the LPP under common law, there are provisions in the DTRPO, OSCO and UNATMO[6] exempting items subject to LPP from the disclosure requirements therein.

37. Recommendation 16 of The 40 Recommendations of the FATF on Money Laundering also provides that:-

"Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege."

38. Nevertheless, where a solicitor, through information subject to LPP, becomes aware or suspicious that a transaction being handled by him involves criminal or terrorist activities in contravention of the DTRPO, OSCO or UNATMO, he should consider if it remains appropriate for him to continue to act for the relevant client.

39. If the solicitor considers there is a conflict of interest or does not wish to continue to act, he should cease to act for that client. **It is therefore advisable for law firms to include a standard clause in their engagement letters to the effect that the firm may terminate its**

[6] Section 2(14) of DTRPO, section 2(18) of OSCO and section 2(5) of UNATMO.

relationship with the client at any time if it is of the opinion that a conflict of interest arises, whether the conflict is between clients of the firm or between the client and the firm.

Client Confidentiality

40. Solicitors are required to comply with Rule 8.01 of the Guide to Professional Conduct which provides:-

"A solicitor has a duty to hold in strict confidence all information concerning the business and affairs of his client acquired in the course of the professional relationship, and must not divulge such information unless disclosure is expressly or impliedly authorised by the client or required by law or unless the client has expressly or impliedly waived the duty."

41. Such general duty of confidentiality may, in certain circumstances, be overridden by orders of the court. For example, an order made pursuant to section 4 of the OSCO, which requires the production of particular material (other than that subject to legal professional privilege) which is relevant for the purpose of an investigation into an organised crime or proceeds of crime.

42. Where a solicitor becomes aware or suspicious that a client's transaction may be related to money laundering or terrorist financing and that the information he has does not fall within LPP, he should consider carefully whether a report should be made to an authorised officer or he may be held liable for failing to make disclosure as required by the DTRPO, OSCO or UNATMO.

43. If the solicitor determines that a report should be made, a conflict of interest is likely to arise between him and the client, in which case the solicitor should cease to act for the client.

44. When a report has been made, the solicitor should not disclose to the client or any third party the making of such report, otherwise the solicitor may commit the offence of "tipping off".

45. The standard clause recommended to be incorporated into a law firm's engagement letter with its client under the above paragraph 39 is particularly useful in circumstances where a report has been made to the authority so that the law firm may terminate the solicitor/client relationship without giving information which may make it liable for the offence of tipping off.

Litigation

46. There are provisions under the DTRPO, OSCO and UNATMO imposing criminal liability on persons (i) having knowledge of or suspicion on money laundering and/or terrorist financing activities and (ii) entering into or becoming involved in such activities, unless disclosure is made and consent to continue with the involvement is obtained from authorised officers (the **"Relevant Provisions"**). Details of these provisions are provided in Annexure 2.

47. Solicitors may in the course of representing clients in existing or contemplating legal proceedings become aware of or suspicious that the subject matter of the proceedings relates to money laundering or terrorist financing activities, or enter into or being involved in such activities. Solicitors in these situations may be at risk of being caught by the Relevant Provisions.

48. In circumstances where the relevant information was obtained from one's own client, disclosure would be exempted by reason of LPP set out in paragraph 34 above.[7]

49. The position is less clear where the relevant information was obtained as a result of discovery made by the opposing party. Based on the decision of the English Court of Appeal in **Bowman v Fels** [2005] EWCA Civ 226, in the absence of clear language, the disclosure obligation imposed by the Relevant Provisions would not override the implied undertaking of lawyers not to use documents disclosed in the discovery procedure of a legal proceeding to any third party or for other purpose. Further, the English Court of Appeal expressed the view that the function of litigation is to resolve the rights and duties of two parties according to law and therefore the conduct of legal proceedings would not be regarded as "carrying out" a "transaction" relating to money laundering. It therefore appears that the Relevant Provisions would not apply to solicitors conducting genuine legal proceedings for their clients. This proposition however is yet to be tested by the Hong Kong Court.

50. If the solicitor considers there is a conflict of interest or does not wish to continue to act, he should not accept any further instructions from the client.

Civil liability

51. Section 25A(3) of DTRPO and OSCO and section 12(3) of UNATMO expressly provide that the making of disclosure under section 25A(2) of DTRPO and OSCO and section 12(2) of UNATMO respectively shall not be treated as breach of contract or confidentiality and the person making such disclosure shall not be made liable in damages for any loss arising

[7] See also paragraph 69.

out of the disclosure or any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.

52. These exemptions from liability in damages, however, do not prevent a party adversely affected by the disclosure made pursuant to the relevant legislation, to make other civil claims such as constructive trusteeship, money had and received and tracing in equity.

Confidentiality Agreement

53. Commercial solicitors are often required by clients (particularly corporate clients) to enter into confidentiality agreements before the clients disclose information relating to their transactions. To ensure that they are not deprived of the protection of section 25A(3) of the DTRPO and OSCO and section 12(3) of UNATMO, solicitors should be cautious in entering into confidentiality agreements **subject to foreign law**. Further, solicitors should be cautious when required by clients to confirm that clients' information will remain confidential, as such representations could be considered to be misleading.

F. Disclaimer

54. Notwithstanding the recommendations made by the Law Society, these Guidelines are not intended to provide legal advice. Practitioners are required to form their own opinions on each individual case.

ANNEXURE 1

What are money laundering and terrorist financing?

55. Money laundering is a transaction or a series of transactions effected with the aim to conceal or change the identity of criminal proceeds, so that the money, after such processing, will appear to have originated from a legitimate source.

56. The only statutory definition of "money laundering activities" is found in Schedule 1 of the Securities and Futures Ordinance (Cap. 571) as:-

> "activities intended to have the effect of making any property-
> (a) which is the proceeds obtained from the commission of an offence under the laws of Hong Kong, or of any conduct which if occurred in Hong Kong would constitute an offence under the laws of Hong Kong; or
> (b) which in whole or in part, directly or indirectly, represents such proceeds,
> not to appear to be or so represent such proceeds."

57. Similar to money laundering, terrorist financing also aims at disguising the origin of funds, but its focus is on the directing of funds, whether legitimate or not, to terrorists.

58. There are 3 common stages of money laundering:-

58.1 *Placement* - the introduction of criminal proceeds into the financial system. Law firms are at risk of getting involved by dealing with client money.

58.2 *Layering* - after the criminal proceeds are placed into the financial system, complex transactions are effected to disguise the audit trail and obscure the origin of the funds.

58.3 *Integration* - if the layering process succeeds, the criminal proceeds will reappear in the financial system as legitimate funds and assets.

Law firms are at risk of being targeted to assist in transactions such as the purchase or sale of property which may be a part of placement, layering or integration in a money laundering scheme.

59. There is an increasing sophistication of techniques used by criminals in laundering funds including the increased use of legal persons to disguise the true ownership and control of illegal proceeds, and the increased use of professionals to provide advice and assistance in laundering criminal funds. Particular attention should be paid when cash is received from clients. Proceeds of many crimes are often generated in the form of cash. As law firms receive and deal with client money on daily basis, they are increasingly targeted as a route to placing cash into the financial system.

ANNEXURE 2

Summary on key provisions in legislation on money laundering and terrorist financing

Key Provisions under DTRPO and OSCO (collectively the "Ordinances")

Failure to disclose

60. Section 25A(1) of the Ordinances imposes a duty on a person, who knows or suspects that any property:-

(a) in whole or in part directly or indirectly represents any person's proceeds of;
(b) was used in connection with; or
(c) is intended to be used in connection with,

drug trafficking or an indictable offence, to disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer as soon as it is reasonable for him to do so.

61. It should be noted that references to an indictable offence in sections 25 and 25A of OSCO include conduct which would constitute an indictable offence if it had occurred in Hong Kong. Accordingly, it is an offence for a person to deal with the proceeds of crime or fail to make the necessary disclosure although the principal crime is not committed in Hong Kong provided that it would constitute an indictable offence if it had occurred in Hong Kong. Similarly references to drug trafficking in sections 25 and 25A of DTRPO include drug trafficking committed outside Hong Kong.

62. "Authorized officer", as defined under section 2 of the Ordinances, includes:-

(a) any police officer;

(b) any member of the Customs and Excise Service; and

(c) any other person authorised by the Secretary for Justice for the purposes of the Ordinances including any officer in the Joint Financial Intelligence Unit ("**JFIU**")[8].

63. Failure to make a disclosure under section 25A(1) is an offence and the penalties upon conviction are imprisonment for 3 months and a fine of HK$50,000.

64. Section 25A(3) of the Ordinances provides that such disclosure shall not be treated as a breach of any restriction on disclosure imposed by contract, enactment or rule of conduct and the person making such disclosure shall not be made liable in damages for any loss arising out of the disclosure or any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.

65. Section 25A(4) of the Ordinances further extends the provisions of section 25A to disclosure made by an employee to an appropriate person in accordance with the procedure established by his employer for the making of such a disclosure. This provides protection to employees of a law firm against the risk of prosecution where they have reported knowledge or suspicion of money laundering transactions to the person designated by their employer.

[8] The JFIU is operated jointly by the Police and the Customs and Excise Service

Active money laundering

66. Section 25(1) of the Ordinances makes it an offence for a person to deal with any property which he, knowing or having reasonable grounds to believe that such property in whole or in part directly or indirectly represents any person's proceeds of drug trafficking or of an indictable offence respectively.

67. "Dealing" is defined under section 2 of the Ordinances to include:-

(a) receiving or acquiring the property;
(b) concealing or disguising the property (whether by concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect of it or otherwise);
(c) disposing of or converting the property;
(d) bringing into or removing from Hong Kong the property;
(e) using the property to borrow money, or as security (whether by way of charge, mortgage or pledge or otherwise).

68. The penalties for these offences are, on indictment 14 years imprisonment and a fine of HK$5,000,000 and on summary conviction, 3 years imprisonment and a fine of HK$500,000.

69. Section 25(2) of both Ordinances provides that it is a defence for a person charged with an offence under section 25(1) to prove that:-

(a) he intended to disclose such knowledge, suspicion or matter to an authorized officer; and

(b) there is reasonable excuse[9] for his failure to make disclosure in accordance with section 25A(2).

70. Further, section 25A(2) of both Ordinances provides that if a person who has made the necessary disclosure does any act in contravention of section 25(1) and the disclosure relates to that act, he does not commit an offence if:-

(a) that disclosure is made before he does that act and the act is done with the consent of an authorized officer; or

(b) that disclosure is made after he does that act on his initiative and as soon as it is reasonable for him to make it.

Tipping off

71. Section 25A(5) of the Ordinances makes it an offence for a person, knowing or suspecting that a disclosure has been made under section 25A, to disclose to any other person any matter which is likely to prejudice any investigation which might be conducted following the first-mentioned disclosure.

72. The penalties for the offence are, upon indictment a fine of HK$500,000 and imprisonment for 3 years and on summary conviction, a fine of HK$100,000 and imprisonment for 1 year.

[9] The existence of common law legal professional privilege constitutes a "reasonable excuse" for not reporting as a defence to the principal offence of money laundering. See paragraphs 36 and 37 of these Guidelines.

Key Provisions under UNATMO

Failure to disclose

73. Section 12 of the UNATMO provides that where a person knows or suspects that any property is terrorist property, then the person shall disclose to an authorized officer the information or other matter:-

(a) on which the knowledge or suspicion is based; and
(b) as soon as is practicable after that information or other matter comes to the person's attention.

74. Section 2 of the UNATMO provides definitions to the followings:-

"Authorized officer" – (a) a police officer; (b) a member of the Customs and Excise Service; (c) a member of the Immigration Service; or (d) an officer of the Independent Commission Against Corruption.

"Terrorist" - a person who commits, or attempts to commit, a terrorist act or who participates in or facilitates the commission of a terrorist act.

"Terrorist act" – the use or threat of action where (i) the action is carried out with the intention of, or the threat is made with the intention of using action that would have the effect of (A) causing serious violence against a person; (B) causing serious damage to property; (C) endangering a person's life, other than that of the person committing the action; (D) creating a serious risk to the health or safety of the public or a section of the public; (E) seriously interfering with or seriously disrupting an electronic system; or (F) seriously interfering with or seriously disrupting an essential service, facility or system, whether public or private; and (ii) the use or threat is (A) intended to compel the Government or to intimidate

the public or a section of the public; and (B) made for the purpose of advancing a political, religious or ideological cause.

"Terrorist associate" – an entity owned or controlled, directly or indirectly, by a terrorist.

"Terrorist property" – (a) the property of a terrorist or terrorist associate; or (b) any other property consisting of funds that was used or is intended to be used to finance or otherwise assist the commission of a terrorist act.

75. A list of designated terrorist, terrorist associates and terrorist properties is from time to time published in the Gazette. Section 5(4) of the UNATMO provides that in the absence of evidence to the contrary, it shall be presumed that persons or properties specified in such a list are terrorists, terrorist associates or terrorist properties.

76. Section 14 of UNATMO provides that the maximum penalty for failure to make disclosure under section 12 is imprisonment for 3 months and a fine of HK$50,000.

77. Similar to section 25A(3) of the Ordinances, section 12(3) of the UNATMO provides that the making of the required disclosure shall not be treated as a breach of contract or enactment or rule of conduct which restricts disclosure and shall not render the person who made the disclosure liable in damages therefor.

78. Similar to section 25A(4) of the Ordinances, section 12(4) of UNATMO renders protection to employees against the risk of prosecution where they have made disclosure to an appropriate person in accordance with the procedure established by their employers.

Active terrorist financing

79. Section 7 of the UNATMO prohibits a person from providing or collecting, by any means, directly or indirectly, funds:-

(a) with the intention that the funds be used; or

(b) knowing that the funds will be used,

in whole or in part, to commit one or more terrorist acts (whether or not the funds are actually so used).

80. Section 8 of the UNATMO prohibits any person, except under the authority of a licence granted by the Secretary for Security, from making any funds or financial (or related) services available, directly or indirectly, to or for the benefit of a person who he knows or has reasonable grounds to believe is a terrorist or terrorist associate.

81. Under section 12(2), it is a defence against prosecution under section 7 or 8 if a person who has made a disclosure under section 12(1) does any act before or after the disclosure and :-

(a) that disclosure is made before the person does that act and the person does that act with the consent of an authorized officer; or

(b) that disclosure is made after the person does that act on the person's initiative and as soon as it is practicable for the person to make it.

Tipping off

82. Section 12(5) of the UNATMO prohibits a person who knows or suspects that a disclosure has been made from disclosing to another person any information or other matter which is likely to prejudice any investigation which might be conducted following the first-mentioned disclosure.

83. Any person found guilty of the offence under section 12(5) shall be subject to a fine and to imprisonment for 3 years.

Other Provisions under the Ordinances and UNATMO

84. In addition to the above offences under the Ordinances and UNATMO[10], such Ordinances also confer extensive powers on the authorities to carry out investigation on drug trafficking, organised crime and terrorist activities, including the production of material and furnishing of information (other than those subject to legal privilege) and authority to search premises, with an order of the court. Failure to comply with such order or hindrance of the relevant authority in execution of such order may amount to criminal liability. There are also provisions imposing criminal liability on persons committing acts which may prejudice investigation.

[10] Part 4A of the UNATMO (which provides for the Court's power to make orders and issue warrants to assist investigation of terrorist activities) has not yet come into effect.

ANNEXURE 3

Client identification, verification and due diligence

Client identification and verification

85. In general, reasonable measures must be taken:-

85.1 to identify the client;

85.2 to verify the identity of the client by using reliable and independent source documents, data or information; and

85.3 for companies and other legal entities, to identify the persons who have effective control or beneficial ownership of the company or legal entity.

86. **Original documents** (e.g. identity card or passport of an individual, certificate of incorporation or registration of a company or other legal entity) should be inspected whenever possible for verification purpose. Where originals are not available, copies of such documents from a reliable independent source (e.g. copies certified by appropriately regulated professional) should be obtained. Copies of all such documents must be kept as a record. It is also advisable to note down when the original document(s) was/were inspected and when the copy(ies) was/were taken.

Individuals

87. For clients who are individuals, reasonable measures must be taken to obtain and verify the following information:-

87.1 name;

87.2 number of identification document, such as identity card or passport;

87.3 address, as confirmed by documents such as a recent utility bill or bank statement;

87.4 occupation or business.

Companies

88. The separate entity of a company makes it an attractive form to money launderers. It is important for solicitors acting for corporate clients to have sufficient knowledge on the background of such clients. For corporate clients, reasonable measures must be taken to:-

88.1 identify the person purporting to give instructions on behalf of the client and verify his identity;

88.2 verify that such person is duly authorized, e.g. obtaining a copy of the company's board resolution which evidenced the conferring of authority on the person concerned;

88.3 obtain proof on the legal status of the client, such as a certificate of incorporation, information recorded at the public register such as the Companies Registry, Business Registration Office, the register of authorised institutions of the Monetary Authority and the register of licensed companies of the Securities and Futures Commission, identity of directors and/or trustees, office address and constitutive documents such as Memorandum and Articles of Association;

88.4 identify and understand the beneficial ownership and control structure of the client and take reasonable steps to verify the identity of persons having such ownership or control.

89. For publicly listed companies, it is not necessary to identify and verify the identity of their shareholders.

Power of Attorney and Agency

90. When a solicitor acts for an attorney or agent of another person, reasonable measures must be taken to obtain the identity and verification documents of both the attorney/agent and the principal. Enquiry must be made on the relationship between the attorney/agent and the principal.

91. Solicitors should inspect the original document conferring the authority on the person giving instruction, such as the original Power of Attorney or letter of appointment of the agent, and obtain a copy of it.

Estates

92. When acting for an estate, the client would be the executor(s) or administrator(s) of that estate. The identity of such individual/legal entity will have to be verified by appropriate measures applicable to an individual or legal entity as provided above. In addition, the following document(s) should be obtained:-

92.1 Death certificate; and

92.2 (where appropriate) Grant of probate or letter of administration.

Trust arrangements

93. Complex trust arrangement is a common form used by criminals to shield their money laundering or terrorist financing activities, for the ownership of the underlying trust property is not apparent. Where the client itself or the transaction to be undertaken involves trust arrangements, the firm must take reasonable steps to identify all parties involved, including the trustee, settlor and beneficiaries, and verify their identities accordingly.

94. Enquiries should be made to understand the nature of the trust.

95. A copy of the trust deed should be obtained.

Charities

96. Charities may be used as a vehicle of money laundering and terrorist financing in that donations received from donors are apparently applied for charitable purposes. When accepting instructions from an existing charity, a copy of the charity's constitution, trust deed or Memorandum and Articles of Association must be obtained and its status verified from reliable independent source such as conducting a search at the Companies Registry. Reasonable measures must be taken to verify the identity of the individuals having effective control of the charity.

97. In setting up charities for clients, in addition to the client identification and verification procedures, solicitors should carefully assess the purpose of the charity and consider if there are indicators that donations could be directed to an organization with a suspicious background.

Non-face to face relationship

98. Due to the increasing money laundering threat of using new or developing technology that favours anonymity, special attention must be paid to non-face to face business relationships or transactions, or if a client refuses to meet face to face without a good reason.

99. In such a situation, copies of identification documents certified by qualified persons, such as solicitors or accountants, should be obtained if possible. If certified documents cannot be obtained, law firms should attempt to verify the identity of the clients by alternative means (e.g. obtain

information through a credit reference agency or information service provider). In any event, the law firm must satisfy itself that the evidence so obtained is reasonably capable of establishing that the client is the person he claims to be.

Instructions referred by intermediaries or third parties

100. Law firms may rely on client identification and verification conducted by intermediaries (including an overseas office of the firm) or third parties in respect of clients referred by them, provided that the following are satisfied:-

100.1 the third party is adequately regulated or supervised, and has appropriate measures in place to comply with the client identification and verification requirements (e.g. banks, other law firms or professionals such as accountants); and

100.2 copies of the client identification and verification documents must be obtained from the third party and kept as a record. Where the intermediary is an overseas office of the firm, the firm may choose not to obtain copies of such documents if they are readily available from the overseas office upon request but the client identity information must be obtained.

IMPORTANT

101. Although solicitors may rely on client information provided by a third party, **they will not be absolved from potential liability** in connection with money laundering or terrorist financing as the ultimate responsibility to establish client identity remains with them.

Client due diligence

102. When acting for a client (new or existing) in any financial transaction or any activity involving custody, management or transfer of funds or assets, or management of companies or other entities, insolvency cases or tax advice, reasonable measures must be taken to conduct client due diligence to:-

102.1 obtain information on the nature and intended purpose of the transaction(s) to be undertaken;

102.2 obtain information on the business relationship between the client and other interested parties to the transaction(s);

102.3 obtain information on the source of funding of the client; and

102.4 where appropriate, check the names of the new client against the published list of terrorist suspects.

103. The extent of client due diligence may vary from client to client, depending on the type of client, business relationship and the transaction to be undertaken. When determining the risk profile of a client, the following factors should be taken into account:-

103.1 background and origin of the client;

103.2 nature of the client's business;

103.3 for corporate client, the structure of ultimate beneficial ownership and control;

103.4 purpose of the transaction to be undertaken;

103.5 source of funding; and

103.6 other information that may suggest that the client is of high money laundering or terrorist financing risk.

Enhanced client due diligence

104. Where enhanced due diligence is required in applicable situations or in respect of clients considered as "high risk", solicitors must make further enquiry or investigation and/or take such further steps as considered appropriate to ensure that there is no suspicion of money laundering or terrorist financing (e.g. by obtaining and verifying further details on the transactions to be undertaken and their underlying purposes and the parties involved). The further enquiry/investigation and findings made by the solicitor must be kept on record. Documents verifying that information must also be obtained and kept on record.

Overseas Companies

105. Where the client is an overseas corporation and information concerning its beneficial ownership and management are not readily accessible or available, enhanced client due diligence measures should include the solicitor taking reasonable steps such as obtaining a declaration from the local registered agent of the overseas corporation regarding its beneficial ownership and management structure.

106. Similar steps should be carried out for companies having a significant proportion of capital in the form of bearer shares and companies having nominee shareholders.

PEP and Client from NCCT or jurisdictions which do not meet FATF standards

107. In relation to PEP and persons, companies and government organisations clearly related to them and client from NCCT or jurisdictions which do not meet FATF standards, additional measures must be taken by solicitors including:-

107.1 taking reasonable measures to establish the source of wealth and source of funds of such persons;

107.2 requiring approval from the management or a partner of the firm before accepting instructions; and

107.3 conducting enhanced on-going monitoring of the business relationship with such persons.

ANNEXURE 4

Examples of suspicious transaction indicators and risk areas

Suspicious transaction indicators

108. The following are some examples of suspicious transaction indicators:-

108.1 unusual settlement requests - such as settlement by cash of large transactions for the purchase of property; or payment by way of third party cheque or money transfer where there is a variation between the account holder, the signatory and the prospective investor without justification or apparent reason;

108.2 unusual instructions (e.g. where the relevant client has no discernable reason for using the firm's services such as when an overseas client could find the same service in his country of residence); or clients whose requirements do not fit into the normal pattern of the firm's business and could be more easily serviced elsewhere;

108.3 large sums of cash to be held in client account, either pending further instructions from the client or for no other purpose than for onward transmission to a third party;

108.4 secretive clients, in particular those with non-face to face relationship;

108.5 client or party(ies) to the transaction from suspect territory such as the NCCTs;

108.6 use of a power of attorney, especially when there is no apparent reason for the client to authorise a third party to deal with assets on his behalf by creating a power of attorney or trusts;

108.7 suspect personality, such as a person known or suspected to be a triad member, drug trafficker or criminal or who is introduced by a known or suspected triad member, drug trafficker or criminal;

108.8 "u-turn" transactions, where money or assets pass from one party to another and then back to the original party;

108.9 "structuring" or "smurfing", where many lower value transactions are conducted when just one, or a few, large transactions could be used.

Property transactions

109. A property transaction is an attractive way of money laundering for it can involve any stage of the money laundering process, as described in paragraph 58.

110. The use of nominee companies as registered owner of properties, in the absence of reasonable explanation, may be suspicious.

111. The provision of funds by one party to purchase property registered in the name of another person also requires explanation. The extent of information regarding the source of funds to be obtained from the client should be determined by a risk based approach. It is not uncommon for family members to assist another family member in purchasing property. In such a situation, a simple enquiry would be sufficient. However, in any case where funds are provided by a party with no apparent relationship with the intended owner, more extensive enquiry should be made.

112. A majority of conveyancing transactions are financed by mortgage loans. Solicitors should be alerted in situations where the purchase price is paid without such financing arrangement, in particular for clients who do not

appear to have the means to make such payment themselves. Enquiries must be made on the source of funding.

113. Risk assessment must be made by solicitors when cash payments in large amounts are made as criminal proceeds are usually in the form of cash.

Examples of risk areas in acting for clients

Private client work

114. Solicitors engaging in private client work will inevitably involve learning about clients' assets, which may lead to knowledge or suspicion of money laundering or terrorist financing. If solicitors become involved in the active management of or dealing with assets of clients, they may be at risk of being involved in money laundering and terrorist financing.

Administration of estate

115. Estate administration is likely to involve financial or real property transactions. During the administration, solicitors may become aware or suspicious of certain illegal dealings or terrorist financing transactions undertaken by the deceased person. As the offences under the DTRPO, OSCO and UNATMO do not restrict the time of the underlying crime or terrorist financing act, solicitors should consider obtaining consent from the authorized officer prior to continue with the administration of the estate.

116. Special attention should be paid to assets in foreign jurisdictions (in particular those in NCCTs) since the definition of "money laundering activities" under the Securities and Futures Ordinance (Cap 571) covers activities which are lawful in an overseas jurisdiction but which constitute an offence if carried out in Hong Kong.

Trust arrangements

117. Similar to administration of estates, solicitors may obtain information regarding the criminal origin of trust properties. In such a situation, the solicitor should assess whether a report to an authorized officer is necessary.

Charities

118. Where a solicitor is involved in the administration of a charity, special attention should also be paid when unusually large sums of donations are received or paid out. If appropriate, enquiry on the identity of the donor or recipient should be made.

Corporate secretarial service, bankruptcy and insolvency practice

119. Particular attention should be paid if corporate secretarial service is to be performed for the client.

120. As solicitors in bankruptcy and insolvency practice are extensively involved in the identification of assets and liabilities of the bankrupt person or insolvent company and dealing in such assets, they are susceptible to the risk of getting involved in money laundering and terrorist financing activities.

Use of solicitor's client account

121. Solicitor's client account should not be used simply for banking purpose as money launderers may use this as a way to get round the extensive money laundering measures taken by financial institutions.

122. When receiving funds from clients, solicitors should be alert and make inquiry on the source of the fund, for payments from unknown source pose significant risk of money laundering.

123. Solicitors should not establish a client account where the identity of the client or the source of funding is unknown.

ANNEXURE 5

Recognition and reporting of suspicious transactions

124. A Systemic Approach to Identifying Suspicious Transaction was recommended by the JFIU[11]. It includes:-

Step One:	Recognition of suspicious financial activity indicator(s);
Step Two:	Ask the client appropriate question(s) to obtain information;
Step Three:	Find out client's records. Review information already known to the firm when deciding whether the apparently suspicious activity is to be expected;
Step Four:	Evaluate all the above information to decide if the financial activity concerned is in fact suspicious.

125. Depending on the size of a law firm, it is advisable for law firms to appoint a compliance officer who is of sufficient seniority within the firm to act as the reception point of suspicious transaction reports and to consider what appropriate actions to take following receipt of such reports.

126. Law firms and their compliance officer (if appointed) should keep written record of all suspicious transaction reports received including information and other matters leading to the making of the report and any other information which the firm and/or the compliance officer has taken into account when considering what appropriate actions to take. If it is decided that it is not necessary to report the matter to an authorized officer, the reasons for such decision should be fully documented.

[11] Joint Financial Intelligence Unit

127. Where a suspicious transaction is identified, it will be necessary for the law firm to consider whether in the circumstances of the transaction there is a need to file a report.

128. Suspicious transaction reports may be made to the JFIU in one of the following ways:-

128.1 by email to jfiu@police.gov.hk;

128.2 by fax to 2529 4013; or

128.3 by mail to Joint Financial Intelligence Unit, GPO Box, 6555 Hong Kong

Enquiries can be made on the JFIU Hotline 2866 3366 or 2860 3404.

129. When a report has been made to the authority, the law firm must not disclose that such report has been made to the relevant client or to any party which may prejudice the investigation. Further, if the firm continues to act for the client after making disclosure to the authority, consent from the authority must be obtained before proceeding further with the transaction.

ANNEXURE 6

SUSPICIOUS TRANSACTION REPORT FORM

for reports made under section 25A of DTRPO and OSCO and section 12 of UNATMO

1. Source	
Name and address of law firm:	Tel No:
Reporting person:	Fax No.:
	E-mail:

2. Suspicion (Please provide particulars of the suspicious activity, the reason why you consider the transaction suspicious, the suspicious activity indicators observed)

3. Explanation given by the subject (if any)

4. Details of the subject	
Name:	Date of Birth:
HKID or other ID document No. & type:	Sex: Male / Female
Address:	Tel No.:
	Fax No.:
	E-mail:
Company name and address:	Position held:

5. Details of other entities involved in the suspicious activity

Signature of reporting person:	Date:

Please send report to:
- by email - jfiu@police.gov.hk;
- by fax - 2529 4013; or
- by mail - Joint Financial Intelligence Unit, GPO BOX, 6555 Hong Kong.

Enquiry Hotline: 2866 3366 and 2860 3404

ANNEXURE 7

LIST OF FATF MEMBERS AND OBSERVERS (AS AT 14 NOVEMBER 2007)

FATF members

1. Argentina
2. Australia
3. Austria
4. Belgium
5. Brazil
6. Canada
7. China
8. Denmark
9. European Commission
10. Finland
11. France
12. Germany
13. Greece
14. Gulf Co-operation Council
15. Hong Kong, China
16. Iceland
17. Ireland
18. Italy
19. Japan
20. Kingdom of the Netherlands (including *the Netherlands, the Netherlands Antilles and Aruba)*
21. Luxembourg
22. Mexico
23. New Zealand
24. Norway
25. Portugal
26. Russian Federation
27. Singapore
28. South Africa
29. Spain
30. Sweden
31. Switzerland
32. Turkey
33. United Kingdom
34. United States

FATF associate members

1. The Asia/Pacific Group on Money Laundering
2. The Council of Europe Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures
3. The Financial Action Task Force on Money Laundering in South America
4. Middle East and North Africa Financial Action Task Force

FATF observers

1. India
2. Republic of Korea
3. Caribbean Financial Action Task Force
4. Eurasian Group
5. Eastern and Southern Africa Anti-Money Laundering Group
6. Intergovernmental Action Group against Money-Laundering in Africa
7. African Development Bank
8. Asian Development Bank
9. Commonwealth Secretariat
10. Egmont Group of Financial Intelligence Units
11. European Bank for Reconstruction and Development
12. European Central Bank
13. Europol
14. Inter-American Development Bank
15. International Association of Insurance Supervisors
16. International Monetary Fund
17. International Organisation of Securities Commissions
18. Interpol
19. Organization of American States / Inter-American Committee Against Terrorism
20. Organization of American States / Inter-American Drug Abuse Control Commission
21. Organisation for Economic Co-operation and Development
22. Offshore Group of Banking Supervisors
23. United Nations - Office on Drugs and Crime
24. United Nations - Counter-Terrorism Committee of the Security Council
25. World Bank
26. World Customs Organization