

GUIDANCE NOTES

**FOR THE PREVENTION & DETECTION OF
MONEY LAUNDERING AND TERRORIST
FINANCING**

FOR THE LEGAL SECTOR

**ISSUED BY
THE BARRISTERS AND ACCOUNTANTS
AML/ATF BOARD**

25 June 2018

TABLE OF CONTENTS

1. <u>Introduction</u>	<u>3</u>
2. <u>Legislative and Regulatory Framework</u>	<u>7</u>
3. <u>Internal Systems and Controls</u>	<u>16</u>
4. <u>Risk Based Approach</u>	<u>23</u>
5. <u>Client Due Diligence</u>	<u>46</u>
6. <u>Timing of Verification</u>	<u>60</u>
7. <u>Ongoing Monitoring</u>	<u>67</u>
8. <u>Suspicious Activity Reporting</u>	<u>73</u>
9. <u>Reliance on Third Parties</u>	<u>93</u>
10. <u>Legal Professional Privilege</u>	<u>105</u>
11. <u>Training</u>	<u>113</u>
12. <u>Record Keeping</u>	<u>119</u>
13. <u>Internal Audit</u>	<u>126</u>

CHAPTER 1: INTRODUCTION

1.1 Lawyers are key professionals in the business and financial sector who often facilitate vital transactions that underpin Bermuda’s economy. As such, they have a significant role to play in ensuring that their services are not used to further a criminal purpose. Increasingly over the past decade, criminals have responded to the anti-money laundering and anti-terrorism financing measures taken by the traditional financial institutions and have sought other means to convert their proceeds of crime, or to mix them with legitimate income before they enter the banking system, thus making those proceeds of criminal conduct harder to detect. Frequently, professional advisors such as lawyers and accountants who interface with the financial sector have been used in some jurisdictions as a conduit for criminal property to enter the financial system and as such Bermuda’s legal fraternity should be on guard to ensure that it is not used in this manner.

1.2 In particular, criminals and money launderers will often try to exploit the services offered by lawyers, through the business of undertaking property and financial transactions, setting up corporate and trust structures and when acting as directors or trustees. Furthermore, client accounts can provide a money launderer with a valuable, anonymous, route into the banking system.

1.3 The inter-governmental agencies and international standard-setting bodies such as the Financial Action Task Force (“FATF”) have recognized the access that professional advisors provide for their clients to financial services and products, and have extended the scope of the international standards and recommendations to include lawyers and accountants – often referred to as ‘gatekeepers’. Bermuda, of course, is an offshore jurisdiction. FATF refers repeatedly to offshore structures facilitated by lawyers as an area of concern¹, and can be expected to focus on the legal sector in Bermuda when the Caribbean Financial Action Task Force (CFATF) conducts its mutual assessment of Bermuda in 2018. As a well-regulated jurisdiction operating within the international financial arena, Bermuda has adopted these

¹ See: FATF REPORT Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals June 2013; <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf>

international standards to guard against money laundering and terrorist financing and has integrated the requirements into its legal and regulatory framework.

1.4 The continuing ability of Bermuda’s finance industry to attract legitimate clients with funds and assets that are clean and untainted by criminality depends, in large part, upon the Island’s reputation as a sound, well-regulated jurisdiction. Therefore, any professional legal advisor in Bermuda who is found to be involved in a money laundering or terrorism financing scheme with knowledge or suspicion or reasonable grounds for suspicion of the connection to crime may face a range of penalties including the loss of reputation, disciplinary action by the Bermuda Bar Association (“the Bar”) and prosecution for criminal offences. Likewise regulated professional firms (“RPF’s) registered pursuant to the Proceeds of Crime (Anti-Money Laundering And Anti-Terrorist Financing Supervision and Enforcement) Act 2008 (“Supervision and Enforcement Act”) who fail to adhere to the AML/ATF Regulations and thereby fail or potentially fail to prevent one of their lawyers or employees being involved in money-laundering or terrorism financing will be sanctioned by, and/or incur civil penalties up to \$250,000 from, the Barristers and Accountants AML/ATF Board (the “Board”) as supervisory authority over such RPFs. Every law firm in Bermuda therefore must recognize the role that it must play in protecting itself and its employees from involvement in money laundering and terrorist financing, and also in protecting the Island’s reputation. This principle relates not only to business operations within Bermuda, but also operations conducted by Bermuda law firms outside the Island.

1.5 These Guidance Notes have been issued by the Board to provide law firms for whom the Board has supervisory authority with guidance as to how they should carry out their obligations as required under Bermuda’s legislative framework for the prevention and detection of money laundering and terrorist financing. It is not enough to “check the box” of a list of compliance items, nor simply to compose risk-management manuals, but rather, the Board requires to be satisfied by word and deed that lawyers have applied and continue actively to apply their minds to each client and each transaction on a risk weighted basis to determine whether they have a reporting obligation to the FIA or whether they should take any other action in relation to a suspect person or activity as required by the AML/ATF Regulations or any other

requirement of law. Accordingly, these Guidance Notes are not intended to be exhaustive or a replacement for a firm's internal policies and procedures manual. However, section 30I (6) of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 ("the Supervision and Enforcement Act") provides that in deciding whether a regulated professional firm has failed to comply with a requirement of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 ("the AML/ATF Regulations"), the designated professional body must consider whether the firm followed any relevant guidance which was at the time issued by the designated professional body. The Board is directed by Section 5 of the Supervision and Enforcement Act to take measures necessary for the purpose of securing compliance by lawyers with the AML/ATF Regulations. In the execution of this broad direction, the Board has wide powers under Part 4A of the Supervision and Enforcement Act, including powers of investigation, inspection, issuing mandatory directives, imposing civil penalties and publicising any decision to impose a penalty on a lawyer. It follows from the broad remit of the Board and the wide powers granted to it, together with the criminal provisions of Section 33 of the Supervision and Enforcement Act and Section 19 of the AML/ATF Regulations of non-compliance with these Guidelines that lawyers will wish to read what follows closely.

1.6 For the purposes of these Guidance Notes, "lawyers" refers to professional legal advisers as defined by Regulation 2(1) of the AML/ATF Regulations as read with Section 42A of the Proceeds of Crime Act 1997 ("the "Proceeds of Crime Act")- a barrister and attorney who is a member of the Bar, and "law firms" refers to firms as defined by section 2(1) of the Supervision and Enforcement Act – a professional company, association or partnership of barristers in independent practice and the employees, servants and agents of such company, association or partnership of barristers, including a barrister in independent practice, operating as a sole proprietor and his employees, servants and agents. "Criminal conduct" means drug trafficking, or any relevant offence; where "relevant offence" means any indictable offence in Bermuda other than a drug trafficking offence; or any act or omission which, had it occurred in Bermuda, would have constituted an indictable offence other than a drug trafficking offence.

1.7 These Guidance Notes have been updated to take into account the amendments introduced by the Proceeds of Crime Amendment Act 2015, which came into effect on 1 January 2016 and which were themselves further amended by four subsequent acts: one in 2017 and three in 2016. These amendments to the AML/ATF Legislation were made so as to ensure Bermuda's compliance with the revised 40 technical recommendations that were published in 2012 by the Financial Action Task Force (FATF) i.e. Bermuda's rules on paper. The Board's role is to ensure such rules are implemented and applied in practice.

1.8 Some key areas covered by the amendments are provisions relating to enhanced due diligence, to the role of the reporting and compliance officer, to the requirement for an independent audit function, and to the identification of Politically Exposed Persons (PEPs) inside Bermuda. However, a fundamental change to the reporting threshold was made this year by the 2017 Amendment Act by the introduction of an objective test. Now, a report (internal or external) must be made where there are "reasonable grounds to suspect" that a money-laundering or terrorist financing offence has, is being or is about to be committed. The "reasonable grounds for suspicion" test is more commonly associated with arrests to be made by the Police and the implication therefore is that lawyers are to actively police their clients (see the discussion on Monitoring below).

1.9 Separate Guidance Notes for the prevention and detection of money laundering and terrorist financing have been drafted for the Bermuda Accounting Sector.

CHAPTER 2: LEGISLATIVE and REGULATORY FRAMEWORK

2.1 Bermuda's key legislative enactments relevant to the legal sector and pertaining to money laundering and terrorist financing primarily consists of the following (the "AML/ATF Legislation"):

Statutes:

- Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 ("Supervision and Enforcement Act");
- Financial Intelligence Agency Act 2007 ("FIA Act");
- Anti-Terrorism (Financial and Other Measures) Act 2004 ("ATFA");
- Proceeds of Crime Act 1997 ("Proceeds of Crime Act");
- The Criminal Justice (International Cooperation) (Bermuda) Act 1994;

Regulations:

- Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 ("AML/ATF Regulations");
- International Sanctions Regulations 2013

Orders:

- International Sanctions (ISIL (Da'esh) and Al-Qaida) Amendment Regulations 2016 ("Al-Qaida Regulations") which implement The ISIL(Da'esh) and Al-Qaida (Sanctions) (Overseas Territories) Order 2016 No. 1218 ("Al-Qaida Order 2016");
- International Sanctions (Afghanistan) (United Nations Measures) Regulations 2012 ("Afghanistan Regulations which implement The

Afghanistan (United Nations Measures) (Overseas Territories) Order 2012 No. 1758 (“Afghanistan Order 2012”);

- International Sanctions (Iran) Amendment Regulations 2016 (“Iran Regulations”) which implements The Iran (Sanctions) (Overseas Territories) Order 2016 No. 371 (“Iran Order 2016”);
- The Terrorist Asset-Freezing etc. Act 2010 (Overseas Territories) Order 2011 (“TAFAs Order 2011”);
- The Terrorist Asset-Freezing etc. Act 2010 (Overseas Territories) (Amendment) Order 2017 (“TAFAs Amendment Order 2017”)
- The Democratic People’s Republic of Korea (Sanctions) (Overseas Territories) Order 2012 No. 3066 (“DPRK Order 2012”)
- Proceeds of Crime (Designated Countries and Territories) Order 1998;

Reference should also be made to www.bermulalaws.bm for a comprehensive list of Bermuda’s legislation.

Supervisory Role

2.2 Regulation 2(1) of the AML/ATF Regulations defines a relevant person as a person to whom in accordance with Regulation 4 of the AML/ATF Regulations those Regulations apply, namely AML/ATF regulated financial institutions and independent professionals acting in the course of business carried on by them in or from Bermuda. Law firms that are “relevant persons” pursuant to Regulation 2(1) of the AML/ATF Regulations must put in place risk-based systems and controls to guard against money laundering and terrorist financing in accordance with Bermuda’s requirements, which are based on the international standards set by the FATF. The FATF standards require that all relevant persons must be supervised by an appropriate anti-money laundering supervisory authority. The Board has been established pursuant to Section

25A of the Bermuda Bar Act 1974. The Minister of Justice by Order has designated the Board under section 4(1) of the Supervision and Enforcement Act as the supervisory authority for the purposes of section 3(1) (b) of that Act as the professional body for the relevant persons regulated by it. The Board's duties and powers are set out more particularly in Sections 30C to 30N of the Supervision and Enforcement Act.

2.3 The AML/ATF Regulations apply to independent professionals pursuant to Regulation 4. An independent professional is defined in Regulation 2(1) of the AML/ATF Regulations as meaning a professional legal adviser or accountant being a firm or sole practitioner in independent practice who by way of business provides legal or accountancy services to other persons when participating in financial or real property transactions concerning -

- i. buying and selling of real property;
- ii. managing of client monies, securities or other assets;
- iii. management of bank, savings or securities accounts;
- iv. organisation of contributions for the creation, operation or management of companies; or
- v. creation, operation or management of legal persons or arrangements, and buying and selling business entities

2.4 A person is defined as participating 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.

Guidance Notes

2.5 The Board's duties are set out in Section 5 of the Supervision and Enforcement Act. Generally, Section 5 directs the Board to effectively monitor the relevant persons for whom it

is the supervisory authority and take necessary measures for the purpose of securing compliance by such persons with the AML/ATF Regulations. Section 5(2) of that Act states that a supervisory authority must issue from time to time guidance as to compliance with –

- the AML/ATF Regulations;
- Part V of Proceeds of Crime Act; and
- paragraph 1 of Schedule 1 to the ATFA.

2.6 These Guidance Notes are being issued in accordance with Section 5(2) of the Supervision and Enforcement Act. As “independent professionals” lawyers are required by Section 4(b) of the AML/ATF Regulations to comply with those Regulations and this Guidance when carrying out the services listed in Regulation 2 (1). The objectives of these Guidance Notes are as follows:-

- i. to outline the requirements of the AML/ATF legislation which applies to all professional legal advisers as defined by Regulation 2(1) of the AML/ATF Regulations;
- ii. to outline good practice for implementing the legal requirements;
- iii. to set out the Board’s requirements for professional legal advisers undertaking business providing legal services to other persons when participating in financial or real property transactions as set out in Regulation 2(1) of the AML/ATF Regulations;
- iv. to outline good practice in developing risk-based policies, procedures and risk-mitigation mechanisms to prevent lawyers from being used to facilitate money laundering, corruption, terrorist financing or the evasion of international sanctions²;
- v. to provide a base from which individual law firms can design, document and implement policies, systems and controls and tailor their own policies and procedures for the prevention and detection of money laundering and terrorist financing on a risk-weighted basis;

² Section 11(1)(ab) Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008

- vi. to ensure that Bermuda matches international standards to prevent and detect money laundering and terrorist financing;
- vii. to provide direction on applying the risk-based approach effectively;
- viii. to provide practical guidance on customer due diligence, including identification and verification of identity;
- ix. to provide practical guidance on the introduction and implementation of an annual audit to provide and document an independent and objective evaluation of the robustness of a lawyer's AML/ATF framework, and the reliability, integrity and completeness of the design and effectiveness of that lawyer's AML/ATF risk management function, AML/ATF internal controls framework, and AML/ATF compliance; and
- x. to provide an information resource to be used in training and raising awareness of money laundering and terrorist financing.

2.7 Where an affiliated company of a law firm is an AML/ATF regulated financial institution operating in or from within Bermuda and as defined by Section 2(1) of the AML/ATF Regulations (which include Corporate Service Providers (CSP)) reference should be made to the Guidance Notes for AML/ATF regulated financial institutions issued by the Bermuda Monetary Authority ("BMA") when drawing up policies and procedures for the prevention of and detection of money laundering and terrorist financing.

2.8 This Guidance is intended for use by senior management and compliance staff of a firm to assist in the development of systems and controls, and detailed policies and procedures. These Guidance Notes are not intended as an internal procedures manual or to provide an exhaustive list of systems and controls to counter money laundering and terrorist financing. In applying the Guidance Notes, a firm should adopt an appropriate risk-based approach and should always consider what additional measures might be necessary to prevent its exploitation, and that of its services, by persons seeking either to launder money, engage in corrupt practices, finance terrorism or breach international sanctions.

Application of the AML/ATF Regulations

2.9 The AML/ATF Regulations came into effect for all law firms that are independent professionals pursuant to Regulation 2 (1) of the AML/ATF Regulations on 15 August 2012 by BR 63/ 2012.

2.10 The AML/ATF Regulations only apply to certain activities of independent professionals and these are set out in Regulation 2(1) of the AML/ATF Regulations. In terms of activities covered it should be noted that:

- i. managing client monies is narrower than handling it; and
- ii. operating or managing a bank account is wider than simply opening a client account. It would be likely to cover, for example, lawyers being a co-signatory on an account, acting as a trustee, exercising a power of attorney, or acting as a receiver.

2.11 The Board has confirmed that the following would not generally be regarded as participating in business falling within the services described in the definition of “independent professional” in Regulation 2(1):

- i. Payment on account of costs to a legal professional or payment of a lawyer’s bill.
- ii. In respect of payments on account of costs, law firms should ensure that the payment is proportionate to the issue in respect of which the firm is asked to advise upon.
- iii. In respect of payment of a lawyer’s bill, if the lawyer knowing that any property is or in whole or in part directly, or indirectly, represents the proceeds of criminal conduct or suspects that the payment is made out of the proceeds of criminal conduct, this would constitute an offence under Section 45 of the Proceeds of Crime Act

- iv. Provision of legal advice
 - a. In relation to the provision of legal advice, a lawyer needs to consider whether they are providing legal advice or whether they are a lawyer participating in a transaction by assisting in its planning or its execution. Ultimately, each case will have to be decided on its own facts and it is a matter for each firm to form a view.
 - b. However, generally, the giving of generic advice, or advice specific to a transaction in terms of whether such a transaction is possible under Bermuda law or what factors are taken into account in making such a transaction possible, will only constitute the giving of legal advice where the decision has not already been taken to proceed with the transaction.
 - c. Where a decision is made to proceed with a transaction set out in Regulation 2(1) of the AML/ATF Regulations, drafting documentation to enable that transaction to proceed, or seeking information to advise further on the planning or execution of the transaction will fall within the scope of the AML/ATF Regulations.

- v. Participation in litigation or a form of alternative dispute resolution.
 - a. The following guidance should be taken into account:
 - b. In relation to litigation involving trusts where the proposed resolution includes a change in trusteeship or the application related to asking the Court to approve a future transaction, then the requirements of the AML/ATF Regulations may apply;

- c. In respect of advising clients on insolvency or debt collection matters relating to individuals or entities, the requirements of the AML/ATF Regulations may apply.

- vi. Will Writing
 - a. In relation to Will writing, any steps taken during the lifetime of the deponent of the Will to enable their wishes to be given effect to as recorded in the Will, may well fall within the definition of Regulation 2(1) of the AML/ATF Regulations in which case the requirements of the AML/ATF Regulations will apply.

Publicly funded work

2.12 Publicly funded work extends to individuals under the legal aid scheme, even if an individual may be required to make a contribution to the fees of the law firm.

Penalties for Non-compliance

2.13 The Board has numerous powers to enforce compliance with the AML/ATF Regulations pursuant to Part 4A of the Supervision and Enforcement Act, including powers to require general or specific information, powers of entry to premises and physical inspection of a lawyer's business, the issuing of directives e.g. to cease trading, and the imposition of civil penalties. In certain cases it is a criminal offence to fail to comply.

2.14 In determining whether to impose a penalty on a firm that has failed to comply with the requirements of the AML/ATF Regulations, the Board must consider whether the firm followed any relevant guidance which was issued at the time by the designated professional body. The sanctions for failing to comply with the AML/ATF Regulations may include civil penalties up to \$250,000.00 and publication of the decision to impose the penalty pursuant to Sections 30I and 30K of the Supervision and Enforcement Act.

2.15 Similarly, in determining whether a person has committed certain offences under the Proceeds of Crime Act, for example section 46 (2) of the Proceeds of Crime Act (the offence of failing to disclose knowledge or suspicion or that they have reasonable grounds for suspicion of money laundering), the Supreme Court is required to take account of the guidance provided herein.³ The sanctions for failing to comply with section 46(2) may be an unlimited fine or up to ten years imprisonment, or both. The sanction for failing to comply with section 9(3) of the ATFA (the offence of failing to disclose information) may be a fine of \$100,000.00 or up to five years imprisonment, or both.

2.16 Nevertheless, these Guidance Notes are not a substitute for the law and compliance with them is not of itself a defence to offences under the AML/ATF legislation. However, courts will generally have regard to regulatory guidance when considering the standards of a professional person's conduct and whether they acted reasonably, honestly, and appropriately, and took all reasonable steps and exercised necessary due diligence to avoid committing the offence.

2.17 The consequences of non-compliance with the AML/ATF regulatory regime could include an investigation by the Board and the imposition of regulatory sanctions by the Board and the Bar.

³ Section 49M of the Proceeds of Crime Act

CHAPTER 3: INTERNAL SYSTEMS AND CONTROLS

Regulation 16

3.1 Corporate governance is the system by which businesses are directed and controlled and the business risks managed. For lawyers, money laundering and terrorist financing are risks that must be managed in the same way as other business risks. These Guidance Notes describe the requirements for a law firm's general framework of systems and controls to manage the risk of money laundering and terrorist financing, and refers to the way in which those systems and controls are to be implemented into the day-to-day operation of the firm's business as policies and procedures.

3.2 Although the Board acknowledges that the legislation only brings within its scope the relevant business of law firms as specified in Regulation 2(1) of the AML/ATF Regulations, the AML/ATF legislation and the general offences and penalties cover all persons and all business activities within Bermuda. However, a law firm that does not undertake a significant amount of regulated activity (as defined in Regulation 2(1) of the AML/ATF Regulations) may wish to assess its money laundering and terrorist financing risks on an individual client and/or engagement basis and apply risk-based systems and controls when necessary. See Section 4 on Risk Based Approach for further guidance.

3.3 In accordance with Regulation 16 (1) of the AML/ATF Regulations a law firm must establish and maintain appropriate and risk sensitive policies and procedures relating to:

- i.customer due diligence measures and ongoing monitoring;
- ii.reporting;
- iii.recordkeeping;
- iv.internal control;
- v.risk assessment and management; and

- vi. the monitoring and management of compliance with and the internal communication of such policies and procedures in order to prevent activities related to money laundering and terrorist financing.

In particular, where a firm intends to introduce a new product, practice or technology the firm must perform and document risk assessments prior to the launch of a new product, practice or technology⁴.

3.4 A law firm must establish and maintain systems and controls to prevent and detect money laundering and terrorist financing, that enable the business to:

- i. apply appropriate client due diligence (“**CDD**”) policies and procedures that take into account vulnerabilities and risk which should include:
 - a. the development of clear client acceptance policies and procedures; and
 - b. identifying and verifying the identity of the client;
- ii. monitor and review instances where exemptions are granted to policies and procedures, or where controls are overridden;
- iii. report to the Financial Intelligence Agency (“**FIA**”) when it has knowledge or suspicion or reasonable grounds for suspicion that another person is involved in money laundering or terrorist financing, including attempted transactions;
- iv. ensure that relevant employees are adequately screened when they are initially employed, aware of the risks of becoming concerned in arrangements involving criminal money and terrorist financing, aware of their personal obligations, internal policies and procedures concerning measures to combat money laundering and terrorist financing, and provided with appropriate training;
- v. keep records in accordance with the AML/ATF Regulations; and
- vi. monitor compliance by overseas branches and subsidiaries with policies and procedures.

⁴ Section 16 (1A) of Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008

3.5 A firm must have policies and procedures in place to address any specific risks associated with client relationships established where the client is not physically present for identification purposes (i.e. non-face to face).

3.6 A firm must ensure that the systems and controls are implemented and operating effectively. For systems and controls (including policies and procedures) to be effective, they will need to be both appropriate to the size and business of the firm and aligned with the risk profile of the firm. In addition, the firm would need to take appropriate measures to guard against the use of technological developments in money laundering or terrorist financing schemes. In particular, there should be policies and procedures in place to address specific risks associated with non-face to face business relationships or transactions, which should be applied when conducting due diligence procedures.

3.7 Issues which may be covered in an internal controls system include:

- i. the level of personnel permitted to exercise discretion on the risk-based application of regulations, and under what circumstances;
- ii. CDD requirements to be met for simplified, standard and enhanced due diligence;
- iii. when outsourcing of CDD obligations or reliance on third parties will be permitted, and on what conditions;
- iv. how the firm will restrict work being conducted on a file where CDD has not been completed;
- v. the circumstances in which delayed CDD is permitted;
- vi. when cash payments will be accepted;

- vii. when payments will be accepted from or made to third parties;
- viii. the manner in which disclosures are to be made to the Reporting Officer.

3.8 The firm may demonstrate it has considered the effectiveness of the firm's risk management systems and controls where it, for example:

- i. receives regular and timely information relevant to the management of the firm's money laundering and terrorist financing risks;
- ii. considers the adequacy of the management of the firm's money laundering and terrorist financing risks;
- iii. monitors the on-going competence and effectiveness of the Compliance Officer ("CO") and the Reporting Officer;
- iv. considers the adequacy of resources to ensure effective compliance with the AML/ATF legislation, the Act and by extension this Guidance;
- v. periodically reviews the adequacy of policies and procedures for higher risk clients;
- vi. considers the adequacy of policies and procedures in place where CDD information and documentation is held by third parties such as group entities, outsourcing service providers, introducers and intermediaries;
- vii. considers whether the incidence of suspicious activity reports (or absence of such reports) has highlighted any deficiencies in the firm's CDD, monitoring or internal or external suspicious activity reporting policies and procedures, and whether changes are required to address any such deficiencies;
- viii. takes into account changes made or proposed in respect of new legislation, regulatory requirements or guidance, or as a result of changes in business activities; and

- ix. considers whether inquiries have been made by the FIA, or production orders received, without issues having previously being identified by CDD or reporting policies and procedures.

3.9 The implementation of systems and controls for the prevention and detection of money laundering and the terrorist financing does not obviate the need for a firm to address cultural barriers that can prevent effective control. Human factors, such as the inter-relationships between different employees within a firm, and between employees and clients, can result in the creation of damaging barriers.

3.10 Unlike systems and controls, the prevailing culture of an organisation is intangible. As a result, its impact on the firm can sometimes be difficult to measure. The risk that cultural barriers might prevent the operation of effective systems and controls to prevent and detect money laundering and the terrorist financing may be minimized by senior management considering the prevalence of the following factors:

- i. an assumption on the part of more junior employees that their concerns or suspicions are of no consequence;
- ii. negative handling by partners or fee earners of queries raised by more junior employees regarding unusual, complex or higher risk activity and transactions;
- iii. an unwillingness on the part of fee earners or other employees to subject high value (and therefore important) clients to effective CDD checks;
- iv. pressure applied by senior management or fee earners outside Bermuda upon employees in Bermuda to conduct transactions without first obtaining all relevant CDD;
- v. excessive pressure applied on fee earners to meet aggressive revenue-based targets, or where employee or fee earner remuneration or bonus schemes are exclusively linked to revenue-based targets;

- vi. the familiarity of fee earners or other employees with certain clients resulting in unusual, complex, or higher risk activity and transactions within such relationships not being identified as such;
- vii. the inability of employees to understand the commercial rationale for client relationships, resulting in a failure to identify non-commercial enterprises and therefore potential money laundering and terrorist financing activity;
- viii. a tendency for management to discourage employees from raising concerns due to lack of time and/or resources, preventing any such concerns from being addressed satisfactorily;
- ix. an excessive desire on the part of employees to provide a confidential and efficient client service; and
- x. non-attendance of partners or other members of management at anti-money laundering and terrorist financing training sessions on the basis of mistaken belief that they cannot learn anything new or because they have too many other competing demands on their time.

3.11 All law firms must designate a person employed at managerial level as the CO of that law firm. The law firm is responsible for ensuring its CO is adequately trained to carry out the role.

3.12 The CO must—

- (a) ensure the necessary compliance programme procedures and controls required by the AML/ATF Regulations are in place; and
- (b) coordinate and monitor the compliance programme to ensure continuous compliance with the Regulations.

3.13 All law firms must also appoint a Reporting Officer who is responsible for receiving disclosures under section 46 of the Proceeds of Crime Act and Schedule 1 Part 1 of the ATFA

and deciding on whether those disclosures should be reported to the FIA. Section 8 deals more comprehensively with Suspicious Activity Reporting. A CO may also be appointed as a Reporting Officer.

3.14 Lawyers may outsource their systems and controls and processing to other jurisdictions or to other companies outside Bermuda within their group of companies. However, a law firm cannot contract out of their legal obligations and as such they (the law firm) remain responsible for the systems and controls which have been outsourced and as such must actively manage the risk to the firm this activity represents.

3.15 In particular, where operational activities are undertaken by staff in other jurisdictions those staff should be subject to the same AML/ATF policies and procedures applicable to the Bermuda firm and internal reporting procedures implemented to ensure all suspicions or reasonable grounds for suspicion related to Bermuda related accounts, transactions or activities are reported to the Reporting Officer in Bermuda.

3.16 Where the AML/ATF regulations and reporting requirements in another jurisdiction are not equivalent to those in Bermuda the Bermuda standard must be applied and adhered to.

CHAPTER 4: RISK BASED APPROACH

Regulation 6(3)

4.1 The possibility of being used to assist with money laundering and terrorist financing poses many risks for law firms including:

- i. criminal prosecution under the AML/ATF legislation;
- ii. disciplinary sanctions imposed by Bar Council and/or the Board;
- iii. civil liability under the Supervision and Enforcement Act; and
- iv. damage to reputation leading to loss of business.

4.2 These risks must be identified, assessed and mitigated in the same way as for all business risks faced by a firm. Firms should develop a risk profile for their business which:

- i. recognises that the money laundering and terrorist financing threats to a firm vary across clients, jurisdictions, services and delivery channels;
- ii. allows a firm to differentiate between clients in a way that matches risk in a particular business;
- iii. while establishing minimum standards, allows a firm to apply its own approach to systems and controls, and other arrangements in particular circumstances; and
- iv. helps to produce a more cost-effective system.

4.3 It must be accepted that applying a risk-based approach will vary between firms. Regulation 6 (3) of the AML/ATF Regulations requires that a relevant person must:

- i. determine the extent of customer due diligence measures on a risk sensitive basis depending on the type of customer, business relationship, geographic areas, services, delivery channels, product or transaction; and

- ii. be able to demonstrate to its supervisory authority that the extent of customer due diligence measures is appropriate in view of the risks of money laundering and terrorist financing.

4.4 The AML/ATF Regulations require a firm to conduct (and keep up to date) a risk assessment, which considers the firm's activities and structure and concludes on the business' exposure to money laundering and terrorist financing risk. The AML/ATF Regulations also require a firm to use the outcome of this risk assessment in the development of appropriate risk management systems and controls, and the business' policies and procedures.

4.5 In particular, a firm is required to develop CDD procedures that take into account risk, and to apply enhanced CDD procedures (also referred to as Enhanced Due Diligence or "EDD") to higher risk client relationships, being instances where a person or a transaction is from or in a country which represents a higher risk of money laundering, corruption, terrorist financing or being subject to international sanctions; or to apply simplified CDD (also referred to as Simplified Due Diligence or "SDD") procedures to low risk client relationships.

4.6 Firms can decide for themselves how to carry out their risk assessment, which may be simple or sophisticated depending on the nature of the firm and its business. Where the business is simple, involving few practice areas, with most clients falling into similar categories, a simple approach may be appropriate for most clients, with the focus being on those clients that fall outside the norm.

4.7 Systems and controls will not detect and prevent all money laundering or terrorist financing. A risk-based approach will, however, serve to balance the cost burden placed on individual firms and on their clients with a realistic assessment of the threat of a firm being used in connection with money laundering or terrorist financing by focusing effort where it is needed and has most impact.

4.8 An effective and documented risk-based approach will enable a firm to justify its position on managing money laundering and terrorist risks to law enforcement, the courts, regulators and supervisory bodies.

4.9 The risk-based approach does not apply to reporting suspicious activity. The AML/ATF Regulations lay down specific legal requirements not to engage in certain activities and to make reports of suspicious activities once a suspicion or reasonable grounds for suspicion is held. However, the risk-based approach does apply to ongoing monitoring of clients and retainers which enable firms to identify suspicions.

4.10 Taking into account the conclusions of the risk assessment, senior management must organise and control its affairs effectively and be able to demonstrate the existence of adequate risk management systems and controls. A firm may extend its existing risk management systems to address money laundering and terrorist financing risks.

4.11 The risk assessment will depend on the firm's size, type of clients and the practice area it engages in. In particular, a firm should consider the following risk factors:

Client risk

4.12 A firm's client geographical diversity can affect the risk of money laundering or terrorist financing. Factors which may vary the risk level include whether a firm:

- i. acts for politically exposed persons ("PEPs"), whether inside or outside Bermuda;
- ii. acts for clients without meeting them;
- iii. practices in locations with high levels of acquisitive crime, or for clients who have convictions for acquisitive crimes, which increases the likelihood the client may possess criminal property;
- iv. acts for clients affiliated to countries with high levels of corruption or organized crime, or where terrorist organisations operate, or

countries with inadequate frameworks to prevent and detect money laundering and the terrorist financing;

- v. acts for clients that it is, or is not, easy to obtain details of beneficial owners for;
- vi. acts for entities that have complex ownership structures

4.13 Additional factors to consider are:

- i. Nature and scope of business activities generating the funds/assets. For example, a client conducting “sensitive” activities (as defined by the Board), engaged in higher risk trading activities or engaged in a business which involves significant amounts of cash may indicate higher risk;
- ii. Transparency of client. For example, persons that are subject to public disclosure rules, e.g. on exchanges or regulated markets (or majority-owned and consolidated subsidiaries of such persons), or subject to licensing by a statutory regulator, e.g. the Bermuda Stock Exchange, or BMA may indicate lower risk. Clients where the structure or nature of the entity or relationship makes it difficult to identify the true beneficial owners and controllers may indicate higher risk;
- iii. Secretive clients. Whilst face to face contact with clients is not always necessary or possible, an excessively obstructive or secretive client may be a cause for concern;
- iv. Reputation of client. For example, a well-known, reputable company, with a long history in its industry, and with abundant independent information about it and its beneficial owners and controllers may indicate lower risk;
- v. Behaviour of client. For example, where there is no commercial rationale for the service that is being sought, or where undue levels of secrecy are requested, or where it appears that an “audit trail” has been deliberately broken or unnecessarily layered, may indicate higher risk; and

- vi. The regularity or duration of the relationship. For example, longstanding relationships involving frequent client contact that result in a high level of understanding of the client relationship may indicate lower risk;

Service risk

4.14 Firms should consider the different types of risk to which they are exposed within the different service areas that they provide. Some services and areas of law provide greater opportunities to facilitate money laundering or terrorist financing. For example:

- i. complicated financial or property transactions;
- ii. providing assistance in setting up trusts or company structures which could be used to obscure ownership of property;
- iii. payments that are made to, or received from, third parties;
- iv. payments made by cash; and
- v. transactions with a cross-border element.

4.15 The risks should be considered within the context that a firm may be used to launder funds or assets through the firm. Factors may include:

- i. the firm directly handling cash, assets or through payments that are made to, or received from, third parties; or
- ii. the firm directly handling the financial affairs, setting up companies, trusts or other structures for politically exposed persons that may be used to obscure beneficial ownership.

Delivery channels risk

4.16 Firms should consider how they interact with their clients and the channels through which it delivers its services to them. Factors may include:

- i. the firm acting for clients without meeting them in person; or
- ii. accepting a client through another firm referral or engagement (such as through an appointed law firm).

Geographical areas of operation risk

4.17 Business activity in locations with high levels of acquisitive crime, or for clients who have convictions for acquisitive crimes, which increases the likelihood the client may possess criminal property. Factors may include:

- i. acting for clients affiliated to countries with high levels of corruption or organized crime, or where terrorist organisations operate, or countries with inadequate frameworks to prevent and detect money laundering and the terrorist financing; and
- ii. in assessing which jurisdictions may present a higher risk, objective data published by the International Monetary Fund (“IMF”), Financial Action Task Force (“FATF”), World Bank, the Egmont Group of Financial Intelligence Units, US Department of State (“International Narcotics Control Strategy Report”), Office of Foreign Assets Control (“OFAC”) and Transparency International (Corruption Perception Index) will be relevant.

Product or Transaction

4.18 Specific products, services, transactions or delivery channels may pose a greater risk of money laundering. Examples include private banking, anonymous transactions (which may include cash), non-face-to-face business relationships or transactions, and payment received from unknown or un-associated third parties. Additionally, a wide range of products and services offered by financial institutions have been found to be vulnerable to abuse. These include private banking, retail banking products, correspondent and concentration accounts, transactions with non-client corporate accounts, and wire transfers.

4.19 Examples of increased risk products & services likely to be encountered by law firms:

- i. Alternative Investment/Structured Products
- ii. Trade/Export Finance
- iii. International Private Banking
- iv. International Correspondent Banking
- v. Precious Metals (Delivery) Services
- vi. Unlimited Cards
- vii. Benchmark and Other Setting of Indices

4.20 Examples of Increased Risk Transactions:

- i. Significant/Unusual Cash/Cash Like
- ii. Pass-through Transactions
- iii. Nested accounts
- iv. International Wires to High Risk Countries
- v. Suspect Shell Company Transactions
- vi. Rapid In/Out (High Velocity Turnover)
- vii. Unusual Wire Transfers
- viii. Smurfing
- ix. Suddenly Active

4.21 A firm may demonstrate that it has considered its exposure to money laundering and terrorist financing risk by:

- i. Involving all members of senior management in determining the risks posed by money laundering and terrorist financing within those areas for which they have responsibility;
- ii. Considering organizational factors that may increase the level of exposure to the risk of money laundering and terrorist financing, e.g. business volumes and outsourced aspects of regulated activities or compliance functions;
- iii. Considering the nature, scale and complexity of its business, the diversity of its operations (including geographical diversity), the volume and size of

its transactions, and the degree of risk associated with each area of its operation;

- iv. Considering who its clients are and what transactions they do;
- v. Considering whether any additional risks are posed by the jurisdictions with which the firm or its clients (including intermediaries and introducers) are connected;
- vi. Considering how the firm establishes business relationships and delivers services or products to its clients. For example, risks are likely to be greater where relationships may be established remotely; and
- vii. Considering the characteristics of its service areas and assessing the associated vulnerabilities posed by each service area, including delivery channels. For example:
 - a. the use of third parties such as group entities, introducers and intermediaries to conduct elements of the CDD process; or
 - b. assessing how legal entities and structures might be used to mask the identities of the underlying beneficial owners.

4.22 Firms should prepare a risk profile for clients based on the type of instructions it has received. A client profile should contain sufficient information to enable it to:

- i. identify a pattern of expected business activity and transactions within each client relationship; and
- ii. identify unusual, complex or higher risk activity and transactions that may indicate money laundering or terrorist financing activity.

4.23 One of the factors to be taken into account in undertaking any risk assessment for a client is whether or not the client is acting for a third party – as an intermediary. One or more of the following factors will be relevant when conducting a risk assessment for an introducer or intermediary:

- i. the stature and regulatory track record of the intermediary or introducer;
- ii. the adequacy of the framework to combat money laundering and terrorist financing in place in the jurisdiction in which the intermediary or introducer is based;
- iii. the adequacy of the supervisory regime to combat money laundering and terrorist financing to which the intermediary or introducer is subject;
- iv. the adequacy of the measures to combat money laundering and terrorist financing in place at the intermediary or introducer;
- v. previous experience gained from existing relationships connected with the intermediary or introducer;
- vi. the nature of the business conducted by the intermediary or introducer. In this case relevant factors include:
 - vii. the geographic location of the client base;
 - viii. the general nature of the client base, e.g. whether institutional or private client;
 - ix. the risk appetite of the intermediary or introducer;
 - x. the nature of the services which the intermediary or introducer provides to its clients;
 - xi. whether relationships are conducted by the intermediary or introducer on a face to face basis;
 - xii. whether specific relationships are fully managed by the intermediary or introducer; and
- xiii. the extent to which the intermediary or introducer itself relies on third parties to identify its clients and to hold evidence of identity or to conduct other due diligence procedures, and whether such third parties are financial services businesses that are overseen for AML/ATF compliance in Bermuda or carry out an equivalent business. Whether or not specific intermediary or introduced relationships involve PEP's or other higher risk relationships.

4.24 A firm should conduct (and keep up to date) a risk assessment, which considers the firm's exposure to money laundering, terrorist financing, product and services risk⁵ and then use the outcome of this risk assessment in the development of appropriate risk management systems and controls, and the firm's policies and procedures. In particular, a firm is required to develop CDD procedures that take into account risk, and to apply enhanced CDD procedures (also referred to as Enhanced Due Diligence or "EDD") to higher risk client relationships, and simplified CDD (also referred to as Simplified Due Diligence or "SDD") procedures low risk client relationships.

4.25 Firms can decide for themselves how to carry out their risk assessment, which may be simple or sophisticated depending on the nature of the firm and its business. Where the business is simple, involving few service lines, with most clients falling into similar categories, a simple approach may be appropriate for most clients, with the focus being on those clients that fall outside the norm.

4.26 A firm may demonstrate that it has considered the business' exposure to money laundering, terrorist financing, corruption or breach of international sanctions risk by:

- i. involving all members of senior management in determining the risks posed by money laundering and terrorist financing within those areas for which they have responsibility;
- ii. considering organisational factors that may increase the level of exposure to the risk of money laundering and terrorist financing, e.g. business volumes and outsourced aspects of regulated activities or compliance functions;
- iii. considering the nature, scale and complexity of its business, the diversity of its operations (including geographical diversity), the volume and size of its transactions, and the degree of risk associated with each area of its products, services and operation;

⁵ Section 16(1)(e) of the AML/ATF Regulations

- iv. considering who its clients are and what transactions they do;
- v. considering whether any additional risks are posed by the jurisdictions with which the firm or its clients (including intermediaries and introducers) are connected; and
- vi. considering the characteristics of the services, products and areas of law that it offers and assessing the associated vulnerabilities posed by each service, product or area, including delivery channels. For example:
 - a. the use of third parties such as group entities, introducers and intermediaries to conduct elements of the CDD process;
 - b. assessing how legal entities and structures might be used to mask the identities of the underlying beneficial owners; or
 - c. considering how the firm establishes and delivers services to its clients. For example, risks are likely to be greater whether relationships may be established remotely (non face-to-face).

4.27 The following sub-sections set out some key legal service area vulnerabilities drawn from FATF and law enforcement guidance and case studies, and some key warning signs that have been drawn up by the Law Society for England and Wales, as an indication of service area vulnerabilities.

Use of client accounts

4.28 Lawyers should not provide a banking service for their clients. However, it can be difficult to draw a distinction between holding client money for a legitimate transaction and acting more like a bank. For example, when the proceeds of a sale are left with a firm to make payments, these payments may be to mainstream lending companies, but these may also be to more obscure recipients, including private individuals, whose identity is difficult or impossible to check.

4.29 The following situations could give rise to cause for concern:

- i. a client deposits funds into a firm's client account, but then ends the transaction for no apparent reason;
- ii. a client advises that funds are coming from one source and at the last minute the source changes; or
- iii. a client unexpectedly requests that money received into a firm's client account be sent back to its source, to the client or to a third party.

4.30 Firms should think carefully before disclosing client account details as this allows money to be deposited into a client account without the firm's knowledge. If it is necessary to provide account details, firms should ask the client where the funds will be coming from. Will it be an account in their name, from Bermuda or another jurisdiction? Firms should consider whether they are prepared to accept funds from any source they are concerned about.

4.31 Circulation of client account details should be kept to a minimum. Clients should be discouraged from passing the details on to third parties and should be asked to use the account details only for previously agreed purposes.

Establish a policy on handling cash

4.32 It is good practice to establish a policy of not accepting cash payments above a certain limit either at the firm's office or into the firm's bank account. Clients may attempt to circumvent such a policy by depositing cash directly into a client account at a bank. Firms may consider advising clients in such circumstances that they might encounter a delay in completion of the final transaction. Avoid disclosing client account details as far as possible and make it clear that electronic transfer of funds is expected.

Source of funds

4.33 Accounts staff should monitor whether funds are from credible sources. For example, it is reasonable for monies to be received from a company if your client is a director of that company and has the authority to use company money for the transaction.

4.34 However, if funding is from a source other than a client, firms may need to make further enquiries, especially if the client has not advised what they intend to do with the funds before depositing them into the firm's account. If it is decided to accept funds from a third party, perhaps because time is short, firms should ask how and why the third party is helping with the funding.

4.35 Enquiries do not need to be made into every source of funding from other parties. However, firms must always be alert to warning signs and in some cases will need to seek more information. In some circumstances, cleared funds will be essential for transactions and clients may want to provide cash to meet a completion deadline. Firms should assess the risk in these cases and ask more questions if necessary.

Private client work – Administration of Estates

4.36 A deceased person's estate is very unlikely to be actively utilised by criminals as a means for laundering their funds; however, there is still a low risk of money laundering for those working in this area where estate assets have been earned or are located in a higher risk territory, firms may need to make further checks about the source of those funds.

4.37 When winding up an estate, there is no blanket requirement that firms should be satisfied about the history of all the funds which make up the estate under administration; however, where estate assets have been earned in a foreign jurisdiction, firms should be aware of the wide definition of criminal conduct in the Proceeds of Crime Act.

4.38 Firms should be alert from the outset and monitor throughout so that any disclosure can be considered as soon as knowledge or suspicion or reasonable grounds for suspicion is formed and problems of delayed consent can be avoided.

4.39 Firms should bear in mind that an estate may include criminal property. An extreme example would be where the firm knows or suspects or has reasonable grounds to suspect that the deceased person was accused or convicted of acquisitive criminal conduct during their

lifetime. If firms know, or suspect or have reasonable grounds to suspect that the deceased person improperly claimed benefits/allowances or had evaded the due payment of taxes during their lifetime, criminal property will be included in the estate and so a money laundering disclosure may be required.

4.40 Relevant local laws will apply before assets can be released. For example, a grant of probate will normally be required before assets can be released. Firms should remain alert to warning signs, for example if the deceased or their business interests are based in a higher risk jurisdiction. If the deceased person is from another jurisdiction and a lawyer is dealing with the matter in the home country, firms may find it helpful to ask that person for information about the deceased to gain some assurances that there are no suspicious circumstances surrounding the estate. The issue of the tax payable on the estate may depend on the jurisdiction concerned.

Charities

4.41 While the majority of charities are used for legitimate reasons, they can be used as money laundering/terrorist financing vehicles. Firms acting for charities should consider its purpose and the organisations it is aligned with. If money is being received on the charity's behalf from an individual or a company donor, or a bequest from an estate, firms should be alert to unusual circumstances including large sums of money.

Property transactions

4.42 Criminal conduct generates huge amounts of illicit capital and these criminal proceeds need to be integrated into personal lifestyles and business operations. The Police advise that property purchases are one of the most frequently identified methods of laundering money. Property can be used either as a vehicle for laundering money or as a means of investing laundered funds. Criminals will buy property both for their own use, e.g. as principal residencies or second homes, business or warehouse premises and as investment vehicles to provide additional income.

4.43 The purchase of real estate is commonly used as part of the last stage of money laundering. Such a purchase offers the criminal an investment which gives the appearance of financial stability. The purchase of a restaurant or hotel, for example, offers particular advantages, as it is often a cash-intensive business, which is the preferred currency of the criminals. Retail businesses provide a good front for criminal funds where legitimate earnings can be used as a front for the proceeds of crime.

Criminal use of conveyancing services

4.44 Law enforcement advises that of all the services offered by legal practitioners, conveyancing is the most utilised function by criminal groups. Conveyancing is a comparatively easy and efficient means to launder money with relatively large amounts of criminal monies ‘cleaned’ in one transaction. In a stable or rising property market, the launderer will incur no financial loss except fees. Conveyancing transactions can also be attractive to money launderers who are attempting to disguise the audit trail of the proceeds of their crimes, as the property itself can be ‘criminal property’ for the purposes of the Proceeds of Crime Act can still be involved in money laundering even if no money changes hands.

4.45 Corrupt lawyers may employ trainees to perform the conveyancing work from criminal groups, thereby distancing themselves from the criminal aspect of the business. Conveyancers should also be alert to instructions which are a deliberate attempt to avoid assets being dealt with in the way intended by the court or through the usual legal process. For example, lawyers may sometimes suspect or have reasonable grounds to suspect that instructions are being given to avoid the property forming part of a bankruptcy, or forming part of assets subject to confiscation.

Ownership issues

4.46 Properties owned by nominee companies or multiple owners may be used as money laundering vehicles to disguise the true owner and /or confuse the audit trail. Firms should be alert to sudden or unexplained changes in ownership.

4.47 Another potential cause for concern is where a third party is providing the funding for a purchase, but the property is being registered in someone else's name. There may be legitimate reasons for this, such as a family arrangement, but firms should be alert to the possibility of being misled about the true ownership of the property. Further CDD measures should be undertaken on the person providing the funding.

Methods of funding

4.48 Many properties are bought with a combination of deposit, mortgage and/or equity from a current property. Usually, the lawyer acting for the purchaser will have information about how the client intends to fund the transaction. Lawyers should expect to be updated if those details change, for example, if a mortgage falls through and new funding is obtained.

4.49 Firms should remember that payments made through the mainstream banking system are not guaranteed to be clean.

4.50 Transactions that do not involve a mortgage or are not being financed wholly from the sale of a previous property have a higher risk of being fraudulent. Firms should be alert for large payments from private funds, especially if the client receives payments from a number of individuals or sources. If concerns arise;

- i. the client should be asked to explain the source of funds. Firms should assess whether the explanation appears to be valid - e.g. the money has been received from an inheritance;
- ii. ensure that the client is the beneficial owner of the funds being used in the purchase.

4.51 Third parties often assist with purchases and firms may be asked to receive funds directly from third parties, for example relatives often assist first time buyers. Consideration will need to be given as to the extent of due diligence that needs to be undertaken on those third

parties. Firms should consider whether there are any obvious warning signs and what needs to be known about:

- i. the client;
- ii. the third party;
- iii. their relationship; and
- iv. the proportion of the funding being provided by the third party.

4.52 Firms should consider their obligations to the lender in these circumstances – firms are normally required to advise lenders if the buyers are not funding the balance of the price from their own resources.

Valuations

4.53 An unusual sale price can be an indicator of money laundering. Whilst lawyers acting in a property sale are not required to get independent valuations, if a firm becomes aware of a significant discrepancy between the sale price and what a property would reasonably be asked to sell for, consideration should be given to asking more questions.

4.54 Properties may also be sold below the market value to an associate, with a view to obscuring the title to the property which the original owner still maintains the beneficial ownership.

Mortgage fraud

4.55 A firm may discover or suspect or have reasonable grounds to suspect that a client is attempting to mislead a lender client to improperly inflate a mortgage advance – for example, by misrepresenting the borrower’s income or because the seller and buyer are conspiring to overstate the sale price. Transactions which are not at arm’s length may warrant particular consideration. However, until the improperly obtained mortgage advance is received, there is not any criminal property for the purposes of disclosure to the FIA.

4.56 Sometimes fraud is achieved by selling the property between related private companies. The transactions will involve inflated values and will not be at arm's length. Increasingly, offshore companies are used with the property sold several times within the group before approaching a lender for a mortgage at an inflated value.

4.57 Firms that discover or suspect or have reasonable grounds to suspect that a mortgage advance has already been improperly obtained should consider advising the mortgage lender.

4.58 Firms acting in a connection with a mortgage who discover or suspect or have reasonable grounds to suspect that a previous mortgage has been improperly obtained may need to advise the lender, especially if the new mortgage is with the same lender. Consideration should also be given to making a disclosure to the FIA as the improperly obtained mortgage advance represents criminal property.

4.59 If a client has made a deliberate misrepresentation on their mortgage application, it is likely that the crime/fraud exemption to legal professional privilege will apply. This means that no waiver of confidentiality will be needed before a disclosure is made. However, such matters will need to be dealt with on a case-by-case basis.

Company and commercial work

4.60 The nature of company structures can make them attractive to money launderers because it is possible to obscure true ownership and protect assets for relatively little expense. For this reason, lawyers working with companies and in commercial transactions should remain alert throughout their retainers, with existing as well as new clients.

4.61 A common operating method amongst serious organized criminals is the use of front companies. These are often used to disguise criminal proceeds as representing the legitimate profits of fictitious business activities. They can also help to make the transportation of suspicious cargoes appear as genuine goods being traded. More often than not, they are used

to mask the identity of the true beneficial owners and the source of criminally obtained assets. Corporate vehicles are also frequently used to help commit tax fraud, facilitate bribery/corruption, shield assets from creditors, facilitate fraud generally or circumvent disclosure requirements.

4.62 The lack of transparency concerning the ownership and control of corporate vehicles has proved to be a consistent problem for money laundering investigations. Corporations serving as directors and nominee directors can be used to conceal the identity of the natural persons who manage and control a corporate vehicle.

4.63 Several international reports have highlighted the extent to which private limited companies, nominees, front companies, and special purpose vehicles have been used in laundering operations. Case studies submitted to the FATF have indicated the following common elements in the misuse of corporate vehicles:

- i. multi-jurisdictional and/or complex structures of corporate entities and trusts;
- ii. foreign payments without a clear connection to the actual activities of the corporate entity;
- iii. use of offshore bank accounts without clear economic necessity;
- iv. use of nominees; and
- v. tax, financial and legal advisers were generally involved in developing and establishing the structure. In some case studies a lawyer was involved and specialised in providing illicit services for clients.

The more of the above elements that exist, the greater the likelihood and the risk that the identity of the underlying beneficial owner may be able to remain unidentifiable.

Shell Corporation

4.64 The shell corporation is a tool that appears to be widely used by criminals. Often purchased “off-the-shelf” it remains a convenient vehicle for laundering money and from concealing the identity of the beneficial owner of the funds. The company records are often more difficult for law enforcement to access because they are held behind a veil of professional privilege or the professionals who run the company act on instructions remotely and anonymously.

4.65 Shell companies are often used to receive deposits of cash which are then transferred to another jurisdiction, to facilitate false invoicing or to purchase real estate and other assets. They have also been used as the vehicle for the actual predicate offence of fraud on many occasions.

Bearer Shares

4.66 Bearer shares confer rights of ownership to a company upon the physical holder of the share. They are commonly and legitimately used in a number of countries. However, the high level of anonymity that bearer shares offer provides opportunities for misuse where the identity of the shareholder is not recorded when the share is issued and transferred, ownership of the share is effectively anonymous.

4.67 Such shares are open to two money laundering risks:

- i. financial assets can be acquired without the purchaser being identified; and
- ii. the company owners and controllers may not be capable of being identified.

4.68 To guard against misuse, a number of jurisdictions have dematerialized or immobilized bearer shares when they are registered in an effort to ensure that the identity of the beneficial owners can be verified. Dematerialisation is achieved by requiring registration upon transfer or requiring registration in order to vote or collect dividends. While physical transfer of bearer shares is possible, it is believed to be rare.

Holding of funds

4.69 Firms who choose to hold funds as stakeholder or escrow agent in commercial transactions should consider the checks to be made about the funds they intend to hold before the funds are received. Consideration should be given to conducting CDD measures on all those on whose behalf the funds are being held.

4.70 Particular consideration should be given to any proposal that funds are collected from a number of individuals whether for investment purposes or otherwise. This could lead to wide circulation of client account details and payments being received from unknown sources.

Private equity

4.71 Law firms could be involved in any of the following circumstances:

- i. the start-up phase of a private equity business where individuals or companies seek to establish a private equity firm (and in certain cases, become authorised to conduct investment business);
- ii. the formation of a private equity fund;
- iii. ongoing legal issues relating to a private equity fund; or
- iv. execution of transactions on behalf of a member of a private equity firm's group of companies (a private equity sponsor that will normally involve a vehicle company acting on its behalf (newco)).

4.72 Generally private equity work will be considered to be low risk for money laundering or terrorist financing for the following reasons:

- i. private equity firms are also covered by the AML/ATF Regulations and similar legislation in equivalent jurisdictions;
- ii. investors are generally large institutions, some of which will also be regulated for money laundering purposes;
- iii. there are generally detailed due diligence processes followed prior to investors being accepted;
- iv. the investment is generally illiquid and the return of capital is unpredictable; and
- v. the terms of the investment in the fund generally strictly control the transfer of interests and the return of funds to investors.

4.73 Factors which may alter this risk assessment include:

- i. where the private equity firm, fund manager or an investor is located in a jurisdiction which is not regulated for money laundering to a standard which is equivalent to the FATF recommendations;
- ii. where the investor is either an individual or an investment vehicle itself (a private equity fund of funds); and
- iii. where the private equity firm is seeking to raise funds for the first time or is approaching a large investor base.

4.74 Systems and controls will not detect and prevent all instances of money laundering or terrorist financing. A risk-based approach will, however, serve to balance the cost burden placed on a firm and on clients with the risk that the firm may be used in money laundering or to finance terrorism by focusing resources on higher risk areas.

4.75 In determining a risk assessment for a client, the presence of one factor to consider that might indicate higher risk will not automatically establish that a client is higher risk. Equally, the presence of one lower risk factor should not automatically lead to a determination that a

client is lower risk. As set out above, the process of determining an appropriate risk assessment should take into account the absence or presence of relevant factors, whether any compensating factors apply and the CDD information held by the firm business.

4.76 Firms should keep records of decisions on the risk assessment process and CDD that was undertaken for a client, and how the category of risk was determined. Such an approach will assist firms to demonstrate that they have applied a risk-based approach to CDD in a reasonable and proportionate manner.

CHAPTER 5: CLIENT DUE DILIGENCE (CDD)

Regulation 5

Regulation 6

Regulation 10

Regulation 11

5.1 Regulation 5 of the AML/ATF Regulations sets out the meaning of customer due diligence. The minimum CDD measures required involve:

- (a) identifying the client or prospective client and verifying the client's identity on the basis of documents, data or information obtained from a reliable and independent source;
- (b) identifying, where there is a beneficial owner who is not the customer, the beneficial owner (including the settlor of any trust) and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the lawyer is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement, including the settlor of any trust;
- (c) in the case of a legal entity or legal arrangement, identifying the name and verifying the identity of the relevant natural person having the position of chief executive or a person of equivalent or similar position, including the settlor of any trust;
- (d) in the case of a legal entity, identifying and verifying the identity of a natural person (either customer, beneficial owner, person of control or ownership) by some means and, where no natural person has been identified, identifying a relevant natural person holding the position of— a chief executive; or a person of equivalent or similar position; and
- (e) obtaining information on and taking steps to understand the purpose and intended nature of the business relationship.

Identification

5.2 A firm may demonstrate collection of relevant identification information. The identity of an individual has a number of aspects e.g. his/her given name (which of course may change), date of birth, place of birth. Other factors about an individual accumulate over time (the so-called electronic “footprint”): which will include family circumstances and addresses, employment and business career, contacts with the authorities or with other institutions and physical appearance.

5.3 The identity of a client who is not a private individual is a combination of its constitution, its business, and its legal and ownership structure.

5.4 Evidence of identity can take a number of forms. In respect of individuals, much weight is placed on so called “identity documents” such as passports and photocard driving licenses and these are often the easiest way of being reasonably satisfied as to someone’s identity. It is however, possible to be reasonably satisfied as to a client’s identity based on other forms of confirmation including in appropriate circumstances, written assurances from persons or organizations that have dealt with the client for some time.

5.5 A firm may demonstrate collection of relevant identification information where it requests and keeps up to date the following:

All clients (minimum)
<ul style="list-style-type: none"> • Legal name, any former names (such as maiden name) and any other names used; • Principal residential address; and • Date of birth

<ul style="list-style-type: none"> • Where client is not an individual copies of constitutional documents evidencing its legal structure
<p>Standard and higher risk: additional information</p>
<ul style="list-style-type: none"> • Place of birth; • Nationality; • Sex; and • Government issued personal identification number or other government issued unique identifier.

5.6 Regulation 6(1) of the AML/ATF Regulations states that a relevant person must conduct CDD measures when it:

- i. establishes a business relationship (where the relationship is expected to have some duration); or
- ii. carries out occasional transactions (i.e. a transaction (carried out other than as part of a business relationship) amounting to \$15,000 or more, whether the transaction is carried out in a single operation or several operations which appear to be linked); or
- iii. suspects money laundering or terrorist financing; or
- iv. doubts the veracity or adequacy of the documents or information previously obtained for the purpose of identification or verification.

5.7 Regulation 6(2) of the AML/ATF Regulations states that a relevant person must apply customer due diligence measures at appropriate times to existing clients on a risk-sensitive basis.

5.8 Regulation 6 (3) of the AML/ATF Regulations requires that a relevant person must:

- i. determine the extent of customer due diligence measures on a risk sensitive basis depending on the type of customer, business relationship, geographic areas, services, delivery channels, product or transaction; and
- ii. be able to demonstrate to its supervisory authority that the extent of customer due diligence measures is appropriate in view of the risks of money laundering and terrorist financing.

5.9 Regulation 6(1A) of the AML/ATF Regulations specifies the stage at which customer due diligence measures should be applied to beneficiaries of: (a) trust; and (b) life insurance policies. Additionally, it requires relevant business persons to determine the extent of customer due diligence measures to be applied on a risk sensitive basis, dependent on the geographic areas, services, delivery channels product or transaction, and makes provision for the prohibition against performing customer due diligence where doing so may result in the tipping off of another person, which is likely to prejudice an investigation or proposed investigation. Where a relevant person is unable to perform customer due diligence in accordance with paragraph (5) he shall, in lieu, file the necessary disclosure with the FIA.

5.10 Regulation 6(1A) requires that, subject to Regulation 6(1) (described in paragraph 5.6 above), in the case of a trust or life insurance policy, a relevant person shall apply customer due diligence measures on a beneficiary as soon as the beneficiary is designated— for a beneficiary that is identified as a specifically named natural person, legal entity or legal arrangement, taking the name of the person, entity or arrangement; for a beneficiary that is designated by characteristics or by class, obtaining sufficient information concerning the beneficiary to satisfy the relevant person that it will be able to establish the identity of the beneficiary at the time of pay-out.

5.11 Where the client is a Bermuda public authority, Regulation 10 of the AML/ATF Regulations does not require evidence of identity to be obtained in respect of the public authority.

5.12 A public authority means any designated person or body of persons (whether corporate or unincorporated) required or authorized to discharge any public function under any Act of the Legislature of Bermuda, or under any act of the Parliament of the United Kingdom which is expressed to have effect, or whose provisions are otherwise applied, in respect of Bermuda, or under any statutory instrument.

Enhanced Due Diligence

5.13 Regulation 11(1) of the AML/ATF Regulations requires that an institution must apply enhanced customer due diligence (“EDD”) measures on a risk sensitive basis in any situation which by its nature can present a higher risk of money laundering or terrorist financing. This may arise in particular situations where the client has not been physically present for identification purposes and when it is determined that a client is Politically Exposed Person (“PEP”). Where a relationship or transaction is assessed as presenting a higher risk, a firm may demonstrate that it has applied EDD to the higher risk client relationships where it undertakes one or more of the measures set out below. The nature of the measures to be applied will depend on the circumstances of the relationship or transaction and the factors leading to the client relationship being considered to be higher risk. Where a relationship or transaction involves a PEP then it must always be considered to present a higher risk.

Definition of PEP

5.14 A PEP is defined by Regulation 11(5), (6) and (7) and Regulation 11(6A) of the AML/ATF Regulations as a person who is or has at any time in the preceding year in any country or territory inside or outside Bermuda variously:-

- (a) been entrusted with prominent public functions, including those listed in paragraph 2(1)(a) or 2(3) of the Schedule to the AML/ATF Regulations; or
- (b) is an immediate family member of such persons, being spouses, partners, children (and the spouses or partners of those children); or
- (c) is a known close associate of a person holding a prominent public function including a person who falls in either of the categories listed in paragraphs 2(1)(e) or 2 (3) (e) of the Schedule, which includes the following— any

individual who is known to have joint beneficial ownership of a legal entity or legal arrangement, or any other close business relations, with a person holding a prominent public function; and any individual who has sole beneficial ownership of a legal entity or legal arrangement which is known to have been set up for the benefit of a person holding a prominent public function.

Scope of PEPs

5.15 Sub-Sections 2(1) and 2 (3) of the Schedule to the AML/ATF Regulations provide for classes of specified politically exposed persons as well as a description of certain other persons who are deemed to be politically exposed persons, along with their relatives and other related parties as set out below:

Outside Bermuda

5.16 Individuals who are or have been entrusted with prominent public functions at both domestic and international level including the following—

- i. Heads of State, heads of government, ministers and deputy or assistant ministers; members of parliaments;
- ii. Members of supreme courts, of constitutional courts or of other high-level judicial bodies whose decisions are not generally subject to further appeal, except in exceptional circumstances;
- iii. Members of courts of auditors or of the boards of central banks;
- iv. Ambassadors, chargés d'affaires and high-ranking officers in the armed forces.

This list does not include middle ranking or more junior officers.

5.17 A further category of PEP outside Bermuda is members of the administrative, management or supervisory bodies of State-owned enterprises (but not including their spouses, partners, children or associates).

Inside Bermuda

5.18 The 2015 Amendment Act introduced a class of Bermudian officials who have been designated as PEPs for the purposes of Regulation 11(6A), being individuals who are or have been entrusted with prominent public functions and including the following—

- i. The Governor, Premier, Ministers and Junior Ministers;
- ii. Members of the Legislature;
- iii. Permanent Secretaries;
- iv. Judges of the Supreme Court and Court of Appeal and Magistrates;

The above categories do not include middle-ranking or more junior officials, but do include, where applicable, positions at domestic and international levels.

5.19 The other categories of Bermuda PEPs are:

- i. Members of the Board or senior management of the Bermuda Monetary Authority and the Bermuda Regulatory Authority;
- ii. Commissioned officers in the Royal Bermuda Regiment and senior officers above the rank of Sergeant (which includes the Commissioner of Police) of the Bermuda Police Service; and
- iii. Members of the Board of Directors and the Chief Executive Officer (by whatever name called) of Bermuda Government owned or controlled enterprises or authorities, including but not limited to— West End Development Corporation; Bermuda Land Development Corporation; Bermuda Development Agency; Bermuda Tourism Authority; Bermuda Deposit Insurance Corporation; and the Bermuda Casino Gaming Commission.

5.20 Individuals who have or have had a high political profile, or hold or have held public office, can pose a higher money laundering or terrorist financing risk to firms as their position may make them vulnerable to corruption. This risk also extends to members of their immediate families and to known close associates. PEP status itself does not, of course, incriminate

individuals or entities. It does, however, put the client or the beneficial owner, into a higher-risk category.

5.21 Although under the definition of a PEP an individual ceases to be so regarded after he has left office for one year, firms are encouraged to apply a risk-based approach in determining whether they should cease carrying out appropriately enhanced monitoring of his transactions or activity at the end of this period. In many cases, a longer period might be appropriate, in order to ensure that the higher-risks associated with the individual's previous position have adequately abated.

5.22 Public functions exercised at levels lower than national should normally not be considered prominent. However, when their political exposure is comparable to that of similar positions at national level, firms should consider, on a risk-based approach, whether persons exercising those public functions should be considered as PEPs.

5.23 For the purpose of deciding whether a person is a known close associate of a PEP, the firm needs only to have regard to any information which is in its possession, or which is publicly known. Having to obtain knowledge of such a relationship does not presuppose active research by the firm.

5.24 Firms are required, on a risk-sensitive basis, to:

- i. Have appropriate risk-based procedures to determine whether a client is a PEP;
- ii. Obtain appropriate senior management approval for establishing a business relationship with such a client;
- iii. Take adequate measures to establish the source of wealth and source of funds which are involved in the business relationship or occasional transaction; and
- iv. Conduct on-going monitoring of the business relationship.

Risk-based procedures

5.25 The nature and scope of a particular firm's business will generally determine whether the existence of PEPs in their client base is an issue for the firm, and whether or not the firm needs to screen all clients for this purpose. In the context of this risk analysis, it would be appropriate if the firm's resources were focused in particular on transactions that are characterized by a high-risk of money laundering or terrorist financing.

5.26 Establishing whether individuals qualify as PEPs is not always straightforward and can present difficulties. Where institutions need to carry out specific checks, they may be able to rely on an internet search engine, or consult relevant reports and databases on corruption risk published by specialized national, international, non-governmental and commercial organizations. Resources such as the Transparency International Corruption Perceptions Index, may be helpful in terms of assessing the risk. If there is a need to conduct more thorough checks, or if there is a high likelihood of a firm having PEPs for clients, subscription to a specialist PEP database may be the only adequate risk mitigation tool.

Senior management approval

5.27 Obtaining approval from senior management for establishing a business relationship does not mean obtaining approval from the Board of directors (or equivalent body), but from the immediately higher level of authority to the person seeking such approval.

On-going monitoring

5.28 Guidance on the on-going monitoring of the business relationship is given in Section 7 of these Guidance Notes.

5.29 Firms should remember that new and existing clients may not initially meet the definition of a PEP, but may subsequently become one during the course of a business relationship. The firm should, as far as practicable, be alert to public information relating to possible changes in the status of its clients with regard to political exposure. When an existing client is identified as a PEP, enhanced customer due diligence must be applied to that client.

5.30 Enhanced due diligence measures include:

- i. obtaining further CDD information (identification information and relationship information, including further information on the source of funds and source of wealth, from either the client or independent sources (such as the internet, public and commercially available databases));
- ii. taking additional steps to verify the CDD information obtained;
- iii. commissioning due diligence reports from independent experts to confirm the veracity of CDD information held;
- iv. requiring higher levels of management approval for higher risk new client relationships;
- v. requiring more frequent review of client relationships;
- vi. requiring the review of client relationships to be undertaken by the compliance function, or other employees not directly involved in managing the client relationship; and
- vii. setting lower monitoring thresholds for transactions connected with the client relationship.

5.31 The risk of handling the proceeds of corruption, or becoming engaged in an arrangement that is designed to facilitate corruption, is greatly increased where the arrangement involves PEP. Appropriate risk-based systems and controls must be put in place to determine whether a: (i) client; (ii) owner or controller of a client; or (iii) third party on whose behalf a client acts, is a PEP. Such systems and controls must recognise that clients may subsequently acquire PEP status.

5.32 A firm may demonstrate that it has appropriate systems and controls for determining whether applicants for business or clients are PEPs where it:

- i. establishes who are the current and former holders of prominent public functions within those higher risk countries and determines, as far as is reasonably practicable,

whether or not applicants for business and clients have any connections with such individuals (including through immediate family or close associates). In determining who are the current and former holders of prominent public functions, it may have regard to information already held by the firm and to external information sources such as the United Nations (“UN”), the European Parliament, the UK Foreign and Commonwealth Office, the Group of States Against Corruption, and commercially available databases; and exercises vigilance where applicants and clients are involved in business sectors that are vulnerable to corruption such as, but not limited to, oil or arms sales. One source of information is the Transparency International Corruption Perception Index.

- 5.33 A firm must have clear policies and procedures for dealing with PEPs, including:
- i. appropriate senior management approval to establish a relationship with a PEP and for continuing a relationship, should a subsequent connection with a PEP be identified; and
 - ii. enhanced CDD, including enhanced scrutiny and regular oversight of the relationship at appropriate senior management level.

Simplified Due Diligence

5.34 Simplified due diligence (“SDD”) is defined in Regulation 10 of the AML/ATF Regulations and it means not having to apply CDD in certain circumstances where the risk of money laundering and the terrorist financing may be lower. This means not having to identify the client or verify his identity or that of the beneficial owner including the settlor of any trust⁶ where relevant nor having to obtain information on the purpose or intended nature of the business relationship. It is, however, still necessary to conduct on-going monitoring of the business relationship. Firms must have reasonable grounds for believing that the customer, product or transaction related to such product, falls within any of the following categories set

⁶ Regulation 3(3)(d) of the AML/ATF Regulations

out in the AML/ATF Regulations and may have to demonstrate this to the Board. Clearly, for operating purposes, the firm will still need to maintain a base of information about the client.

5.35 The circumstances where SDD can be applied are where the client is:

- i. Itself an AML/ATF regulated financial institution subject to the AML/ATF Regulations or is a foreign AML/ATF regulated financial institution subject to requirements equivalent to the AML/ATF Regulations in force in Bermuda and which is supervised for compliance with those requirements;
- ii. A company listed on an appointed stock exchange.
- iii. An independent professional where the product is an account into which monies are pooled provided that where the pooled account is held in a country or territory other than Bermuda— that country or territory imposes requirements to combat money laundering and terrorist financing which are equivalent to those laid down in the AML/ATF Regulations; the independent professional has effectively implemented those requirements; and the independent professional is supervised in that country or territory for compliance with those requirements; and information on the identity of the person on whose behalf monies are held is available on request to the institution acting as custodian for the account.
- iv. A public authority in Bermuda.
- v. The product is a life insurance contract where the annual premium is no more than \$1,000 or where a single premium of no more than \$2,500 is paid for a single policy; or an insurance contract for the purpose of a pension scheme where the contract contains no surrender clause and cannot be used as collateral; or a pension, superannuation or similar scheme which provides retirement benefits to employees, where contributions are made by an employer or by way of deduction from an employee's wages and the scheme rules do not permit the assignment of a member's interest under the scheme.
- vi. The product and any transaction related to such product fulfils all the conditions set out in paragraph 1 of the Schedule to the AML/ATF Regulations.

Verification

5.36 All key documents (or parts thereof) used to verify identity must be understandable (i.e. in a language understood by the employees of the firm), and may be required to be translated into English.

5.37 Components of identity may be verified using the following sources:

All clients – identification verification methods
<p>General identification information:</p> <ul style="list-style-type: none"> • Current passport – providing photographic evidence of identity; • Current national identity card – providing photographic evidence of identity; or • Current driving license – providing photographic evidence of identity – where the licensing authority carries out a check on the holder’s identity before issuing. <p>Independent data sources (including electronic sources).</p> <p>Residential address:</p> <ul style="list-style-type: none"> • Correspondence from a local government department or agency • A letter of introduction confirming residential address from: (i) a Relevant Person regulated by the BMA; (ii) a regulated Relevant Person which is operating in a well-regulated jurisdiction; or (iii) a branch or subsidiary of a group headquartered in a well-regulated jurisdiction which applies group standards to subsidiaries and branches worldwide, and tests the application of and compliance with such standards; • Personal visit to residential address; • A bank statement or utility bill; or • One of the general identification information sources listed above.

Lower risk
<p>Where the above general identification information sources are unavailable, identity may be verified using:</p> <ul style="list-style-type: none"> • A Bermuda driving license; or • A birth certificate in conjunction with: <ul style="list-style-type: none"> ○ a bank statement or a utility bill; ○ documentation issued by a government source; or ○ a letter of introduction from a relevant person that is regulated by the BMA.

5.38 Verification methods provide evidence of identity from a number of sources. These sources may differ in their integrity, reliability and independence. For example, some identification documents are issued after due diligence on an individual’s identity has been undertaken, for example passports and national identity cards; others are issued on request, without any such checks being carried out. A firm should recognize that some documents are more easily forged than others.

5.39 Additionally, verification methods incorporating photographic confirmation of client identity provide a higher level of assurance that an individual is the person who they claim to be. Where a firm is not familiar with the form of the evidence obtained to verify identity, appropriate measures may be necessary to satisfy itself that the evidence is genuine.

When applying reasonable measures to the re-verification of identity following a change in a particular aspect of identity, e.g. a change of address, a firm may apply a risk-based approach which focuses on higher risk clients.

CHAPTER 6: TIMING OF VERIFICATION

Regulation 8

6.1 To comply with the requirements of Regulation 8 of the AML/ATF Regulations, CDD procedures should normally be carried out before the start of a business relationship or prior to carrying out an occasional transaction. However, where there is little risk of money laundering or terrorist financing and it is necessary to enter into a relationship prior to obtaining identification evidence, then a concession is provided in respect of a business relationship (but not an occasional transaction).

6.2 A business relationship is defined in Regulation 2(1) of the AML/ATF Regulations as a business, professional or commercial relationship between a relevant person and a client which is expected by the relevant person when contact is first made between them to have an element of duration. For example, a business relationship may be established once a firm undertakes to act on instructions as to the operation of that relationship, for example, by receiving and accepting signed terms of business from the client.

6.3 An occasional transaction is defined in Regulation 2(1) of the AML/ATF Regulations as a transaction (carried out other than as part of a business relationship) amounting to \$15,000.00 or more, whether the transaction is carried out in a single operation or several operations which appear to be linked.

6.4 Where urgent advice is required in the course of conducting specified business in Regulation 2 of the AML/ATF Regulations, this may be given prior to completing CDD requirements with the exception that such advice may not be given for the objective of furthering a criminal act.

6.5 Regulation 8 of the AML/ATF Regulations provides that a relevant person must verify the identity of the client (and any beneficial owner, including the settlor of any trust, beneficiaries of a trust or insurance policy) before the establishment of a business relationship

or the carrying out of an occasional transaction. Such verification may be completed during the establishment of a business relationship if— this is necessary not to interrupt the normal conduct of business; and there is little risk of money laundering or terrorist financing occurring, provided that the verification is completed as soon as practicable after contact is first established; and any money laundering or terrorist financing risks that may arise are effectively managed. The verification of the identity of the beneficiary under a life insurance policy or a trust may take place after the business relationship has been established provided that it takes place at or before the time of pay-out or at or before the time the beneficiary exercises a right vested under the policy or trust.

6.6 A firm may complete verification of identity after the initial establishment of a business relationship if the following conditions are met:

- i. the need to perform verification of identity at a later stage is essential not to interrupt the normal conduct of business e.g. the provision of urgent advice; and
- ii. there is little risk of money laundering or terrorist financing occurring and the verification is completed as soon as practicable after the contact is first established.
- iii. any money laundering or terrorist financing risks that may arise are effectively managed.

6.7 In any event, a firm must not permit final agreements to be signed or pay away funds to a third party (or to another account in the name of the client) other than to deposit the funds on behalf of the client until such time as identity has been verified.

6.8 At any time when a relevant person suspects money laundering or terrorist financing (unless agreed otherwise with the FIA) or they have doubts about the veracity or adequacy of documents, that relevant person must verify the identity of the client data or information previously obtained.

6.9 In the case of a higher risk client, an appropriate time to apply identification procedures will be:

- i. as soon as practicable after the risk has been assessed as high;
- ii. when an existing standard or lower risk client instructs on a new higher risk retainer;
or
- iii. where an existing client has already been designated as higher risk.

6.10 In the case of standard and lower risk clients, an appropriate time to apply identification procedures will be:

- i. when a transaction of significance takes place;
- ii. where there has been a gap in retainers of 3 years or more; or
- iii. when the firm's client documentation standards change substantially

6.11 The verification requirements under the AML/ATF Regulations are, however, different as between a client and a beneficial owner (which expression includes the settlor of a trust). The identity of a client must be verified on the basis of documents, data or information obtained from a reliable and independent source. The obligation to verify the identity of a beneficial owner is for the institution to take risk-based and adequate measures so that it is satisfied that it knows who the beneficial owner is. It is up to each institution whether they make use of records of beneficial owners in the public domain (if any exist), ask their clients for relevant data or obtain the information otherwise. There is no specific requirement to have regard to particular types of evidence.

6.12 Irrespective of risk, verification procedures must always be applied to existing clients:

- i. where a firm suspects money laundering or terrorist financing; or
- ii. where there are doubts about the veracity or adequacy of documents, data or information that a firm has previously obtained for the purposes of CDD.

6.13 When conducting or updating CDD measures on existing clients a firm may demonstrate that it has taken reasonable measures to apply identification procedures when other information

already held on file for an existing client provides satisfactory evidence that the client is who they claim to be. Publicly available information may also confirm the information held by the firm.

6.14 A firm may delay obtaining satisfactory evidence of identity until such time as this has been collected by the introducer. However, confirmation should be received from the introducer that identification procedures are to be applied within a reasonable period of time and the firm should periodically check that this is the case.

6.15 On occasions, an individual resident abroad may be unable to provide evidence of their principal residential address using the verification methods set out above. Examples of such individuals include residents of countries without postal deliveries and few street addresses, who rely upon post office boxes or employers for delivery of mail, and residents of countries where, due to social restraints, private addresses may not be verified by personal visits.

6.16 It is essential for law enforcement purposes that a record of an individual's residential address (or details of how that individual's residential address may be reached) be recorded, so that an individual may be located by law enforcement if necessary during an investigation. As a result, it is not acceptable only to record a post office box number as an address, or to fail to take steps to verify that a residential address is valid where CDD is required.

6.17 A firm must ensure that there is a valid reason for a client being unable to satisfy its more usual verification of address requirements, and must document that reason. Where alternative methods to verify address are relied on, a relevant person must consider whether enhanced monitoring of the activity and transactions carried out by the client is appropriate.

6.18 There may also be circumstances where there is face to face contact with an individual, but where documentary evidence is to be provided at a time when the individual is not present. Regulation 11 (2) of the AML/ATF Regulations requires that where the client has not been

physically present for identification purposes, the firm must take specific and adequate measures to compensate for the higher risk, for example by applying one or more of the following measures:

- i. ensuring that the client's identity is established by additional documents, data or information;
- ii. supplementary measures to verify or certify the documents supplied, or requiring confirmatory certification by an AML/ATF regulated financial institution (or equivalent institution) which is subject to equivalent Regulations;
- iii. ensuring that the first payment is carried out through an account opened in the client's name with a banking institution.

6.19 Where a relationship is established or transaction conducted remotely, or where the identity of an individual is to be verified using documentary evidence when the individual is not physically present, a firm must perform an additional check to reduce the risk of identity fraud. A firm may demonstrate that the specific additional check undertaken is appropriate where it takes into account the client risk assessment, matching the level of assurance given by the check to the risk presented by the client.

6.20 For higher risk clients where certification is relied upon, a firm may demonstrate that it has obtained appropriate verification of identity where it takes steps to check that the certifier is real, or alternatively, performs a further check to reduce the risk of identity fraud. This will guard against the risk that copy documentation provided is not a true copy of the original document and that the documentation does not correspond to the applicant whose identity is to be verified. For certification to be effective, the certifier will need to have seen the original documentation and, where documentation is to be used to provide satisfactory evidence of identity for an individual, have met the individual (where certifying evidence of identity containing a photograph). An acceptable certifier will also be subject to professional rules (or equivalent) providing for the integrity of their conduct.

6.21 Persons certifying documents must certify that:

- i. they have seen original documentation verifying identity and/or residential address;
- ii. the copy of the document (which they certify) is a complete and accurate copy of that original.

6.22 The certifier must also sign and date the copy document, and provide adequate information so that he may be contacted in the event of a query. An adequate level of information to be provided by a suitable certifier would include their name, position or capacity, their address and a telephone number or email address at which they can be contacted.

6.23 Acceptable persons to certify evidence of identity may include:

- i. Any barrister and attorney entitled to practise as such under the Supreme Court Act 1905.
- ii. Magistrates.
- iii. The Registrar of the Court of Appeal or the Supreme Court.
- iv. Officers of the Bermuda Police Service of or above the rank of Inspector.
- v. The manager of any bank, being an institution licensed as a bank under the Banks and Deposit Companies Act 1999.
- vi. The Deputy Governor.
- vii. The Secretary to the Cabinet.
- viii. The Registrar-General.
- ix. The Registrar of Companies.
- x. Customs officers as defined in the Revenue Act 1898 in the performance of their duty as such.
- xi. Immigration officers in the performance of their duty as such.
- xii. Justices of the Peace.

6.24 A higher level of assurance will be provided where the relationship between the certifier and the subject (individual, legal body or express trust) is of a professional rather than a personal nature.

Incomplete Identification

6.25 Where identification procedures cannot be completed, a firm must not proceed or continue with a business relationship or occasional transaction. Regulation 9 (1) of the AML/ATF Regulations provides that if a Relevant Person is unable to apply identification procedures in accordance with the AML/ATF Regulations, it shall:

- (a) not carry out a transaction with or for the client through a bank account;
- (b) not establish a business relationship or carry out an occasional transaction with the client;
- (c) terminate an existing relationship;
- (d) consider making a disclosure to the FIA.

CHAPTER 7: ONGOING MONITORING

Regulation 6

Regulation 7

Regulation 15

Regulation 18A

7.1 Ongoing monitoring procedures apply to all business relationships, including those with existing clients. Monitoring of existing clients will be based on the type of risk the client represents.

7.2 Regulation 7(1) of the AML/ATF Regulations requires a relevant person to conduct ongoing monitoring of a business relationship. Ongoing monitoring of a business relationship means:-

- (a) scrutiny of transactions undertaken throughout the course of the relationship (including, where necessary, the source of funds) to ensure that the transactions are consistent with the relevant person's knowledge of the client, his business and risk profile; and
- (b) so far as practicable keeping the documents, data or information obtained for the purpose of applying client due diligence measures up to date.

7.3 Regulation 6(3) of the AML/ATF Regulations applies to the duty to conduct ongoing monitoring to CDD measures.

7.4 The monitoring procedures must:

- i. involve a firm applying its understanding of its business (i.e. the outcome of its risk assessment) to determine the nature of usual activity and its expectations for unusual and higher risk activity and transactions;
- ii. be designed to result in the identification of unusual and higher risk activity or transactions;

- iii. require that, in particular, special attention is paid to specific higher risk activity, clients and transactions;
- iv. require the examination of any unusual or higher risk activity or transaction by an appropriate person to determine the background and purpose of the activity or transaction;
- v. in connection with the above examination, involve the collection of additional information (where appropriate);
- vi. establish whether there is a rational explanation (an apparent economic or visible lawful purpose) for the unusual or higher risk activity or transaction, and document these findings in writing; and
- vii. result in appropriate action being taken as a result of the findings of the above procedures.

7.5 When conducting monitoring procedures, the following are to be considered to be higher risk activity and transactions:

- i. complex transactions;
- ii. unusual large transactions;
- iii. unusual patterns of transactions;
- iv. activity and transactions: (i) connected with jurisdictions which do not, or insufficiently apply the FATF Recommendations; or (ii) which are the subject of UN or European Union (“EU”) countermeasures;
- v. activity and transactions that may be conducted with persons who are the subject of UN or EU sanctions and countermeasures;
- vi. activity or transactions with PEPs or where PEPs are connected with the client, whether inside or outside Bermuda; and

- vii. activity or transactions for clients who have not been physically present for identification purposes.

7.6 In line with enhanced due diligence requirements for higher risk clients, more intensive scrutiny of client activity and transactions may involve, for example:

- i. more frequent reviews and updating of CDD information;
- ii. more regular reviews of client activity and transactions against the client's expected activity profile; and
- iii. client reviews being conducted by persons not directly involved in managing client relationships.

7.7 The examination of unusual and higher risk activity or transactions may be conducted either by fee earners or by accounts or administration staff. In any case, a firm should ensure that the reviewer has access to relevant CDD information, and that the enquiries made, and the conclusions reached by the reviewer are appropriate.

7.8 Appropriate follow up action may include:

- i. updating CDD information to record the results of the enquiries made;
- ii. reviewing the appropriateness of the client risk assessment in light of the unusual activity and/or additional CDD information obtained;
- iii. applying increased levels of monitoring to particular relationships; and
- iv. where the activity or transaction does not have a rational explanation, considering whether the circumstances require a suspicious activity report to be submitted to the firm's Reporting Officer.

7.9 In determining the nature of the monitoring procedures that are appropriate, a firm may have regard to the following factors:

- i. its risk assessment;

- ii. the size and complexity of its business;
- iii. the nature of its legal business and services;
- iv. whether it is possible to establish appropriate standardized parameters for unusual activity; and
- v. the monitoring procedures that already exist to satisfy other business needs.

7.10 Appropriate factors to consider in determining whether activity or transactions are unusual include:

- the expected frequency, size, and origin/destination of client funds or other activity for individual clients; and
- the presence of risk factors specific to the nature of the activity or matter undertaken for the client. A firm should determine risk factors based on its knowledge of its client and should have regard to typologies (whether external or developed from its own experiences) relevant to the nature of its business activities.

7.11 A firm may demonstrate that it is appropriately examining unusual and higher risk activity and transactions where it:

- reviews the identified activity/transaction in light of the client risk assessment and the CDD information that it holds;
- makes further enquiries to obtain any further information required to enable a determination as to whether the activity/transaction has a rational explanation; and
- considers the activity or transaction in the context of any other relationships connected with the client.

7.12 Risk assessment should be carried out on an ongoing basis for those clients that have been identified as high risk throughout the business relationship and for each instruction. In the case of a client relationship assessed as presenting a higher risk, a firm may demonstrate that its CDD information remains up to date where it is reviewed and updated on at least an annual basis.

7.13 In the case of other relationships, a firm may demonstrate that its CDD information remains up to date where it is reviewed and updated on a risk sensitive basis, including where additional “factors to consider” become apparent (i.e. trigger events - when taking new instructions from a client, or meeting with a client may also present a convenient opportunity to update CDD information).

7.14 A comprehensive understanding of the risk presented by a client relationship may only become evident at a later stage following the establishment of a relationship. A firm may demonstrate that its client risk assessments remain up to date where its monitoring procedures involve consideration as to the ongoing appropriateness of the client’s risk assessment.

7.15 FATF Recommendation 22 states that Designated Non-Financial Businesses and Professions (“DNFBPs”) should be required to apply, amongst other things, Recommendation 10 (which deals with CDD) to existing clients at appropriate times on the basis of materiality and risk. Accordingly, Regulation 6(2) requires that a relevant person must apply customer due diligence measures at appropriate times to existing customers on a risk-sensitive basis.

Source of funds

7.16 Source of funds is the activity which generates the funds for a relationship e.g. a client’s occupation or business activities. Information concerning the geographical sphere of the activities may also be relevant. Regulation 15 of the AML/ATF Regulations stipulates record keeping requirements for transaction records which require information concerning the remittance of funds also to be recorded (e.g. the name of the bank and the name and account number of the account from which the funds were remitted). This is the source of transfer and

is not to be confused with source of funds. The ability to follow the audit trail for criminal funds and transactions flowing through the professional and financial sector is a vital law enforcement tool in money laundering and terrorist financing investigations.

7.17 Firms should monitor whether funds received from clients are from credible sources. If funding is from a source other than a client, a firm may need to make further enquiries. If it is decided to accept funds from a third party, perhaps because time is short, firms should ask how and why the third party is helping with the funding. In some circumstances, cleared funds will be essential for transactions and clients may want to provide cash to meet a completion deadline. Firms should assess the risk in these cases and ask more questions if necessary.

Compliance Officer

7.18 Firms must designate a person employed at managerial level to serve as its compliance officer. Firms shall be responsible for ensuring its compliance officer is adequately trained to carry out the role of compliance officer. The Compliance Officer must ensure that the necessary compliance programme procedures and controls described above and throughout these Guidance Notes and as required by the AML/ATF Regulations are in place; and coordinate and monitor the compliance programme to ensure continuous compliance with the AML/ATF Regulations. A Compliance Officer may also be appointed as a Reporting Officer.⁷

⁷ Regulation 18A of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008

CHAPTER 8: SUSPICIOUS ACTIVITY REPORTING

Regulation 17

8.1 Regulation 17 of the AML/ATF Regulations requires a relevant person to maintain internal reporting procedures to allow for reports to be made to a Reporting Officer when information comes to the attention of an employee which gives rise to knowledge or suspicion or reasonable grounds for suspicion that another person is engaged in money laundering or terrorist financing. The Reporting Officer after considering the information shall disclose that information to the FIA where he knows or suspects or has reasonable grounds to suspect that a person is engaged in money laundering or terrorist financing.

8.2 The provisions of Regulation 17 requiring a relevant person to maintain internal reporting procedures however do not apply to sole practitioners.

8.3 Firms are required to make a report in respect of information or any other matter that comes to them in the course of their profession or business where they know or suspect or have reasonable grounds for suspicion that a person is engaged in money laundering or terrorist financing.

8.4 Having knowledge means knowing the existence of certain facts. In a criminal court, it must be proved that the individual in fact knew that a person was engaged in money laundering. That said, knowledge can be inferred from the surrounding circumstances; so, for example, a failure to ask obvious questions may be relied upon by a jury to imply knowledge. The knowledge must, however, have come to the person in the course of their trade, profession, business or employment. Information that comes to the person in other circumstances do not come within the scope of Section 46 of the Proceeds of Crime Act or Schedule 1 of the ATFA and therefore no obligation exists to make a report. This does not preclude a report being made should the person choose to do so.

8.5 Suspicion is more subjective and falls short of proof based on firm evidence. Suspicion has been defined by the courts as being beyond mere speculation and based on some foundation,

for example: “A degree of satisfaction and not necessarily amounting to belief but at least extending beyond speculation as to whether an event has occurred or not”; and “Although the creation of suspicion requires a lesser factual basis than the creation of a belief, it must nonetheless be built upon some foundation.” Justice Nelson in the case of *N2J Ltd v Cater Allen* before the High Court in London cited with approval Lord Devlin’s definition of suspicion in *Hussein v Chong Fook Kam* [1970] AC 942: “Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking.” “I suspect but I cannot prove.” Justice Nelson continued “Suspicion does not have to have a long history of misdoing before it arises. It may arise in an otherwise seamless period of good conduct from one important new piece of information.” “Suspicion may be no more than a feeling based on material which may fall well short of prima facie evidence.”

8.6 A transaction which appears unusual is not necessarily suspicious. Even clients with a stable and predictable transactions profile will have periodic transactions that are unusual for them. Many clients will, for perfectly good reasons, have an erratic pattern of transactions or account activity. So the unusual is, in the first instance, only a basis for further enquiry, which may in turn require judgment as to whether it is suspicious. A transaction or activity may not be suspicious at the time, but if suspicions are raised later, an obligation to report then arises.

8.7 A suspicion reportable under the AML/ATF Legislation includes having reasonable grounds for suspicion. That is to say, being in possession of facts which to a reasonable person would arouse suspicion, whether or not one has actually formed any such suspicion, imposes a reporting duty. Thus the trigger-point for reporting has been lowered with corresponding greater obligation on lawyers to be aware of a) the facts occurring around them; b) the implication of those facts which others might draw whether or not they share such interpretation; and c) their duty to report.

Reporting on activities outside Bermuda

8.8 The offence of money laundering, and the duty to report under the Proceeds of Crime Act, apply in relation to the proceeds of any criminal conduct, wherever carried out, that

would constitute an offence if it took place in Bermuda. This broad scope excludes offences which the institution, staff member or Reporting Officer knows, or believes on reasonable grounds, to have been committed in a country or territory other than Bermuda and not to be unlawful under the criminal law then applying in the country or territory concerned.

8.9 The duty to report under ATFA applies in relation to any terrorist financing offence under Sections 5-8 of that Act, that would have been an offence under these sections of the Act had it occurred in Bermuda.

8.10 The requirement to report knowledge or suspicion or having reasonable grounds for suspicion of money laundering or terrorist financing also applies where a Bermuda company or Bermuda partnership conducts business outside Bermuda. Where business is conducted outside Bermuda, for example through an office in another jurisdiction, through business trips to another jurisdiction, or where functions are outsourced to another jurisdiction, or where functions are outsourced to another jurisdiction and knowledge or suspicion or reasonable grounds for suspicion of money laundering or terrorist funding arises in respect of that non-Bermuda business, a report must be made to the FIA in the same way as for business conducted in Bermuda. Under the AML/ATF Regulations, where a firm conducts business pertaining to the specified activities in Section 49(5) of the Proceeds of Crime Act in Bermuda, but outsources aspects of its activities to another jurisdiction, whether to a group entity or to a third party, its money laundering and terrorist financing reporting procedures must also cover those outsourced activities.

8.11 It is likely that there will also be a requirement to report the knowledge or suspicion of money laundering or terrorist financing to an overseas financial intelligence unit to avoid the commission of an offence in that jurisdiction. This is known as a dual reporting requirement.

Other Reporting Obligations

8.12 Section 64A of the Companies Act 1981 establishes a Register of Directors. By way of this register, every company registered in Bermuda must file annually with the Registrar of Companies a current listing of directors in the form prescribed by Section 64A. If default is

made in complying with this section the company or every officer of the company who is in default shall be liable to a default fine. Accordingly, lawyers who serve as a director of any company incorporated under the Companies Act 1981 have a personal responsibility to ensure that the required filing with the Registrar of Companies is made upon any change of director or be personally subject to a default fine.

Reporting Officer

8.13 Regulation 17 of the AML/ATF Regulations requires that law firms (but not sole practitioners) must appoint a Reporting Officer. A firm's Reporting Officer is responsible for ensuring that, when appropriate, the information or other matter leading to knowledge or suspicion or reasonable grounds for knowledge or suspicion of money laundering or terrorist financing is reported to the FIA. The decision to report or not to report must not be subject to the consent of anyone else.

8.14 A firm must ensure that the Reporting Officer:

- i. is employed by the firm;
- ii. has sufficient experience and skills;
- iii. has appropriate independence;
- iv. has a sufficient level of seniority and authority within the business;
- v. has sufficient resources, including sufficient time, and (if appropriate) is supported by Deputy Reporting Officer(s);
- vi. is able to raise issues directly with senior management;
- vii. is fit and proper;
- viii. maintains a record of all enquiries received from law enforcement authorities and records relating to all internal and external suspicious activity reports;
- ix. is fully aware of both their own and the business' obligations under AML/ATF Regulations, the Proceeds of Crime Act and by extension these Guidance Notes;

- x. ensures that relationships are managed effectively post disclosure to avoid tipping-off any third parties; and
- xi. acts as the liaison point with the Board/the Bar/FIA and in any other third-party enquiries in relation to money laundering or terrorist financing.

8.15 Whilst the AML/ATF Regulations requires one individual to be appointed as Reporting Officer it recognizes that given the size and complexity of operations of many firms, it may be appropriate to designate an additional person (“Deputy Reporting Officer”) to whom suspicious activity reports may also be made. Where a firm has appointed one or more Deputy Reporting Officers, it must ensure that the requirements set out above for the Reporting Officer are also applied to any Deputy Reporting Officer.

8.16 Where a firm has appointed one or more Deputy Reporting Officers, it must ensure that the Reporting Officer:

- keeps a record of the appointment of all Deputy Reporting Officers;
- provides support to and routinely monitors the performance of any Deputy Reporting Officer; and
- ensures that suspicious activity reports are considered and determined in an appropriate and consistent manner.

8.17 In the event that the position of Reporting Officer is expected to fall vacant, to comply with the statutory requirement to have an individual appointed to the office of Reporting Officer at all times, a firm must take action to appoint an appropriate member of senior management to the position on a temporary basis.

Reporting

8.18 Section 44 (assisting another to retain the benefit of criminal conduct) and Section 45 (acquisition, possession or use of proceeds of criminal conduct) of the Proceeds of Crime Act states that where a person is concerned in an arrangement involving the proceeds of crime, or has possession of the proceeds of crime, they will not have committed an offence if the disclosure is made before he does the act concerned and the act is done with the consent of the FIA or the disclosure is made after he does the act but is made on his initiative as soon as it is reasonable for him to make it. Subsections 43(2) – (5) and 44(3) and (3A) – (3F) and 45 (5) and (5A) – (5F) of the Proceeds of Crime Act protect persons who carry out transactions that could contravene subsection 43(1) or subsection 44(1) or subsection 45(1) where they have done so having made a disclosure to the FIA and have obtained its consent or deemed consent for the transaction.

8.19 Section 12 of ATFA contains similar provisions in circumstances where offences would otherwise be committed under Section 5 (fund-raising), Section 6 (use and possession of property), Section 7 (funding arrangements) and Section 8 (money laundering).

8.20 Section 9 of ATFA contains an offence of failure to report knowledge or suspicion or having reasonable grounds for suspicion of another person's involvement in terrorist financing or money laundering (Sections 5 to 8 of the ATFA), where the knowledge or suspicion or reasonable grounds for suspicion arose during the course of a trade, profession, business or employment, other than in the course of a business in the regulated sector.

8.21 Schedule 1 Part 1 Section 1 of the ATFA contains a further offence, where a person fails to report another person's involvement in terrorist financing or money laundering (Sections 5 to 8 of the ATFA), where their knowledge or suspicion or reasonable grounds for suspicion, arose during the course of business in the regulated sector.

8.22 The mental elements of knowledge and suspicion, which are relevant to statutory offences are not terms of art and are not defined within the statutes. Knowledge means actual knowledge. There is some suggestion that wilfully shutting one's eyes to the facts may amount to knowledge. However, the current general approach from the criminal courts is that nothing less than actual knowledge will suffice. Additional guidance may be found in *Shah v HSBC* (2012) EWHC 1283 (QB)

8.23 The term 'suspects' is one which the court has historically avoided defining; however, because of its importance in English criminal law, some general guidance has been given. In the case of *Da Silva* [1996] EWCA Crim 1654, Longmore LJ stated:

'It seems to us that the essential element in the word "suspect" and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice.'

8.24 There is no requirement for the suspicion to be clear or firmly grounded on specific facts, but there must be a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond speculation.

8.25 The test for whether a person holds a suspicion is a subjective one. If someone thinks a transaction is suspicious, they are not expected to know the exact nature of the criminal offence or that particular funds were definitely those arising from the crime. They may have noticed something unusual or unexpected and, after making enquiries, the facts do not seem normal or make commercial sense. There does not have to be evidence that money laundering is taking place for there to be a suspicion.

8.26 The meaning of suspicion detailed above was also confirmed by the Court of Appeal in the case of *K v NatWest* [2006] EWCA Civ 1039.

8.27 If someone has not yet formed a suspicion, but they have cause for concern, a firm may choose to ask the client or others more questions. This choice depends on what is already known, and how easy it is to make enquiries.

8.28 If there is a belief that a client is innocent, but there are suspicions that another party to a transaction is engaged in money laundering, a firm may need to consider referring the client for specialist advice regarding the risk that they may be a party to one of the principal offences. However, whether someone has a suspicion is a matter for their own judgment.

8.29 The considerations relating to “reasonable grounds for suspicions” are the same as for the mental element of suspicion, except that it is an objective test. Were there factual circumstances from which an honest and reasonable person [having like duties under the AML/ATF Legislation] should have inferred knowledge or formed the suspicion that another was engaged in money laundering or terrorist financing?

8.30 A firm must ensure that:

- i. where a new or an existing client fails to supply adequate CDD information, or adequate documentation verifying identity (including the identity of any beneficial owners and controllers or settlor of any trust), consideration is given to making a SAR;
- ii. internal reporting procedures encompass the internal recording of attempted transactions and business that has been turned away;
- iii. employees make written internal SARs containing all relevant information to the Reporting Officer (or a Deputy Reporting Officer) as soon as it is reasonable practicable after the information comes to their attention;

- iv. SARs include as full a statement as possible of the information giving rise to knowledge, suspicion or reasonable grounds for knowledge or suspicion of money laundering or terrorist financing activity and full details of the client;
- v. reports are not filtered out by supervisory staff or managers such that they do not reach the Reporting Officer (or Deputy Reporting Officer); and
- vi. reports are acknowledged by the Reporting Officer (or a Deputy Reporting Officer).

8.31 A firm must establish and maintain arrangements for disciplining any member of staff who fails, without reasonable excuse, to make an internal SAR where they have knowledge, or suspicion or reasonable grounds for suspicion of money laundering or terrorist financing.

8.32 Firms, but not sole practitioners, need to have a system clearly setting out the requirements for making an internal SAR. These may include:

- i. the circumstances in which a disclosure is likely to be required;
- ii. how and when information is to be provided to the Reporting Officer or deputies;
- iii. resources which can be used to resolve difficult issues around making a disclosure;
- iv. how and when a disclosure is to be made to the FIA;
- v. how to manage a client when a disclosure is made whilst waiting for consent; and
- vi. the need to be alert to tipping-off issues.

8.33 A firm may demonstrate that it has established and maintained appropriate arrangements for disciplining staff, where employment contracts and employment handbooks provide for the imposition of disciplinary sanctions for failing to report knowledge or suspicion or reasonable grounds for suspicion.

8.34 A firm must ensure that:

- i. all relevant information is promptly made available to the Reporting Officer (or Deputy Reporting Officer) on request to ensure that internal SARs are properly assessed;
- ii. each SAR is considered by the Reporting Officer (or Deputy Reporting Officer) in light of all relevant information; and
- iii. the Reporting Officer (or Deputy Reporting Officer) documents the evaluation process following and reasons for the decision to report or not to report to the FIA.

8.35 In order to demonstrate that a report is considered in light of all relevant information when evaluating a suspicious activity report, the Reporting Officer (or Deputy Reporting Officer) may:

- i. review and consider transaction patterns and volumes, previous patterns of instructions, the length of the business relationship and CDD information; and
- ii. examine other connected accounts or relationships. Connectivity can arise through commercial connections, such as transactions to or from other customers or common introducers, or through connected individuals, such as third parties, common ownership of entities or common signatories. However, the need to search for information concerning connected accounts or relationships should not delay the making of a report the FIA.

Communication with the FIA

8.36 A firm must ensure that the Reporting Officer makes external SARs containing all relevant information including the provision of all the necessary documentation in support of the SAR directly to the FIA as soon as is reasonably practicable, in a format approved by the FIA. Relevant information includes:

- i. full details of the client and as full a statement as possible of the information giving rise to knowledge or suspicion or reasonable grounds for suspicion. It will be particularly important to provide as comprehensive a narrative to the FIA as possible describing the who, what, when, where and why of the suspicion or grounds for suspicion;
- ii. if a particular type of criminal conduct is suspected, a statement of this conduct;
- iii. financial records;
- iv. correspondence;
- v. file/account opening documentation;
- vi. where a firm has additional relevant information that could be made available, the nature of this information; and
- vii. statistical information to assist the FIA in its analysis of reports.

8.37 The FIA does not accept manual submissions of SARs (including those faxed or emailed). All SAR filing is done electronically, and in order to file a SAR you should:

1. Register with goAML by filling out a Registration form on the www.fia.bm website
2. Obtain your login information
3. File your SAR(s) online

4. Contact the FIA for any training issues at: analyst@fia.bm

Additional information may be obtained at www.fia.bm.

8.38 A SAR must be filed with the FIA as soon as it is reasonably practicable to do so once knowledge or suspicion has been formulated or where there are reasonable grounds for suspicion. As such it must be made either before a transaction occurs, or afterwards, if knowledge or suspicion is formulated, or the grounds for suspicion present themselves, with the benefit of hindsight after a transaction or activity occurs.

8.39 Firms should keep comprehensive records of suspicions, objective facts providing grounds for suspicion, and disclosures because disclosure of a suspicious activity or transaction is a defence to criminal proceedings. Such records may include notes of:

- i. ongoing monitoring undertaken and concerns raised by management and staff;
- ii. discussions with the Reporting Officer (or Deputy Reporting Officer) regarding concerns;
- iii. advice sought and received regarding concerns;
- iv. why the concerns did not amount to a suspicion or meet the objective test of “reasonable grounds” and a disclosure was not made;
- v. copies of any disclosures made; and
- vi. conversations with the FIA, insurers, supervisory authorities etc. regarding disclosures made; and decisions not to make a report to the FIA which may be important for the Reporting Officer to justify his position to law enforcement.

Tipping Off

8.40 The Proceeds of Crime Act, Section 47 and ATFA, section 10A, set out the offence of “tipping off”

8.41 The Proceeds of Crime Act Section 47(1) and ATFA section 10A(1) provide that where a person knows or suspects or has reasonable grounds to suspect that the police are acting or proposing to act in connection with an investigation which is being or is about to be conducted into money laundering or terrorist financing, and discloses any information to any other person which is likely to prejudice that investigation or proposed investigation, they commit an offence. It is a defence if the person does not know or suspect that disclosure is likely to prejudice the investigation.

8.42 The Proceeds of Crime Act section 47(2) and ATFA section 10A(2) provide that once an internal or external suspicious activity report has been made, it is a criminal offence for any person knowing or suspecting or having reasonable grounds to suspect that such a report has been made, to disclose to any other person information or any other matter which is likely to prejudice any investigation which might be conducted following such a disclosure.

8.43 In order to prevent the commission of a tipping-off offence, at the time of acknowledging receipt of an internal SAR, the Reporting Officer (or Deputy Reporting Officer) may provide a reminder to the member of staff submitting the report of the risk of communicating information that might prejudice law enforcement enquiries.

8.44 Regulation 6(1) (c) of the AML/ATF Regulations requires a relevant person to apply customer due diligence measures when the firm suspects money laundering or terrorist financing. Therefore, there is a risk that the contact between the firm and the client (or his advisors) could unintentionally lead to the client being tipped-off, where the process is managed without due care. Although it is not tipping-off to include a paragraph about a firm’s obligations under the money laundering and terrorist financing legislation in a firm’s standard client care letter. Reference should be made to the client due diligence procedures outlined in Section 5 of the Guidance Notes.

8.45 In circumstances where a SAR has been filed with the FIA, and the CDD procedures are incomplete, the risk of tipping-off a client (and its advisers) may be minimized by ensuring that employees undertaking due diligence enquiries are aware of tipping-off procedures and are provided with adequate support, such as specific training or assistance from the Reporting Officer.

Obtaining Consent from the FIA

8.46 Where a SAR is made before a suspected transaction or event takes place, FIA consent must be obtained before the transaction or event occurs. Consent will only be given in respect of that particular transaction or activity and future transactions or activity should continue to be monitored and reported accordingly (the Proceeds of Crime Act Sections 44(3)(b)(i) and 45(5)(b)(i); and the ATFA Section 12 sets out consent provisions).

8.47 Where a SAR report is made after the transaction or event, this will be acknowledged by the FIA. In the absence of any instruction to the contrary from the FIA, a firm will be free to maintain the client relationship under normal commercial circumstances. However, receipt of an acknowledgment from the FIA in these circumstances does not indicate that the knowledge or suspicion or ground for suspicion is with or without foundation, and future transactions or activity should continue to be monitored and reported as appropriate.

8.48 Refusal to act upon a client's instruction (for example, as a result of the FIA refusing to give consent for a transaction to proceed) may also lead to civil proceedings being instituted by the client. It may be necessary in circumstances where a client has instigated civil proceedings for a firm to seek the directions of the court.

Transactions following a disclosure

8.49 A firm is not obliged to continue relationships with clients if such action would place them at commercial risk. Termination is ultimately a commercial decision, however, in certain

circumstances a firm should consider liaising with the FIA to determine whether it is likely that termination would alert the client, and in such a case the FIA may request that a relationship is not terminated to avoid prejudicing an investigation.

8.50 If a firm, having filed a SAR, wishes to terminate a relationship or transaction and is concerned that in doing so, it may prejudice an investigation resulting from the report, it should seek the consent of the FIA to do so where the activities referred to fall within Sections 44 and 45 of Proceeds of Crime Act and section 12 of the ATFA. This is to avoid the danger of tipping-off.

Obtaining Information

8.51 Section 16(1) of the FIA Act provides that the FIA may, in the course of enquiring into a suspicious transaction relating to a money laundering offence or a terrorist finance offence, serve a notice in writing on any person requiring that person to provide the FIA with such information as it may reasonably require for the purpose of its enquiry.

8.52 Section 16(2) of the FIA Act provides that a person who is required to provide information pursuant to a notice served under subsection (1) must provide the information to the FIA in such manner as the FIA requires.

8.53 Pursuant to Section 16(3) of the FIA Act, any person who without reasonable excuse fails to comply with a requirement imposed on him under this section shall be guilty of an offence and liable on summary conviction to a fine of \$10,000 or to imprisonment for six months or to both.

8.54 Nothing in section 16 requires the disclosure of information which is subject to legal professional privilege.

Service of Orders and Notices

8.55 During the course of an investigation, a firm may be served with an order designed to restrain particular funds or property pending the outcome of an investigation. It should be noted that the restraint order may not apply to all funds or assets involved within a particular business relationship and a firm should consider what, if any, property may be utilized.

8.56 Upon the conviction of a defendant, a court may order the confiscation of their criminal proceeds or the confiscation of assets to a value representing the benefit of their criminal conduct, which may require the realization of legitimately obtained assets. A firm may be served with a confiscation order in relation to any funds or property belonging to that defendant. For example, if a person is found to have benefited from drug dealing to a value of \$100,000, then the court may order the confiscation of any assets belonging to that person to a value of \$100,000. Confiscation of the proceeds of criminal conduct is becoming commonplace within many jurisdictions, and legislation in place in Bermuda provides a mechanism by which overseas criminal confiscation orders may be recognized. Overseas civil confiscation orders may also be recognized in Bermuda.

Freezing of funds

8.57 Section 15(1) of the FIA Act provides that the FIA may in the course of enquiring into a suspicious transaction relating to the suspected proceeds of criminal conduct or to a money laundering offence or terrorist finance offence serve a notice on any relevant institution in Bermuda requiring it to not make available any funds to any person specified in the notice. Pursuant to Section 15(2) of the FIA Act such a notice shall be in writing and may require the relevant institution, as defined by Section 2(2), to freeze funds for a period not exceeding 72 hours. A relevant institution commits an offence if without reasonable excuse it fails to comply with a notice served on it under subsection (1) and a relevant institution guilty of an offence under subsection (1) is liable on summary conviction to a fine of \$50,000.

8.58 Under Section 52A(1) and (2) of Proceeds of Crime Act, a magistrate, upon the application of a police officer in the course of a confiscation investigation or an investigation

into money laundering, may make an order requiring a relevant institution, as defined by Section 7(2), to not make available the suspected funds to any person. Pursuant to Section 52A(3) such an order shall not have effect for more than seven days,

Persons firms should not accept as clients

8.59 Recommendation 6⁸ and 7⁹ of the FATF Standards require that countries implement targeted financial sanctions regimes to comply with United Nations Security Council resolutions (“UNSCRs”) relating to the prevention and suppression of terrorism and terrorist financing, and the prevention, suppression and disruption of proliferation of weapons of mass destruction and its financing.

Prevention and suppression of terrorism and terrorist financing

8.60 On 31 March 2011, the **Terrorist Asset-Freezing etc. Act 2010 (Overseas Territories) Order 2011** (“TAFAs 2011 Order”) (as read with the Terrorist Asset-Freezing etc. Act 2010 (Overseas Territories) (Amendment) Order 2017) brought into effect in Bermuda the requirements of UNSCR 1373 (2001)¹⁰. The purpose of the TAFAs 2011 Order is to ensure that the necessary international anti-terrorism and terrorist asset-freezing measures are in place in the Overseas Territories of the UK. To this end the TAFAs 2011 Order extends, with modifications, the UK Terrorist Asset-Freezing etc. Act 2010 (“TAFAs”) to Overseas Territories. The key objective of TAFAs is to prevent and suppress the financing and facilitation

⁸ Recommendation 6 is applicable to all current and future successor resolutions to resolution 1267(1999) and any future UNSCRs which impose targeted financial sanctions in terrorist financing context. At the time of issuance of the FATF Interpretive Note, (February 2012), the successor resolutions to resolution 1267 (1999) are resolutions: 1333 (2000), 1363 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1730 (2006), 1735 (2006), 1822 (2008), 1904 (2009), 1988 (2011), and 1989 (2011).

⁹ Recommendation 7 is applicable to all current Security Council resolutions applying targeted financial sanctions relating to the financing of proliferation of weapons of mass destruction, any future successor resolutions, and any future Security Council resolutions which impose targeted financial sanctions in the context of the financing of proliferation of weapons of mass destruction. At the time of issuance of this Recommendation, (February 2012), the Security Council resolutions applying targeted financial sanctions relating to the financing of proliferation of weapons of mass destruction are: resolutions 1718 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1874 (2009), and 1929 (2010).

¹⁰ The requirements of UNSC Resolution 1373 (2001) were previously implemented in Bermuda through the Terrorism (United Nations Measures) (Overseas Territories) Order 2001 (“2001 Order”) and the Terrorist Asset-Freezing (Temporary Provisions) Act 2010.

of any acts of terrorism. There are five core prohibitions in the TAFE 2011 Order, breach of any of which is a criminal offence:-

- (i) Dealing with the funds and economic resources of a designated person;
- (ii) Making funds or financial services available to a designated person;
- (iii) Making funds or financial services available for the benefit of a designated person;
- (iv) Making economic resources available to a designated person; and
- (v) Making economic resources available for the benefit of a designated person.

8.61 The TAFE Amendment Order 2017 alters the definition of designated person in the principal Order to include persons designated by: the Treasury; the Council of the European Union under Article 2(3) of Council Regulation (EC) 2580/2001; and persons designated by the Governor of an Overseas Territory.

8.62 The requirements of UNSCR 1267 (1999)¹¹ as amended, and other additional European Union (“EU”) measures, is brought into force in Bermuda through the International Sanctions (ISIL (Da’esh) and Al-Qaida) Amendment Regulations 2016 (“Al-Qaida Regulations”) and the **International Sanctions (Afghanistan) (United Nations Measures) Regulations 2012** (“Afghanistan Regulations”). The Al-Qaida Regulations and the Afghanistan Regulations implement respectively The ISIL (Da’esh) and Al-Qaida (Sanctions) (Overseas Territories) Order 2016 No. 1218 (“Al-Qaida Order 2016”) and **The Afghanistan (United Nations Measures) (Overseas Territories) Order 2012 No. 1758** (“Afghanistan Order 2012”). As with previous measures implementing non-UN obligations of the UK, these EU measures cannot be directly extended to Bermuda as such non-UN Sanctions obligations must be implemented by Regulations, made under section 2(1) of the International Sanction Act 2003.

8.63 The Al-Qaida Order 2016 gives effect to UN sanctions in respect of ISIL (Da’esh) and Al-Qaida and places restrictive measures on certain persons and entities associated with ISIL (Da’esh) and Al-Qaida. These restrictive measures include, inter alia, an arms embargo, asset freezing measures and the prohibition on the provision of assistance to persons and entities

¹¹ The requirements of UNSC Resolution 1267 (1999) were previously implemented in Bermuda through **The Al-Qa’ida and Taliban (United Nations Measures) (Overseas Territories) Order 2002**, as amended.

designated by the United Nations Security Council or European Union as associated with ISIL (Da'esh) or Al-Qaida. The Afghanistan Order 2012 places restrictive measures on certain persons and entities associated with the Taliban. These restrictive measures include, inter alia, asset freezing measures and the prohibition of the supply of military goods and technical assistance related to military activities to designated persons.

Prevention, suppression and disruption of proliferation of weapons of mass destruction and its financing

8.64 The requirements of UNSCR 1718 (2006) is implemented in Bermuda via the International Sanctions Regulations 2013, which brought into force The Democratic People's Republic of Korea (Sanctions) (Overseas Territories) Order 2012 No. 3066 ("DPRK Order 2012"). The DPRK Order 2012 gives effect to the UN and EU sanctions in respect of the Democratic People's Republic of Korea adopted in Resolutions 1718 (2006) and 1874 (2009), and implemented by EU Regulation 329/2007. The DPRK Order 2012 provides for prohibition in respect of the direct or indirect sale, supply or transfer to any person in, or for use, in DPRK of: arms and related materiel; items and technology which could contribute to DPRK's nuclear-related, ballistic missile-related or other weapons of mass destruction-related programmes or which could contribute to its military activities; certain dual use goods and technology; and luxury goods; a prohibition on the supply to DPRK of certain technical assistance, training, financial and other specified forms of assistance.

8.65 The sanctions measures against Iran are brought into force in Bermuda via the International Sanctions (Iran) Amendment Regulations 2016, which implements the Iran (Sanctions) (Overseas Territories) Order 2016. The Iran Order 2016 gives effect to the EU sanctions in respect of Iran implemented by EU Regulation 267/2012 amended by 2015/1861 and 2015/1862. The main provisions of the sanctions in respect of Iran include: the freezing of funds and economic resources of designated persons, as well as trade restrictions in respect of specified goods. The Joint Comprehensive Plan of Action ("JCPOA"), annexed to UNSCR Resolution 2231, provides for staged sanctions relief for Iran in exchange for Iran verifiably limiting its nuclear programme. The 2015 Council Decision and 2015 Council Regulations

were adopted to reduce the restrictive measures imposed on Iran consistent with the first stage of sanctions relief set out in the JCPOA and resolution 2231, and entered into force on 16 January 2016.

8.66 It should be appreciated that any obligations that arise under these Orders are in addition to any obligations under the AML/ATF suite of legislation and are separate from those obligations. The full text of the Orders are available at: www.legislation.gov.uk/ and the International Sanctions Act Regulations are available at: www.bermudalaws.bm. Persons should ensure that they fully understand their obligations under this legislation. As appropriate, persons should take legal advice to assist in their understanding and compliance.

The links provided below may be of assistance in relation to financial sanctions regimes in the United Kingdom, the European Union and the United States –

United Kingdom – Office of Financial Sanctions Implementation HM Treasury:

[Office of Financial Sanctions Implementation](#)

European Union – External Relations:

Common Foreign & Security Policy (CFSP) - Sanctions or restrictive measures in force:
http://eeas.europa.eu/archives/docs/cfsp/sanctions/docs/measures_en.pdf

United States of America – Office of Foreign Asset Control:

U.S. Treasury - Office of Foreign Assets Control:

<https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>

CHAPTER 9: RELIANCE ON THIRD PARTIES

Regulation 14

9.1 A firm may rely on certain third parties to perform customer due diligence provided those third parties meet, or there are reasonable grounds to believe they meet any of the below descriptions:

- (a) an AML/ATF regulated financial institution;

- (b) a “relevant person” for the purposes of the AML/ATF Regulations who is an independent professional; and is supervised for the purposes of these Regulations by the Bermuda Bar Association or, as the case may be, the Chartered Professional Accountants of Bermuda.

- (c) a person who carries on business in a country or territory other than Bermuda who is an institution that carries on business corresponding to the business of AML/ATF regulated financial institutions or independent professionals. In the case of an independent professional, that professional must be subject to mandatory professional registration recognised by law; subject to requirements equivalent to those laid down in the AML/ATF Regulations; and supervised for compliance with requirements equivalent to supervision by a supervisory authority under the AML/ATF Regulations.

9.2 Further, the third party conducting client due diligence measures must consent to being relied upon. However, notwithstanding the firm’s reliance on that third party, the firm must itself immediately obtain information sufficient to identify customers and must satisfy itself that reliance is appropriate given the level of risk for the jurisdiction in which the third party to be relied upon is usually resident.

9.3 Even if a firm relies on a third party, it will nevertheless remain liable for any failure to apply customer due diligence measures.

9.4 Nothing in Regulation 14 prevents a firm applying customer due diligence measures by means of an outsourced service provider or agent provided that the firm remains liable for any failure to apply such measures.

For example:

- Where an entity (entity A) enters into a business relationship with, or undertakes an occasional transaction for, the underlying client of another entity (entity B), for example by accepting instructions from the client (given through entity B); Regulation 14(2) (a) & (b) applies:-

In this context, Entity B must be:

(1) a person who carries on business in Bermuda who is an AML/ATF regulated financial institution under section 2(2) of the AML/ATF Regulations or a business in the regulated sector under section 3 of the Anti-Terrorism (Financial and Other Measures) (Business in Regulated Sector) Order 2008; or an independent professional as defined at section (2) (1) of the AML/ATF Regulations.

OR

(2) a person who carries on business in a country or territory other than Bermuda who is:

- (a) an institution that carries on business corresponding to the business of an AML/ATF regulated financial institutions or independent professionals;
- (b) subject to mandatory professional registration recognised by law;
- (c) subject to requirements equivalent to those laid down in the regulations; and
- (d) supervised for compliance with those requirements in a manner equivalent to supervision by the relevant supervisory authority.

Consent to be relied upon

9.5 The Regulations do not define how consent must be evidenced. Ordinarily, ‘consent’ means an acceptance of some form of proposal by one party from another – this may be written or oral, express or implied. Written acknowledgement that an entity is being relied on makes its relationship with the firm relying on it clear. On the other hand, it is not necessary for an entity to give an express indication that it is being relied on, and it may be inferred from their conduct.

9.6 In order to satisfy the purpose behind Regulation 14(1)(a), a firm may wish to consider providing the entity being relied on with notification of the reliance. The notification should specify that the firm intends to rely on the third-party institution for the purposes of Regulation 14(1) (a). Such a notification can be delivered in a number of ways. For example, where one firm is introducing a client to another firm, the issue of reliance can be raised during the introduction process and may form part of the formal agreement with the intermediary. Similarly, where the relying and relied upon entities are party to tripartite agreement with a client, the notification may be communicated during exchange of documents. Where a relationship exists between the parties it is likely that such a notification plus some form of acceptance should be sufficient for the purposes of establishing consent.

9.7 Where there is no contractual or commercial relationship between the relying and relied upon entities it is less likely that consent can be assumed from the silence of the entity being relied on. In such circumstances firms may wish to seek an express agreement as to reliance. This does not need to take the form of a legal agreement and a simple indication of consent (e.g., by e-mail) should suffice.

Basis of reliance

9.8 For one firm to rely on verification carried out by another entity, the verification that the entity being relied upon has carried out must have been based at least on the standard level of customer verification. It is not permissible to rely on simplified due diligence carried out, or any other exceptional form of verification, such as the use of source of funds as evidence of identity.

9.9 Firms may also only rely on verification actually carried out by the entity being relied upon. An entity that has been relied on to verify a customer's identity may not 'pass on' verification carried out for it by another entity.

9.10 Whether an entity wishes to place reliance on a third party will be part of the firm's risk-based assessment, which, in addition to confirming the third party's status (Regulation 14(2)), may include consideration of matters such as:

- Its public disciplinary record, to the extent that this is available;
- The nature of the client the service sought and the sums involved;
- Any adverse experience of the other entity's general efficiency in business dealings; and
- Any other knowledge, whether obtained at the outset of the relationship or subsequently, that the firm has regarding the standing of the entity to be relied upon.

9.11 The assessment as to whether or not a firm should accept confirmation from a third party that appropriate customer due diligence measures have been carried out on a client will be risk-based, and cannot be based simply on a single factor.

9.12 In practice, the firm relying on the confirmation of a third party needs to know:

- i. ▪ The identity of the client and/or beneficial owner or settlor of any trust¹² whose identity is being verified;
- ii. ▪ The level of customer due diligence that has been carried out; and
- iii. ▪ Confirmation that the third party understands his obligation to make available, on request, copies of the verification data, documents or other information.

¹² Regulation 3(3) of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, at paragraph (d), sets out the broadened definition of "beneficial owner" to include "the settlor of a trust".

9.13 The third party has no obligation to provide such confirmation to the firm, and may choose not to do so. In such circumstances, or if the firm decides that it does not wish to rely upon the third party, then the firm must carry out its own customer due diligence measures on the client.

9.14 For an entity to confirm that it has carried out customer due diligence measures in respect of a customer is a serious matter. An entity must not give a confirmation on the basis of a generalized assumption that the entity's systems have operated effectively. There has to be awareness that the appropriate steps have in fact been taken in respect of the client that is the subject of the confirmation.

9.15 **Note:** notwithstanding the firm's reliance on that third party, the firm must itself immediately obtain information sufficient to identify customers and must satisfy itself that reliance is appropriate given the level of risk for the jurisdiction in which the third party to be relied upon is usually resident.

9.16 Even if a firm relies on a third party, it will nevertheless remain liable for any failure to apply customer due diligence measures.

Outsourcing

9.17 Controls on firms' outsourcing the due diligence function to other parties are now in place. Outsourcing means delegating any of the following functions to be performed by an external third party:

- i. AML/ATF systems;
- ii. AML/ATF controls; and
- iii. AML/ATF procedures,

9.18 Section 14A of the AML/ATF Regulations provides that where a firm delegates its AML/ATF compliance function to another entity (outsourcing), the firm must retain ultimate responsibility for the AML/ ATF compliance function. Ultimate responsibility includes the

obligation to ensure that the provider of the outsourced AML/ATF compliance function has in place the following:

- i. AML/ATF systems;
- ii. AML/ATF controls; and
- iii. AML/ATF procedures.

Such systems, controls and procedures must be in compliance with the Bermuda AML/ATF requirements.

9.19 Further, the firm must consider the effect that outsourcing compliance functions have on the money laundering and terrorist financing risk. The firm must also: assess the money laundering and terrorist financing risk associated with outsourced functions and record its assessment; monitor any perceived risk on an ongoing basis; and, where the compliance functions themselves have been delegated (Compliance Officer or Reporting Officer), the firm must ensure that the roles, responsibilities and respective duties are clearly defined and documented.

9.20 The firm must likewise ensure that the Compliance Officer or Reporting Officer and all employees understand the roles, responsibilities and the respective duties of all parties contemplated by the AML/ATF Regulations.

9.21 A firm must not rely on a third party or enter into outsourcing arrangements of the type referred to in Regulation 14A, where access to records specified under Regulation 15 is likely to be impeded by confidentiality or data protection restrictions.¹³

Regulation 15(5)

9.22 An entity which carries on business in Bermuda and is relied on by another person must, within the period of five years beginning on the date on which it is relied on, if requested by the firm relying on it:

¹³ POCA Regulations 2008.

- i. As soon as reasonably practicable make available to the firm which is relying on it any information about the client (and any beneficial owner or settlor of any trust) which the third party obtained when applying customer due diligence measures; and
- ii. As soon as reasonably practicable forward to the firm which is relying on it relevant copies of any identification and verification data and other relevant documents on the identity of the client (and any beneficial owner or settlor of any trust) which the third party obtained when applying those measures.

Regulation 15(6)

9.23 A firm which relies on an entity situated in a country or territory other than Bermuda to apply customer due diligence measures must take steps to ensure that the entity on which it relies will, within the period of five years beginning on the date on which the third party is relied on, if requested, comply with the obligations to retain and maintain information as set out above.

9.24 The personal information supplied by the client as part of a third party's customer identification procedures will generally be set out in the form that the relying firm will require to be completed, and this information will therefore be provided to that entity.

Regulation 15(5) & (6)

9.25 A request to forward copies of any identification and verification data and other relevant documents on the identity of the customer or beneficial owner or settlor of any trust obtained when applying customer due diligence measures, if made, would normally be as part of a firm's risk-based customer acceptance procedures. However, the entity giving the confirmation must be prepared to provide this data or other relevant documents throughout the five-year period for which it has an obligation under the Regulations to retain them.

9.26 Where a firm makes such a request and it is not met, the firm will need to take account of that fact in its assessment of the third party in question, and of the ability to rely on the third party in the future. In addition, the firm should review its application of CDD in respect of the client or beneficial owner in question.

A firm must also document the steps taken to confirm that the entity relied upon satisfies the requirements in Regulation 14(2). This is particularly important where the entity relied upon is situated in a country or territory other than Bermuda.

9.27 Part of the firm's AML/ATF policy statement should address the circumstances where reliance may be placed on other entities and how the firm will assess whether the other entity satisfies the definition of third party in Regulation 14(2)

Group introductions

9.28 Where clients are introduced between different firms of the same group, entities that are part of the group should be able to rely on identification procedures conducted by that part of the group which first dealt with the client. One member of a group should be able to confirm to another part of the group that the identity of the client has been appropriately verified.

9.29 Where a client is introduced by one part of a firm to another, it is not necessary for his identity to be re-verified, provided that:

- The identity of the client has been verified by the introducing firm in line with AML/ATF standards of Bermuda or an equivalent jurisdiction; and
- The group entity that carried out the customer due diligence measures can be relied upon as a third party under Regulation 14(2).

9.30 The acceptance by a Bermuda firm of confirmation from another group entity that the identity of a client has been satisfactorily verified is dependent on the relevant records being readily accessible, on request, from the other entity.

9.31 Where Bermuda firms have day-to-day access to all group client information and records, there is no need to obtain a group introduction confirmation, if the identity of that client has been verified previously to AML/ATF standards in Bermuda, or in an equivalent jurisdiction. However, if the identity of the client has not previously been verified, for example because the group client relationship pre-dates the introduction of AML/ATF regulations, or if the verification evidence is inadequate, any missing verification evidence will need to be obtained.

Use of pro-forma confirmations

Regulation 14(2)

9.32 Whilst a firm may be able to employ another party to apply all or part of the customer due diligence measures under Regulation 14(2), it must receive, as part of its risk-based procedures, a written confirmation from the third party, at least in so far as to evidence consent. This may also be the case, for example, when a firm is unlikely to have an on-going relationship with the third party. Confirmations can be particularly helpful when dealing with third parties located in a country or territory other than Bermuda, where it is necessary to confirm that the relevant records will be available.

9.33 The provision of a confirmation certificate implies consent to be relied upon, in the terms agreed and in accordance with Regulation 14

Situations which are not reliance

One firm or entity acting solely as introducer

9.34 At one end of the spectrum, one entity may act solely as an introducer between the client and the firm providing the service, and may have no further relationship with the client. The introducer plays no part in the transaction between the client and the firm, and has no relationship with either of these parties that would constitute a business relationship.

9.35 In these circumstances, where the introducer neither gives advice nor plays any part in the negotiation or execution of the transaction, the identification and verification obligations under the Regulations lie with the firm. This does not, of course, preclude the introducing entity carrying out identification and verification of the client on behalf of the firm providing service, as agent for that firm.

Where the intermediary is the agent of the firm

9.36 If the intermediary is an agent or appointed representative of the firm, it is an extension of that firm. The intermediary may actually obtain the appropriate verification evidence in respect of the client, but the firm is responsible for specifying what should be obtained, and for ensuring that records of the appropriate verification evidence taken in respect of the client are retained.

Regulation 10(2)

9.37 Depending on jurisdiction, where the client is an intermediary carrying on appropriately regulated business, and is acting on behalf of another, there is no obligation on the firm to carry out customer due diligence measures on the client, or on the underlying party.

9.38 Where a firm cannot apply simplified due diligence to the intermediary, the firm is obliged to carry out customer due diligence measures on the intermediary and, as the intermediary acts for another, on the underlying client.

9.39 A relevant person is not required to apply the customer due diligence measures referred to in Regulation 5 in the circumstances mentioned in Regulation 6(1)(a) or (b), or Regulation 6(1A) where he has reasonable grounds for believing that the customer, product or transaction related to such product, falls within any of the following paragraphs:

- (a) The customer is— an AML/ATF regulated financial institution which is subject to the requirements of these Regulations; or an AML/ATF regulated financial

institution (or equivalent institution) which— is situated in a country or territory other than Bermuda which imposes requirements equivalent to those laid down in these Regulations; has effectively implemented those requirements; and is supervised for compliance with those requirements.

- (b) The customer is a company whose securities are listed on an appointed stock exchange.
- (c) The customer is an independent professional (or similar professional) and the product is an account into which monies are pooled, provided that—where the pooled account is held in a country or territory other than Bermuda— that country or territory imposes requirements to combat money laundering and terrorist financing which are equivalent to those laid down in these Regulations; the independent professional has effectively implemented those requirements; and the independent professional is supervised in that country or territory for compliance with those requirements; and information on the identity of the persons on whose behalf monies are held in the pooled account is available, on request, to the institution which acts as a custodian for the account.
- (d) The customer is a public authority in Bermuda.
- (e) The product is— a life insurance contract where the annual premium is no more than \$1,000 or where a single premium of no more than \$2,500 is paid for a single policy; an insurance contract for the purpose of a pension scheme where the contract contains no surrender clause and cannot be used as collateral; or a pension, superannuation or similar scheme which provides retirement benefits to employees, where contributions are made by an employer or by way of deduction from an employee's wages and the scheme rules do not permit the assignment of a member's interest under the scheme.

- (f) The product and any transaction related to such product fulfils all the conditions set out in paragraph 1 of the Schedule. The conditions are— the product has a written contractual base; any related transaction is carried out through an account of the customer with a banking institution which is subject to these Regulations or a banking institution situated in a country or territory other than Bermuda which imposes requirements equivalent to those laid down in these Regulations; the product or related transaction is not anonymous and its nature is such that it allows for the timely application of customer due diligence measures where there is a suspicion of money laundering or terrorist financing; the product is within the following maximum thresholds — in the case of insurance policies or savings products of a similar nature, the annual premium is no more than \$1,000 or there is a single premium of no more than \$ 2,500; in the case of products which are related to the financing of physical assets where the legal and beneficial title of the assets is not transferred to the customer until the termination of the contractual relationship (whether the transaction is carried out in a single operation or in several operations which appear to be linked), the annual payments do not exceed \$15,000; in all other cases, the maximum threshold is \$15,000; the benefits of the product or related transaction cannot be realised for the benefit of third parties, except in the case of death, disablement, survival to a predetermined advanced age, or similar events; in the case of products or related transactions allowing for the investment of funds in financial assets or claims, including insurance or other kinds of contingent claims— the benefits of the product or related transaction are only realisable in the long term; the product or related transaction cannot be used as collateral; and during the contractual relationship, no accelerated payments are made, surrender clauses used or early termination takes place.

9.40 In particular, where the intermediary is located in a higher-risk jurisdiction, the risk-based approach should be aimed at ensuring that the business does not proceed unless the identity of the underlying client has been verified to the firm's satisfaction.

CHAPTER 10: LEGAL PROFESSIONAL PRIVILEGE

10.1 Lawyers are professionally and legally obliged to keep the affairs of their clients confidential and the circumstances in which they are able to disclose client communications are strictly limited. This obligation extends to all matters revealed to a lawyer, from whatever source, by a client or someone acting on the client's behalf. Only in exceptional circumstances, may this general obligation of confidence be overridden. The most relevant instances are where a court orders disclosure or disclosure is required by statute.

10.2 The Proceeds of Crime Act, the FIA Act and the ATFA all contain provisions requiring the disclosure of confidential information in certain circumstances to the FIA (or the Reporting Officer) by persons working in firms that fall within Regulation 2(1) of the AML/ATF Regulations.

10.3 There will likely be potential tensions between a lawyer's duty of confidentiality to his client and the disclosure requirements imposed under Proceeds of Crime Act, the FIA Act and the ATFA.

10.4 Under Section 44 of the Proceeds of Crime Act, a person who enters into an arrangement with another person knowing or suspecting that the other person is or has been engaged in criminal conduct or has benefited from criminal conduct commits an offence, unless they disclose that knowledge or suspicion or belief or any matter on which it is based to the FIA or to the Reporting Officer in accordance with their employer's procedures. Such a disclosure is to be made before he does the act concerned and the act is done with the consent of the FIA, or the disclosure is made after he does the act but is made on his initiative as soon as it is reasonable for him to make it.

10.5 Under Section 45 of the Proceeds of Crime Act a person commits an offence if that person acquires, uses or has possession of criminal property, unless acquired for adequate consideration or they disclose in good faith to the FIA a belief that any property is, or in whole or in part directly or indirectly represents, the proceeds of criminal conduct, or any matter on which such a belief is based. Subsection 45(8) provides that in the case of a person who was in

employment at the time in question, disclosures, and intended disclosures, may be made to the appropriate person in accordance with any procedure established by his employer as they have effect in relation to disclosures, and intended disclosures, to the FIA. Again, such a disclosure is to be made before he does the act concerned and the act is done with the consent of the FIA, or the disclosure is made after he does the act but is made on his initiative as soon as it is reasonable for him to make it.

10.6 Section 5 – 10 of the ATFA contains similar provisions in relation to terrorist financing and money laundering relating to terrorist property.

10.7 Section 46 of Proceeds of Crime Act and Section 9 of the ATFA contain comparable provisions. Those provisions provide that a person commits an offence if they come into information in the course of their employment which leads them to know or suspect or to have reasonable grounds to suspect that another person is engaged in money laundering or committing an offence under Sections 5 – 8 of the ATFA and the person does not report their knowledge or suspicion or reasonable ground for suspicion to the FIA or to the Reporting Officer in accordance with their employer's procedures.

10.8 Sections 46(4) the Proceeds of Crime Act and 9(4) the ATFA set out a defence of reasonable excuse for not making a disclosure.

10.9 The Proceeds of Crime Act, FIA Act and the ATFA also include exemptions from the requirement to make such disclosures for professional legal advisers acting in privileged circumstances (see Section 46 (3) of the Proceeds of Crime Act, 9(6) of the ATFA, and 16(4) and 20(3) of FIA Act). Legal professional privilege is defined in Section 46(6) of the Proceeds of Crime Act and 9(7) of the ATFA as any information or other matter which comes to a professional legal advisor in privileged circumstances where it is communicated to him by or by a representative of a client of his in connection with the giving by the adviser of legal advice to the client; or by a person seeking legal advice from the adviser or by any person in

contemplation of or in connection with legal proceedings and for the purpose of those proceedings.

10.10 The exemptions do not apply to information or other matters communicated or given with a view to furthering a criminal purpose.

10.11 Section 47 of the Proceeds of Crime Act and Section 10A of the ATFA covers the offence of “tipping-off” However, Sections 47(3) and 10A(3) also provide that it is not an offence where a professional legal adviser discloses any information or other matter:

- (a) to or to a representative of a client of the legal adviser in connection with the giving by the adviser of legal advice to the client; or
- (b) to any person –
 - (i) in contemplation of or in connection with legal proceedings, and
 - (ii) for the purpose of those proceedings.

Again, this exemption does not apply in relation to any information or other matter that is disclosed with a view to furthering a criminal purpose.

10.12 Certain confidential communications between a lawyer and his client will fall into a category known as Legal Professional Privilege (“LPP”). LPP is a privilege against disclosure, ensuring clients know that certain documents and information provided to lawyers cannot be disclosed without the client’s consent. It recognises a client’s fundamental right to be candid with their legal adviser, without fear of later disclosure to their prejudice. It is an absolute right and cannot be overridden by any other public interest. LPP can, however, be waived and it can be overridden by statute (*R (Morgan Grenfell & Co Ltd.) v Special Comr of Income Tax* [2003] 1 AC 563).

10.13 LPP does not extend to everything lawyers have a duty to keep confidential. LPP protects only those confidential communications falling under either of the two heads of privilege – advice privilege or litigation privilege.

10.14 For the purposes of LPP, lawyers include barristers, solicitors, in-house lawyers and their employees.

10.15 Communications between a lawyer, acting in their capacity as a lawyer, and a client, are privileged if they are both:

- confidential; and
- for the purpose of seeking advice from a lawyer or providing it to a client.

(Bene Ltd. v. VAR Hanson & Partners 1997 JLR N-10)

10.16 Communications are not privileged merely because a client is speaking or writing to their lawyer. The protection applies only to those communications which directly seek or provide advice or which are given in a legal context, that involve the lawyer using their legal skills and which are directly related to the performance of the lawyer's professional duties (Three Rivers District Council and Others v Governor and Company of the Bank of Scotland (No 6) [2004] UKHL 48).

Case law has given some examples of what advice privilege covers:

10.17 Communications subject to advice privilege:

- a lawyer's bill of costs and statement of account (Chant v Brown (1852) 9 Hare 790); and
- information imparted by prospective clients in advice of a retainer will attract LLP if the communications were made for the purpose of indicating the advice required (Minister v Priest 1930 AC 558 per Lord Atkin at 584).

10.18 Communications not subject to advice privilege:

- i. notes of open court proceedings (*Parry v News Group Newspapers* (1990) 140 New Law Journal 1719 and *Pacific Investments Ltd. v Christensen* 1996 JLR N-7) are not privileged, as the content of the communication is not confidential;
- ii. a client account ledger maintained in relation to the client's money (*Nationwide Building Society v Various Solicitors* [1999] P.N.L.R. 53);
- iii. an appointments diary or time record on an attendance note, time sheet or fee record relating to a client (*R v Manchester Crown Court, ex p. Rogers* [1999] 1 W.L.R. 832 and *Bene Ltd. v VAR Hanson & Partners* 1997 JLR N-10)); and
- iv. conveyancing documents are not communicated so not subject to advice privilege (*R v Inner London Crown Court ex p. Baines and Baines* [1988] QB 579).

10.19 All communications between a lawyer and their client relating to a transaction in which the lawyer has been instructed for the purpose of obtaining legal advice are covered by advice privilege, notwithstanding that they do not contain advice on matters of law and construction, provided that they are directly related to the performance by the lawyer of their professional duty as legal adviser of their client. (*Three Rivers District Council v the Bank of England* [2004] UKHL 48 at 111).

10.20 This means that where a lawyer is providing legal advice in a transactional matter (such as conveyancing) the advice privilege will cover all:

- i. communications with;
- ii. instructions from; and
- iii. advice given to

the client, including any working papers and drafts prepared, as long as they are directly related to the lawyer's performance of their professional duties as a legal adviser.

10.21 This privilege, which is wider than advice privilege, protects confidential communications made in pursuance of, or contemplation of, litigation, between either:

- i. a lawyer and a client;
- ii. a lawyer and an agent, whether or not that agent is a lawyer; or
- iii. a lawyer and a third party.

(Bene Ltd. v VAR Hanson & Partners 1997 JLR N-10)

10.22 Such communications must be for the sole or dominant purpose of litigation, either:

- i. for seeking or giving advice in relation to it;
- ii. for obtaining evidence to be used in it; or
- iii. for obtaining information leading to obtaining such evidence.

10.23 An original document not brought into existence or privileged purposes and so not already privileged, does not become privileged merely by being given to a lawyer for advice or another privileged purpose.

10.24 Furthermore, where a lawyer has a corporate client, communication between the lawyer and the employees of the corporate client may not be protected by LPP if the employee cannot be considered to be “the client” for the purpose of the retainer. As such, some employees will be clients, while others will not. (*Three Rivers District Council v the Governor and Company of the Bank of England* (no 5) [2003] QB 1556).

10.25 It is not a breach of LPP to discuss a matter with your Reporting Officer for the purpose of receiving advice on whether to make a disclosure. Privilege will continue to apply whilst such a determination is being made.

10.26 LPP protects advice a lawyer gives to a client on avoiding committing a crime (*Bullivant v Att-Gen of Victoria* [1901] AC 196) or warning them that proposed actions could attract prosecution (*Butler v Board of Trade* [1971] Ch 680). LPP does not extend to documents which themselves form part of a criminal or fraudulent act (*Hume v Attorney General* 2006 LJR N-36), or communications which take place in order to obtain advice with the intention of carrying out an offence (*R v Cox and Railton* (1984) 14 QBD 153). It is irrelevant whether or not the lawyer is aware that they are being used for that purpose (*Banque Keyser Ullman v Skandia* [1986] 1 Lloyds Rep 336).

10.27 Section 44, 45, and 46 of the Proceeds of Crime Act, Section 10 of the ATFA, and Section 20 of the FIA Act provides that, if a person discloses information under those laws, the disclosure will not be treated as a breach of any restriction on the disclosure of information (however imposed).

10.28 It is not just a client's intention which is relevant for the purpose of ascertaining whether information was communicated for the furtherance of a criminal purpose. It is also sufficient that a third party intends the lawyer/client communication to be made with that purpose (e.g. where the innocent client is being used by a third party) (*R v Central Criminal court ex p Francis & Francis* [1989] 1 AC 346).

10.29 The direct reporting obligations contained in Section 46 (2) of the Proceeds of Crime Act and Section 9(3) of the ATFA do not apply to a lawyer's knowledge or suspicion or grounds for suspicion arising from information obtained in privileged circumstances (as defined in those laws). A lawyer may, however, wish to consider making a joint report with his client. The agreement of the lawyer's client to waive LPP is necessary in order for this to be possible.

10.30 If information leading to knowledge or suspicion or reasonable grounds for suspicion is obtained in circumstances that are not covered by LPP, a disclosure should be made to avoid the commission of an offence of failing to disclose. Lawyers will not be in breach of their professional duty of confidentiality when they do so.

10.31 If a lawyer commits an offence under Section 44 or 45 of the Proceeds of Crime Act or Section 8 of the ATFA they should make a disclosure to a police officer, otherwise they will not be able to avail themselves of the defences which operate under those Sections.

10.32 As the application of LPP is complex, it is recommended that firms consider requiring that reports be made to the Reporting Officer on each occasion that there is knowledge or suspicion or reasonable grounds for suspicion of money laundering or terrorist financing. The Reporting Officer can then discuss the situation with the fee earner concerned and, as necessary, take advice from an appropriate partner, director or senior lawyer.

10.33 It would be prudent, and would facilitate a firm's compliance with the requirements of Proceeds of Crime Act, the ATFA and the FIA Act, for consideration to be given to the need to separate all material on client files so that it is clear what material is non-privileged and the material for which privilege is claimed.

10.34 CDD and risk assessment documents should be completed, where possible, in a way which distinguishes privileged and non-privileged information. It would be prudent where possible, to include guidance to the effect in internal procedure manuals. This will assist in ensuring that the Board can undertake audits of firms with the minimum disruption to business and those firms comply with their obligations to the Board.

Chapter 11: TRAINING

Regulation 18

11.1 Regulation 18 of the AML/ATF Regulations requires a relevant person to take appropriate measures so that all relevant employees are made aware of the laws relating to money laundering and terrorism financing and regularly given training in how to recognize and deal with transactions which may be related to money laundering or terrorist financing. The effective application of even the best designed control systems can be quickly compromised if staff lack competence or probity, are unaware of or fail to apply systems and controls, and are not adequately trained.

11.2 Regulation 18(2) of the AML/ATF Regulations defines a relevant employee as an employee who at any time in the course of his duties has or may have access to any information which may be relevant in determining whether any person is engaged in money laundering or terrorist financing. For the purposes of Regulation 18, “relevant employee” includes an individual working on a temporary basis whether under a contract of employment, contract for services or otherwise.¹⁴

11.3 One of the most important controls over the prevention and detection of money laundering and terrorist financing is to have appropriately vetted staff who are: (i) alert to money laundering and terrorist financing risks; and (ii) well trained in the identification of unusual or higher risk activities or transactions, which may indicate money laundering or terrorist financing activity.

11.4 Therefore all relevant employees will need to have a basic understanding of money laundering and terrorist financing and an awareness of internal reporting procedures (including the identity of the Reporting Officer and the statutory penalties for non-compliance). It is

¹⁴ Regulation 18 (3) of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008

important for senior management to make employees aware of their obligations and to provide regular training on how to discharge them.

11.5 A firm must have appropriate measures in place to make relevant employees aware of:

- the firm's business' systems and controls (including policies and procedures) designed to prevent and detect money laundering and terrorist financing;
- the statutory obligations under which the business operates and under which employees may be held personally liable; and
- the implications of failing to report information in accordance with procedures, and that as well as criminal, civil or regulatory sanctions, disciplinary proceedings can also arise.

11.6 A firm may demonstrate that it has appropriate measures in place where it:

- i. provides relevant employees with a copy of, or intranet access to, the firm's procedure manual for AML/ATF;
- ii. informs staff of the identity of the Reporting Officer and the procedures to make internal SARs;
- iii. provides relevant employees with a document outlining the firm's and their own obligations and potential criminal liability under the AML/ATF legislation and this Guidance;
- iv. requires employees to acknowledge that they have received and understood the business' procedures manual and document outlining statutory obligations; and

- v. periodically tests employees' awareness of policies and procedures and statutory obligations.

11.7 It is not sufficient solely to provide employees with a copy of these Guidance Notes as these are designed to provide a base from which a firm can design and implement systems and tailor its own policies and procedures appropriate to its business.

11.8 A firm may demonstrate that it has appropriate measures to maintain awareness where it:

- i. keeps employees aware of anti-money laundering and terrorist financing developments (such as updates issued by the Board or the Office of the National Anti-Money Laundering Committee ("NAMLC"), or developments in international standards) as they occur;
- ii. provides employees with case studies illustrating how products or services provided by the financial services business may be abused;
- iii. advises employees of current news stories involving money laundering and terrorist financing activity; and
- iv. sends e-mail reminders of employee obligations and the need to remain vigilant.

11.9 The guiding principle of all anti-money laundering and terrorist financing training should be to encourage employees, irrespective of their level of seniority, to understand and accept their responsibility to contribute to the protection of the business against the threat of money laundering and terrorist financing. A firm may demonstrate the provision of adequate training where the training promotes an awareness of the threat of money laundering and terrorist financing and the reporting procedures that should be followed in the event that unexplained unusual, or higher risk activity or transactions are spotted.

11.10 Training must:

- i. be tailored to the business and relevant to the employees to whom it is delivered;
- ii. highlight to employees the importance of the contribution that they can individually make to the prevention and detection of money laundering and terrorist financing; and
- iii. cover key aspects of legislation to prevent and detect money laundering and terrorist financing.
- iv. A firm may demonstrate the provision of adequate training to relevant employees where it addresses:
 - v. the money laundering and terrorist financing legislation;
 - vi. vulnerabilities of services and products offered by the firm, and subsequent money laundering and terrorist financing risk;
 - vii. policies and procedures, and employees' responsibilities;
 - viii. application of risk based CDD policies and procedures;
 - ix. recognition of and dealing with unusual or higher risk activity and transactions, such as activity outside of expected patterns, unusual settlements, abnormal payment or delivery instructions and changes in the patterns of business relationships;

- x. money laundering and terrorist financing developments, including techniques, methods, trends and typologies; and
- xi. management of client relationships which have been the subject of a SAR, e.g. risk of committing the offence of tipping-off, and dealing with questions from such clients, and/or their advisers.
- xii. 11.6 A firm may demonstrate the provision of adequate training where (in addition to training for relevant employees) it addressed the evaluation of the effectiveness of systems and controls (and policies and procedures) in place to prevent and detect money laundering and terrorist financing.
- xiii. A firm may demonstrate the provision of adequate training where (in addition to training for relevant employees) it addresses:
- xiv. the design and implementation of systems and controls to counter money laundering and terrorist financing; and
- xv. the design and implementation of compliance testing and monitoring programs.
- xvi. A firm may demonstrate the provision of adequate training where (in addition to training for relevant employees) it addresses:
- xvii. the handling and validation of internal disclosures;
- xviii. liaising with the FIA and law enforcement;
- xix. management of the risk of tipping-off; and
- xx. the handling of, for example, production and restraint orders.

11.11 A firm may demonstrate the provision of training at appropriate frequencies by:

- i. providing all employees with induction training within 30 days of the commencement of employment and, when necessary, where there is a subsequent change in an employee's role;
- ii. delivering training to all employees at least annually, and otherwise determining the frequency of training for relevant employees on the basis of risk, with more frequent training where appropriate.
- iii. A firm may demonstrate that it has assessed the effectiveness of training provided by:
 - iv. testing employee's understanding of the business' policies and procedures to combat money laundering and terrorist financing, and also their ability to recognise money laundering and terrorist financing activity;
 - v. monitoring the compliance of employees with systems and controls (including policies and procedures) to prevent and detect money laundering and terrorist financing, and taking any action that may be necessary;
 - vi. monitoring internal reporting patterns, and taking any action that may be necessary; and
 - vii. the routine supervision of employees.

CHAPTER 12: RECORD KEEPING

Regulation 15

12.1 The record keeping obligations of the AML/ATF Regulations and additional regulatory requirements are essential to facilitate effective investigation, prosecution and confiscation of criminal property. If law enforcement agencies, either in Bermuda or elsewhere, are unable to trace criminal property due to inadequate record keeping, then prosecution for money laundering or terrorist financing and confiscation of criminal property may not be possible. Likewise, if the funds used to finance terrorist activity cannot be traced back through the financial system, then the sources and the destination of terrorist funding will not be identified.

12.2 Regulation 15 of the AML/ATF Regulations provides for record keeping procedures to be followed by a relevant person. Records may be kept:

- i. by way of original documents;
- ii. by way of photocopies of original documents (certified where appropriate);
- iii. microfiche;
- iv. in scanned form; or
- v. in computerized or electronic form.

12.3 Regulation 15(2) of the AML/ATF Regulations requires the following records to be kept:

- i. a copy of or the references to, the evidence of the client's identity obtained pursuant to AML/ATF Regulations 6,11,13(4) or 14; and

- ii. the supporting evidence and records (consisting of the original documents or copies admissible in court proceedings) in respect of the business relationships and occasional transactions which are the subject of customer due diligence.

12.4 Regulation 15 (3) of the AML/ATF Regulations requires a relevant person to retain records in relation to evidence of identity for at least five years beginning on the date on which the business relationship ends, or in the case of an occasional transaction five years beginning on the date on which the transaction is completed. AML/ATF Regulation 2 defines an independent professional as a Relevant Person for the purposes of the records retention requirements.

12.5 A firm must ensure that the way in which CDD information is recorded and stored facilitates periodic updating of the information. A firm may demonstrate adequate recording and storage of CDD information by ensuring that updated information relating to a client that is obtained through meetings, discussions, or other methods of communication with the client is recorded and retained.

12.6 Records must contain the following details of each transaction carried out with or for a client in the course of business activities specified by Regulation 2 of the AML/ATF Regulations:

- i. name and address of the client;
- ii. if a monetary transaction, the kind of currency and the amount;
- iii. if the transaction involves a client's account, the number, name or other identifier for the account;
- iv. date of the transaction;

- v. details of the counterparty, including account details;
- vi. nature of the transaction; and
- vii. details of the transaction.

12.7 The records prepared and retained by a firm in relation to client transactions and activity must be orderly and such that the audit trail for incoming and outgoing funds or asset movement is clear and complete. Adequate recording of details of transactions may be demonstrated by recording all transactions undertaken on behalf of a client within that client's records, enabling a complete transaction history for each client to be easily constructed.

12.8 Adequate recording of details of transactions may be demonstrated by including (where appropriate):

- a. valuation(s) and price(s);
- b. the form (e.g. cash, cheque, electronic transfer) in which funds are transferred;
- c. memoranda of instruction(s) and authority(ies);
- d. memoranda of purchase and sale;
- e. custody of title documentation; and
- f. other records in support of transaction of records where these are necessary to enable a clear and complete audit trail of fund or asset movements to be established.

12.9 A firm must keep for at least five years adequate and orderly records to enable the Board, internal and external auditors and other competent authorities to assess the effectiveness of systems and controls that are maintained by a firm to prevent and detect money laundering and terrorist financing.

12.10 A firm must keep adequate and orderly records documenting its policies and procedures to prevent and detect money laundering and terrorist financing for at least five years from the date those policies and procedures are superseded.

12.11 A firm may demonstrate that it has retained adequate records where it keeps:

- i. its risk assessment;
- ii. compliance reports to senior management; and
- iii. the working papers of the CO to the extent that these provide details of the testing programs conducted.

This does not necessitate the retention of all compliance testing working papers.

12.12 A firm must keep, for a period of five years from the date a business relationship ends, or, if in relation to an occasional transaction, for five years from the date that a transaction was completed, orderly records containing:

- i. internal SARs and supporting documentation;
- ii. the decision of the Reporting Officer concerning whether to make an external suspicious activity report and the basis of that decision; and
- iii. any external SARs

in relation to that business relationship or an occasional transaction.

12.13 A firm must keep adequate and orderly records containing the findings of reviews of:

- i. complex transactions;
- ii. unusual large transactions; and
- iii. unusual patterns of transactions which have no apparent economic or visible lawful purpose,

for a period of five years from the date the business relationship ends, or, if in relation to an occasional transaction, for five years from the date that the transaction was completed.

12.14 A firm must keep adequate and orderly records containing the findings of review of clients and transactions:

- i. connected with jurisdictions which do not or insufficiently apply the FATF Recommendations, where the business relationship or transaction has no apparent economic or visible lawful purpose; or
- ii. which are the subject of international countermeasures – for a period of five years from the date the business relationship ends, or, if in relation to a one-off transaction, for five years from the date that the transaction was completed.

12.15 A firm must keep adequate and orderly records for five years detailing the dates on which training on the prevention and detection of money laundering and terrorist financing was provided, the nature of the training and the names of employees who received the training.

12.16 A firm must ensure that the way in which CDD information (including transaction information) is recorded facilitates ongoing monitoring of each relationship.

12.17 For all other purposes, the records retained by a firm must be readily accessible by the firm. A firm must periodically review the accessibility of, and condition of, paper and electronically retrievable records and ensure adequate consideration of the safekeeping of records.

12.18 A firm must periodically test procedures relating to retrieval of records.

12.19 A firm that undergoes mergers, take-overs, or internal reorganisations, must ensure that records remain readily retrievable for the required period when rationalising computer systems and storage arrangements.

12.20 Records must be maintained in a format which would enable the firm to respond fully and rapidly to enquiries received from the FIA or law enforcement relating to:-

- i. Whether it maintains, or has maintained during the previous five years a business relationship with any person and;
- ii. the nature of that relationship.

12.21 Where documentation is held overseas or by third parties, such as under outsourcing arrangements, or where reliance is placed on introducers or intermediaries, this will present additional factors for a financial services business to consider. Where record keeping is outsourced, a firm remains responsible for compliance with all requirements.

12.22 Where an introducer ceases to trade or have a relationship with a client that it has introduced to a firm, particular care needs to be taken to retain, or hand over, the appropriate client records.

12.23 A firm must not enter into outsourcing arrangement or place reliance on third parties to retain records where access to records is likely to be impeded by confidentiality or data protection restrictions.

12.24 Record keeping arrangements must be agreed with the Board where a firm terminates activities, or disposes of business or a block of client relationships to another accounting firm or service provider. Where a firm terminates activities, or disposes of business or a block of client relationships to other accounting firms or service providers, record keeping requirements are unaffected by the termination or disposal.

CHAPTER 13: INTERNAL AUDIT

Regulation 17A, Independent audit function

13.1 A law firm must maintain an independent audit function to be conducted by a qualified independent third party or internally by persons independent of any other function, the lines of business over which the function has audit responsibilities, and financial operations.

13.2 An independent audit function must provide and document an independent and objective evaluation of the robustness of the firm's AML/ATF framework, and the reliability, integrity and completeness of the design and effectiveness of the AML/ATF risk management function and AML/ATF internal controls framework, and the AML/ATF compliance.