

# AML / CFT LEGAL PROFESSION

**Albert Yome**

Legal Profession Supervision Officer

Gibraltar Courts Service

2<sup>nd</sup> February 2018

[albert.yome@gcs.gov.gi](mailto:albert.yome@gcs.gov.gi)

## The Story so Far

- 14/10/2015 - Council of Europe adopted a resolution which allows the British Overseas Territory of Gibraltar to be evaluated by **MONEYVAL**, and be subject to its procedures
- 20/09/2017 **Legal Services Act** was passed unanimously by Parliament, although not yet in force
- 19/10/2017 **Registrar** of the Supreme Court appointed as **Supervisory Authority** under POCA
- 01/11/2017 **Guidance Notes** for the legal profession issued.
- 01/02/2018 **GNs applicable** to any new relationship entered into on or after the 1<sup>st</sup> February 2018

# Proceeds of Crime Act 2015 (“POCA”)

- POCA applies to all persons, although certain failure to report offences only apply to persons who are engaged in activities in a relevant financial business.
- It also sets out administrative requirements for AML regime within the relevant financial businesses and outlines the scope of customer due diligence. The aim is to limit the use of professional services for money laundering by requiring professionals to know their clients and monitor the use of their services by clients.

# Status of the Guidance Notes

- Section 33(2) POCA -“In deciding whether a person has committed an offence under subsection (1), the court must consider whether he followed any relevant guidance which was at the time issued by a Supervisory Authority or any other appropriate body.” The Notes are drawn up considering the above provisions.

# Application - Who should read these Guidance Notes?

- All notaries
- Lawyers\*
- Other staff in a law firm who are involved in AML/CFT compliance.

\*Lawyers will be deemed to include **barristers, solicitors, legal executives and any other person acting or authorised to act** in law or acting under the supervision of a person legally authorised to act.

# “Relevant Financial Business” (S.9 POCA)

- 9(i) **notaries** and other **independent legal professionals**, when they participate whether—
- (i) by **assisting** in the planning or execution of **transactions** for their client concerning the-
  - (A) buying and selling of **real property** or **business entities**;
  - (B) managing of **client money, securities** or **other assets**;
  - (C) opening or management of **bank, savings** or **securities accounts**;
  - (D) organisations of contributions necessary for the **creation, operation** or **management of companies**;
  - (E) creation, operation or management of **trusts, companies, foundations, or similar structures**; or
- (ii) by acting on behalf of and for their client in any **financial** or **real estate transaction**

# Transactions

You will be 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.

# Activities covered by POCA

- In terms of the key activities covered, note that:
- managing client money is narrower than handling it; and
- opening or managing a bank account (including savings or securities accounts) is wider than simply opening a lawyers' or notaries' client account. It would be likely to cover them acting as a trustee, attorney or a receiver

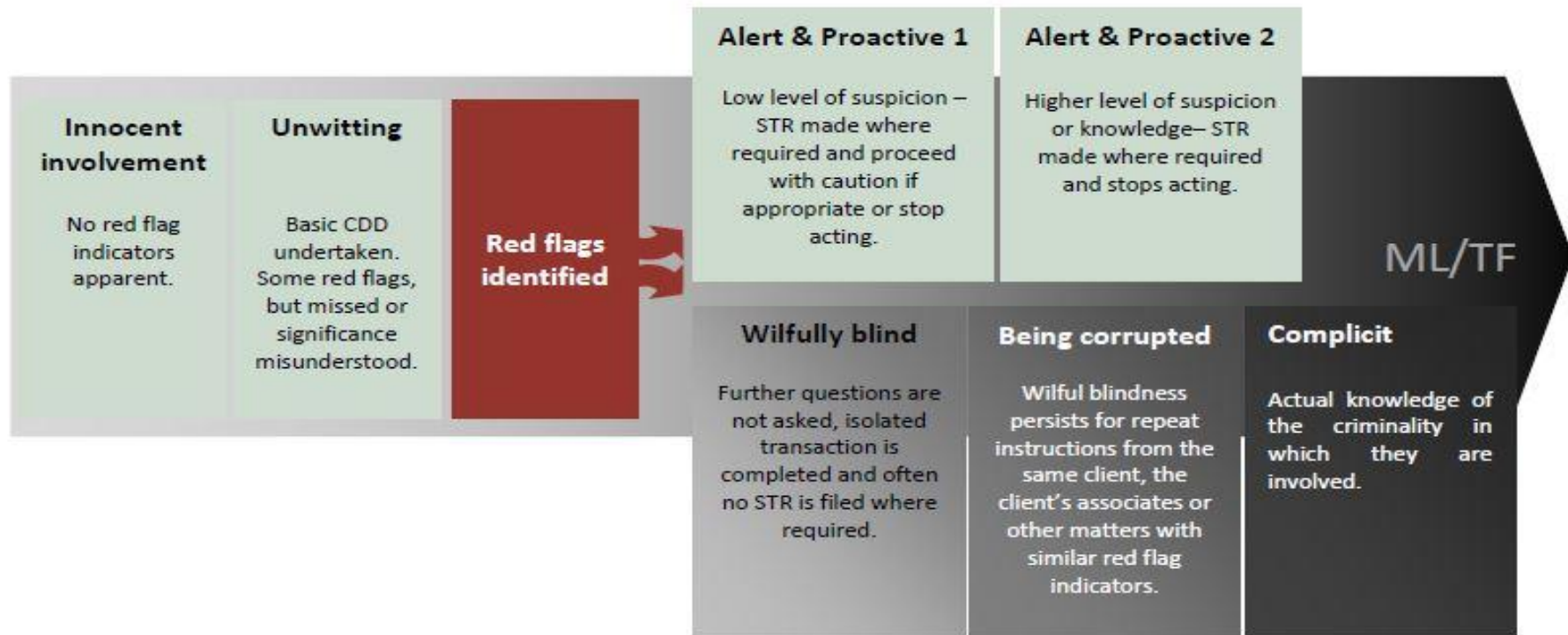


# Activities not covered by POCA

The following would not generally be viewed as participation in financial transactions:

- payment on account of **costs** to a lawyer or to a notary or payment of a **bill**
- provision of **legal advice**
- participation in **litigation** or a form of **alternative dispute resolution**
- **will-writing**, although you should consider whether any accompanying taxation advice is covered.

## Involvement of Legal Professionals in money laundering and terrorist financing (ML/TF)



# The Risk-Based Approach

Risks of your firm being used to assist with money laundering / terrorist financing include:

- **criminal and disciplinary sanctions** for firms, individual lawyers and notaries
- **civil action** against the firm as a whole and individual partners
- damage to **reputation** leading to a loss of business

# The Risk-Based Approach

- Identify
- Assess
- Mitigate
- Know Your Client (KYC)
- Understand Instructions
- Apply Controls
- Document, make risk-based judgements on individual clients and retainers - to **justify** your position on managing the risk to law enforcement, courts and Supervisory Authorities.

**Focus your resources** on the areas of greatest risk, should result in:

- more efficient & effective use of resources proportionate to the risks faced
- minimising compliance costs and burdens on clients
- greater flexibility to respond to emerging risks as laundering and terrorist financing methods change

- RBA required by POCA for compliance with CDD.
- Reporting suspicious activity not risk-based - POCA and TA 2005 have specific legal requirements not to engage in certain activities and to report suspicious activities once a suspicion is held.

# Assessing your firm's risk profile

- Client demographic
- Services and areas of law

## Assessing individual risk

- Determining the risks posed by a specific client or retainer will then assist in applying internal controls in a proportionate and effective manner.

# Part 3 of POCA

- Requires a relevant financial business to have certain systems in place.
- Failing to have those systems in place is an offence, punishable by a fine or up to two years' imprisonment, or both.
- You must demonstrate your compliance to the Supervisory Authority designated under POCA, as supervisor under this legislation.



# The Appropriate Person or the Money Laundering Reporting Officer

- POCA requires firms within the regulated sector to have an “appropriate person” (better known as the Money Laundering Reporting Officer or MLRO) to receive disclosures under section 28 POCA & make disclosures to the GFIU.
- No requirement to have an appropriate person in a relevant financial business if you are an individual who operates in a relevant financial business but does not employ any people or act in association with anyone else.

# Risk Assessment – Systems for AML CFT

- Detail & sophistication of systems will depend on firm's size, complexity of business.
- Ways of incorporating your RA of clients, business relationships and transactions into the overall risk assessment will be governed by the size of your firm and how regularly compliance staff and senior management are involved in day-to-day activities

# Issues which may be covered in a risk assessment system include:

- firm's current risk profile
- how AML/CTF risks will be assessed & processes for re-assessment &
- updating of the firm's risk profile
- internal controls to be implemented to mitigate the risks
- which firm personnel have authority to make risk-based decisions on compliance on individual files
- how compliance will be monitored and effectiveness of internal controls will be reviewed

# Internal controls & monitoring compliance

Level of internal controls & monitoring affected  
by:

- your firm's size
- the nature, scale and complexity of its practice
- its overall risk profile

# Issues which may be covered in an internal controls system include

- level of personnel permitted to exercise discretion on the risk-based application of POCA, and under what circumstances
- CDD requirements to be met for simplified, standard and enhanced due diligence
- when outsourcing of CDD obligations or reliance will be permitted, and on what conditions
- how you will restrict work being conducted on a file where CDD has not been completed
- the circumstances in which delayed CDD is permitted
- when cash payments will be accepted
- when payments will be accepted from or made to third parties
- the manner in which disclosures are to be made to the nominated officer
- employee screening • independent audit

# Customer Due Diligence ('CDD')

- Customer due diligence ("CDD") is required by POCA because you can better identify suspicious transactions if you know your customer and understand the reasoning behind the instructions they give you.
- You must conduct CDD on those clients who retain you for services regulated under POCA (see Part III of POCA). See also chapters 2 & 3 of these GNs.

# When is CDD required? (s.11 POCA)

- **establishing** a business relationship
- carrying out an **occasional transaction**
- you **suspect** money laundering or terrorist financing
- you **doubt** the veracity or adequacy of documents, data or information previously obtained for the purpose of CDD

# Existing business relationships before 1st February 2018

- Must apply CDD measures at appropriate times to existing clients on a risk- sensitive basis. Not required to apply CDD measures to all existing clients immediately after 01/02/2018. Where you have verified a client's identity to a previously applicable standard then, unless circumstances indicate the contrary, the risk is likely to be low. If you have existing high risk clients that you have previously identified, you may consider applying the new CDD standard sooner than for low risk clients.



# What is CDD? S.10 POCA says;

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

# Identification and verification

- Identification of a client or a beneficial owner is simply being told or coming to know a client's identifying details, such as their name and address.
- Verification is obtaining some evidence which supports this claim of identity.

# Risk-based approach S.11(3); you must

- determine extent of CDD measures on a risk-sensitive basis, depending on type of customer, business relationship, product or transaction
- be able to demonstrate to Supervisory Authority that extent of the measures is appropriate in view of the risks of money laundering and terrorist financing.

# Methods of verification

- obtaining or viewing original documents
- conducting electronic verification
- obtaining information from other regulated persons
- Reliance and outsourcing

# Timing

- When must CDD be undertaken?
- S.13(2) POCA requires you to verify your client's identity and that of any beneficial owner, before you establish a business relationship or carry out an occasional transaction.

# S.15 POCA - unable to complete CDD in time, you cannot:

- carry out a transaction with or for the client through a bank account
- establish a business relationship or carry out an occasional transaction and additionally section 15 POCA provides that you must also:
  - terminate any existing business relationship
  - consider making a disclosure to the GFIU

# Ongoing monitoring – S.12 POCA

- scrutiny of transactions undertaken throughout the course of the relationship, (including where necessary, the SoF), to ensure that transactions are consistent with your knowledge of the client, their business and the risk profile and their SoF.
- keeping documents, data or information obtained for the purpose of applying CDD up-to-date. You must also be aware of obligations to keep clients' personal data updated under the DPA\*.

# Customer due diligence – system may include:

- When CDD is to be undertaken
- information to be recorded on client identity
- information to be obtained to verify identity, either specifically or providing a range of options with a clear statement of who can exercise their discretion on the level of verification to be undertaken in any particular case
- when simplified due diligence may occur



- what steps need to be taken for enhanced due diligence ('EDD')
- what steps need to be taken to ascertain whether your client is a PEP
- when CDD needs to occur and under what circumstances delayed CDD is permitted
- how to conduct CDD on existing clients
- what ongoing monitoring is required

# Risks – ML, TF, further risks

- National Risk Assessment 2016
- *Solicitors Regulation Authority 2014*
- *Bar Standards Board 2016*
- *FATF Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals 2013*

## Risk (continued)

- Use by **ML or TF** of the legal profession as unwilling participants (Gibraltar NRA, 2016)
- **Money laundering** - Risk that firm or individual commits, facilitates, or is otherwise involved in money laundering (UK SRA, 2014)
- **Financial impropriety** - The risk that a barrister / other regulatory individual / chambers / entity is knowingly or unknowingly involved in financial crime or impropriety, such as money laundering or terrorist funding (UK BSB, 2016)

## Further risks

- Ineffective **systems and controls** - Risk that firm's systems and controls are ineffective (UK SRA, 2014)
- Ineffective **systems and controls** - The risk that the operational systems and controls, risk management and governance of a sole practitioner / chambers / entity / organisation are ineffective or do not meet relevant legal requirements (UK BSB, 2016)

## UK SRA risks cont'd

- **Bribery & corruption** - Risk that firm or individual commits, facilitates or is otherwise involved in bribery or other corrupt practices
- **Criminal association** - Risk that firm or individual is involved with criminal organisation/group
- **Misuse of money or assets** - Risk that firm or individual misuses money or assets

# Money Laundering Offences

- POCA applies to all lawyers and notaries, although some offences apply only to persons within a relevant financial business, or appropriate persons.
- **'Mental elements'** relevant to offences under Part 2 of POCA are:
  - knowledge
  - suspicion
  - reasonable grounds for suspicion (only RFB)

# Knowledge

- Means actual knowledge. There is some suggestion that wilfully shutting one's eyes to the truth may amount to knowledge. However, the current general approach from the criminal courts is that nothing less than actual knowledge will suffice.

# Suspicion

- The term 'suspects' is one which courts have historically avoided defining; however because of its importance in English criminal law, some general guidance has been given. Da Silva [1996] EWCA Crim 1654; was prosecuted under the previous money laundering legislation, 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.'



# Reasonable grounds to suspect

- The issues here for the lawyer or notary conducting regulated activities 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, engaged in a business in the regulated sector should have inferred knowledge or formed the suspicion that another was engaged in money laundering?

# Principal Money laundering offences/provisions ( & duties to disclose)

- Offences assume that criminal offence has occurred in order to generate the criminal property which is now being laundered (“predicate offence”).
- No conviction for the predicate offence is necessary for a person to be prosecuted for a money laundering offence.

- Also an offence to **conspire** or **attempt to launder** the proceeds of crime, or to **counsel, aid, abet or procure** money laundering.

# Section 2(1) POCA - Arrangements

- A person commits an offence if he enters into, or becomes **concerned in an arrangement** which he **knows or suspects** facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

# What is an arrangement?

- not defined in POCA
- arrangement must exist and have practical effects relating to the acquisition, retention, use or control of property by or on behalf of another person.
- Test is whether the arrangement does in fact, in **the present** and not the future, have the effect of facilitating the acquisition, retention, use or control of criminal property by or on behalf of another person.

# Sham litigation

- Created for the purposes of ML, remains within the ambit of section 2(1) POCA. Our view is that shams arise where an acquisitive criminal offence is committed and settlement negotiations or litigation are intentionally fabricated to launder the proceeds of that separate crime.
- A sham can also arise if a whole claim or category of loss is fabricated to launder the criminal property. In this case, ML for the purposes of POCA cannot occur until after execution of the judgment or completion of the settlement.

# Defences to principal money laundering offences

- Authorised disclosure & consent
- Intended to + reasonable excuse
- Commit prohibited act in carrying out a function relating to enforcement of POCA or other relevant legislation relating to criminal conduct or benefit from criminal conduct
- DAML – for GFIU to go into details, but also see GNs.

# Failure to disclose offences

- A person within a **relevant financial business** commits an offence where that person:
- **knows, suspects** or has **reasonable grounds to suspect** that another person is engaged in money laundering, or is attempting to launder money;
- the information or other matter, on which that knowledge or suspicion is based **came to his attention in the course of his trade, profession, business or employment**; and
- he **does not disclose** the information or other matter to the GFIU as soon as is reasonably practicable after it comes to his attention.
- Provided these conditions are satisfied you will be under an **obligation to disclose** such information or matters to the GFIU.
- There are **exceptions** to failure to disclose offence
  
- All relevant financial business, including for the purposes of these Guidance Notes the **legal profession**, is subject to a **higher standard** and is expected to be more aware and more alert to possible money laundering.



# Tipping-off

- Offence under 5 POCA, where you disclose certain matters which came to you in the course of a business or activity in a **relevant financial business**. Where you disclose that:
- You or another person has made a **disclosure** relating to one of the principal ML offences information that came to you in the course of a relevant financial business; or
- money laundering **investigation** is being contemplated or is being carried out.
- Numerous exceptions / defences

# Making enquiries of a client

- Nothing in POCA prevents you from making normal enquiries about your client's instructions, and the proposed retainer, in order to remove, if possible, any concerns and enable the firm to decide whether to take on or continue the retainer.

Thank you.