

# Anti-Money Laundering/Counterfeiting Financing of Terrorism Measures and the Legal Profession: Potential approaches



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# Caveats

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- This presentation seeks to raise the issues specific to the international framework for AML/CFT and to generate discussion on how best Jamaica can achieve compliance.
- The views expressed here are mine and not those of the Bank of Jamaica.
- Some material previously presented
- Based on a desk based review.
- Errors are mine.



# Agenda

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- Background (FATF/CFATF, etc)
- What FATF requires of lawyers
- Current Jamaican Framework
- The position in other jurisdictions
- Way forward



# Background

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- International AML/CFT Standards are set by the Financial Action Task Force (FATF), which is an OECD led intergovernmental body. Its work is essentially to develop international AML/CFT standards and to ensure that these are implemented around the globe.
- Key Work: development of the 40 + 9 Recommendations on Anti-Money laundering and the Countering Financing of Terrorism



# 40 + 9 Recommendations

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- 40 Recommendations on Money laundering covering: Legal framework (criminalization, seizure, MLA, Conventions, legal persons and arrangements), FIU, Financial Sector Obligations, DNFBPs, Cross Border Transportation of Cash.
- 9 Special Recommendations on TF: criminalization, actions per UNSCRs, Conventions, MLA, Non Profit Organizations



# Background

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- Regionally, Jamaica is a member of the Caribbean Financial Action Task Force, a regional FATF Styled Body (FSRB), whose members have committed to maintaining adherence to the 40 + 9 Recommendations.
- Established by the Kingston Accord in 1992;
- CFATF's core functions is to assist countries to achieve compliance via training and technical assistance. However central to the activities are the Mutual Evaluations of member countries.
- Entails a 2 week mission assessing compliance with the 40+9; Reports are published
- BOJ is prime contacts for Jamaica to CFATF



## Jamaica Last MEV in 2005

<b>Country</b>	<b>Compliant</b>	<b>Largely Compliant</b>	<b>Partially Compliant</b>	<b>Non-Compliant</b>
<b>Jamaica</b>	<b>3</b>	<b>27</b>	<b>13</b>	<b>5</b>
<b>Trinidad</b>	<b>1</b>	<b>6</b>	<b>13</b>	<b>28</b>
<b>Costa* Rica</b>	<b>1</b> <b>Also 1 N/A</b>	<b>10</b>	<b>18</b>	<b>19</b>
<b>Cayman</b>	<b>14</b>	<b>23</b>	<b>10</b>	<b>1</b>
<b>Bahamas*</b>	<b>13</b>	<b>10</b>	<b>22</b>	<b>4</b>
<b>Barbados*</b>	<b>11</b>	<b>10</b>	<b>23</b>	<b>5</b>
<b>Antigua*</b>	<b>5</b>	<b>7</b>	<b>19</b>	<b>18</b>
<b>Panama</b>	<b>11</b>	<b>27</b>	<b>9</b>	<b>1</b>



# Areas of Weakness identified

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- ML offence (fixed with passage POCA)
  - Customer Due Diligence
  - New Technologies
  - Recordkeeping (in progress)
  - DNFBPs
  - Suspicious Transaction Reporting (in progress)
  - Special attention to higher risk countries
  - Other non financial businesses and professions
  - Conventions
  - Freezing and Confiscation for TF (fixed with passage of TPA, though no listing done)





# Why compliance is important

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- Preventative/Investigative effect?
- Rec 21: FI should be required to give special attention to business relationships and transactions with persons from or in countries which do not/insufficiently apply the Recommendations. Where a country continues not to or insufficiently apply the Recommendations, countries should be able to apply appropriate countermeasures.



# Countermeasures

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Examples of possible counter-measures include:

- Stringent requirements to identify the beneficial owners before business relationships are established;
- Enhanced relevant reporting mechanisms on the basis that financial transactions with such countries are more likely to be suspicious;
- More caution in dealing with requests for approving the establishment of entities where the relevant FI is from this type of country;
- Warning businesses that transactions with persons within that country might run the risk of money laundering.
- Limiting business relationships or financial transactions with the identified country or persons in that country.



# Current FATF Procedures

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- In 1990ies, FATF employed a Non-Co-operative Country or Territory (NCCT) “Blacklist”.
- This has been replaced by the International Co-operation Review Group (ICRG), which reviews countries and publicly identifies those with “strategic deficiencies”.
- Caribbean countries listed (as at June 2011), Antigua and Barbuda, Trinidad, Venezuela, Honduras. It was noted however that these countries did have action plans and were committed to the necessary reforms.
- Listings have impact on cross border financial transactions and relations (e.g. correspondent banking relations), FDI, multi-lateral funding and international financial services.



## Who are FATF's DNFBPs (per Rec. 16)?

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- Lawyers (in certain circumstances);
- Casinos (re: transactions over a threshold);
- Accountants (in certain circumstances)
- Gem and Precious metal dealers (over a cash threshold)
- Real estate agents (in certain circumstances)
- Trust and Corporate service providers (in certain circumstances).



# Circumstances for Lawyers

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- buying and selling of real estate;
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;
- organisation of contributions for the creation, operation or management of companies;
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities.



# According to FATF Glossary

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- It is not meant to refer to ‘internal’ professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may already be subject to measures that would combat money laundering.



# FATF'S REQUIREMENTS FOR DNFBPS

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- Rec 12 requires compliance with Rec. 5 (CDD); Recs. 6 (PEPS) and 8 (Technology), 9 (Intermediaries and Introducers), 10 (Record keeping) and 11 (Unusual transactions)
- Rec. 16 requires DNFBP compliance with Rec 13 (Suspicious Transaction Reporting);
- Rec. 24 requires a competent authority or SRO responsible for monitoring/ensuring compliance with AML/CFT requirements, with adequate powers and resources.



## FATF on legal professional privilege/secretcy (re: Rec. 16 & 13)

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- Lawyers, etc. are not required to report suspicious transactions if the information was obtained in circumstances where they are subject to legal professional privilege/secretcy.
- It is for each jurisdiction to determine the matters that would fall under legal professional privilege/secretcy. This would normally cover information lawyers, receive in the course of ascertaining the legal position of their client, or in representing that client in legal/administrative/other proceedings.





## According to the Interpretative Note for Rec. 16...

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Countries may allow lawyers, notaries, other independent legal professionals and accountants to send their STRs to their appropriate self-regulatory organisations (SROs), provided that there are appropriate forms of co-operation between these organisations and the FIU.



# Supervision

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- Rec 24: Countries should ensure that categories of designated non-financial businesses and professions are subject to effective systems for monitoring and ensuring their compliance with requirements to combat money laundering and terrorist financing. This should be performed on a risk-sensitive basis.
- Rec 25: The competent authorities should establish guidelines, and provide feedback which will assist financial institutions and designated non-financial businesses and professions in applying national measures to combat money laundering and terrorist financing, and in particular, in detecting and reporting suspicious transactions.



# Critical Issue: Risk

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Rec 24. Countries should ensure that the other categories of DNFBP (including attorneys) are subject to effective systems for monitoring and ensuring compliance with AML/CFT requirements. In determining whether the system for monitoring and ensuring compliance is appropriate, regard may be had to the risk of money laundering or terrorist financing in that sector i.e. if there is a proven low risk then the extent of the required measures may be less.



# The Jamaican Framework

## POCA s. 92: General Offence

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92(1) Offence of engaging in a transaction that involves criminal property, conceals, disguises, disposes of or brings into Jamaica any such property or converts, transfers or removes any such property from Jamaica, and the person knows or has reasonable grounds to believe, at the time, that the property is criminal property.

(2) Offence if that person enters into or becomes concerned in an arrangement that the person knows or has reasonable grounds to believe the acquisition, retention, use or control of criminal property by or on behalf of another person.

(4) Defences: making an authorized disclosure, or where intended to make disclosure and good excuse for not making it, or makes a disclosure after the fact on own initiative, acting in good faith in exercise of a function.



## Second main offence s. 93

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93(1) Acquiring, using or possession of criminal property and the person knows or has reasonable grounds to believe that the property is criminal property;

(2) Defences: same disclosure defences as s. 92, bona fide purchaser, good faith in pursuing official function.



# Section 94: Reporting Offence

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- Offence committed if a person knows or reasonably suspects a person engaging in transaction that could constitute or be related to money laundering and this information came to him in the course of business in the regulated sector and the person does not make the required disclosure within 15 days (i.e. to nominated officer or the Designated Authority).
- Designated Officer is obliged under section 95 to make a report to the Designated Authority



## POCA s. 94 Obligations for Regulated Sector

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- S. 94(2) Making the required disclosure to either the nominated officer or designated authority in form and manner prescribed;
- Section 94(3) paying special attention to complex large unusual transactions, patterns of transactions that are inconsistent with normal transactions;
- S. 94(7) adhere to procedures prescribed in Regulations for the purpose of preventing detecting money laundering;



# Defences s 94(5) & (6)

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- Reasonable excuse for not disclosing the information;
- Person is an attorney & information came to him in privileged circumstances;
- There is no knowledge or suspicion of ML and the person in sector has not received training as prescribed in regulations;
- Court will consider supervisory guidance issued and procedures prescribed by regulations.





# Privileged Circumstances under POCA

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- 94(7) Information comes to an attorney-at-law in privileged circumstances if it is communicated or given to him -
- by, or by a representative of, a client of his in connection with the giving by the attorney of legal advice to the client;
- by, or by a representative of, a person seeking legal advice from the attorney-at-law; or
- by a person in connection with legal proceedings or contemplated legal proceedings:
- Provided that this subsection does not apply to information or other matter that is communicated or given with the intention of furthering a criminal purpose.



# Jamaican Framework: Relevance to lawyers

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## FOURTH SCHEDULE (Section 94)

A business is in the regulated sector if the business is-

- (a) a financial institution; or
- (b) a designated non-financial institution.

(2) In this Act, "*designated non-financial institution*" means a person who is-

- (a) not primarily engaged in carrying on financial business; and
- (b) designated as a non-financial institution for the purposes of this Act by the Minister by order subject to affirmative resolution.**



# Under the Regulations

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- **Reg 5** Requirement for regulated business to have policies on employee integrity, history, training, independent audit, compliance officer, consultation with competent authority;
- **Reg 6** Obligation on regulated business to maintain identification/ transaction verification, record keeping, internal control procedures; also keep employees aware of procedures and statutory provisions, training regarding obligations under the Act



# Under the TPA

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- Minister can designate entities to be reporting entities under s. 15(2)(c) of the TPA;
- Main obligations refer to suspicious transaction reporting and the reporting of possession or control of assets or property that belongs to a Listed Entity;
- Procedure for the DPP to list entities under s. 14 based on UN Listing and reasonable belief that entity engaged in terrorism or related offences



# Is anyone compliant with FATF?

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- Bahamas,
- Barbados,
- Cayman,
- BVI,
- UK,
- Canada
- US



# Bahamas

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- Financial Transactions Reporting Act
- Applies to a counsel and attorney, but only to the extent that the counsel and attorney receives funds in the course of that person's business otherwise than as part of services rendered pursuant to a financial and corporate service provider's licence
- (i) for the purposes of deposit or investment;
- (ii) for the purpose of settling real estate transactions; or
- (iii) to be held in a client account;



# Bahamas: Professional Privilege

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A communication is privileged if:

- (a) It is a confidential communication, whether oral or written, between —
  - (i) a counsel/attorney in his or her professional capacity and another counsel/attorney in such capacity; or
  - (ii) a counsel and attorney in his or her professional capacity and his client, whether made directly/indirectly through an agent;

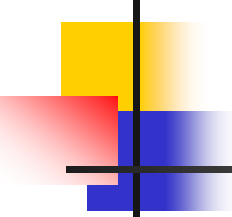


## Bahamas: Professional Privilege

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- (b) it is communicated or given to a counsel/attorney by, or by a representative of, a client of his in connection with the giving of legal advice to the client;
- (c) it is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and
- (d) it is not made or brought into existence for the purpose of committing or furthering the commission of some illegal or wrongful act.





## What's not Privileged (CC's Guidance Notes 2006)

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- For the purposes of reporting a suspicious transaction information is not considered privileged where it consists wholly or partly of, or relates wholly or partly to receipts, payments, income, expenditure or financial transactions of a specified person (whether a counsel and attorney, his client or any other person). Nor is such information considered privileged if it is contained in, or comprises the whole or part of any book, account, statement or other record prepared or kept by the counsel and attorney in connection with a clients account of the counsel and attorney.



## How does CC determine who is covered?

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If a counsel and attorney does not provide the preceding services, then he is not a financial institution for AML purposes and is not required to submit to the annual on-site examination. In such a case, the attorney should complete and submit the declaration found at the bottom of the Compliance Commission's (the Commission) registration form (Form R-1A). Where there is doubt as to whether the counsel and attorney is a financial institution, please contact the Commission's Inspector before the examination commences.



# Bahamas: Other Obligations

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- Obligations: CDD, ascertain beneficial owner, keep transaction and ID records;
- Constitutional challenge on STRs?
- Compliance Commission: A lawyer is a financial institution for AML purposes in any case where he **receives funds** in the course of his business on a client's behalf, for the purpose of (i) deposit or investment, (ii) settling a real estate transaction or (iii) holding in a client account; in circumstances where the lawyer merely acts in relation to those funds, as an agent, intermediary or conduit for the client, to facilitate the entry or placement, movement, or removal of such funds, into, within or out of the financial system.
- The FIU reports for 2009 indicates one STR from the legal profession for the year 2009 from a total of 138 from all sectors



# Compliance Commission: Powers

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- do all things necessary for the performance of its functions including entering into contracts;
- require production of records and the supply of information/explanation-
- require, at all reasonable times, a financial institution to produce transaction records, verification records and any other records prescribed by Regulations that must be kept under the FTRA; and
- require financial institutions to provide such information or explanation, as it may reasonably require, for the purpose of enabling the Commission to perform its functions under the FTRA; and
- periodically issue Codes of Practice to guide profession



# Supervisory Inspections

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- Most financial service supervisors conduct supervision by both on-site and off site methods;
- In Bahamas: THE ON-SITE EXAMINATION IS NOT AN AUDIT OF THE BUSINESS ACTIVITIES, IT IS AN AGREED UPON PROCEDURE DESIGNED TO TEST THE ADEQUACY OF AML/CFT SYSTEMS THAT HAVE BEEN IMPLEMENTED BY A LAW FIRM FOR THE PURPOSE OF MEETING ITS OBLIGATIONS UNDER THE AML/CFT LAWS AND REGULATIONS.
- 4 Types: Routine/Follow-up/Random and Special.
- On site examinations carried out by public accountants. Covers Customer identification and verification, record-keeping, suspicious transaction reporting, MLRO, internal procedures for training.
- 5 page questionnaire of 38 Questions. On STRs, info required is name/ awareness of MLRO, registration with the FIU, amount of reports made.



# Barbados: Position in May 2011

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- Per CFATF 5<sup>th</sup> Follow Up Report:
- The examiners' recommended action was for the authorities to enact measures to apply the requirements of Recommendations 5, 6, 8 to 11 and 17 to DNFBPs not licensed by the Central Bank. The situation as noted in the previous Follow-Up Report that the new MLFT Bill would extend the application of AML/CFT obligations to non-financial business entities and professionals remains unchanged awaiting the enactment of the law.



## Cayman: Proceeds of Crime Act

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136. (1) A person commits an offence if -

(a) he knows of suspects/has reasonable grounds for knowing/suspecting that another person is engaged in criminal conduct;

(b) the information or other matter on which his knowledge or suspicion is based, or which gives reasonable grounds for such knowledge or suspicion, came to him in the course of a business in the regulated sector or other trade, profession, business or employment ;

(c) he does not make the required disclosure to a nominated officer, or the Financial Reporting Authority, as soon as is practicable after the information or other matter comes to him; and

(d) the required disclosure is a disclosure of -

(i) the identity of the person who may be involved in money laundering, if he knows it;

(ii) information or other matter in the form and manner prescribed by regulations;

(iii) the whereabouts of the property with respect to which the criminal conduct is committed, so far as he knows it; and

(iv) the information or other matter mentioned in paragraph (b), or prescribed under section 201 for purposes of this section.



# Cayman: Defences

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- (2) But he does not commit an offence under this section if -
- (a) he has a reasonable excuse for not making the required disclosure;
  - (b) he is a professional legal adviser or other relevant professional adviser and the information or other matter came to him in privileged circumstances; and
  - (c) he does not know or suspect that another person is engaged in money laundering and he has not been provided by his employer with such training as is specified in guidelines issued by the Monetary Authority and published in the Gazette for the purposes of this section.





# Cayman: Money Laundering Regulations

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The Regulations require anyone engaged in "relevant financial business" activities to have in place systems and training to prevent money laundering. In particular, procedures should be put in place to:

- 1. identify clients/customers;
- 2. keep records of identification of customers and records of all transactions;
- 3. record internal reporting within the business;
- 4. monitor internal control and communication, which may be appropriate in assisting to prevent money laundering, must be in place;
- 5. ensure that employees involved in the relevant business are aware of all the procedures listed above and are aware of the relevant legislation and regulations relating to money laundering; and
- 6. ensure employees are provided with appropriate training from time to time in the recognition and handling of transactions where money laundering is or appears to be involved.



## Cayman: Definition of financial business: Schedule 2

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- Advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings
- Financial, estate agency and legal services provided in the course of business relating to the sale, purchase or mortgage of land or interests in land on behalf of clients or customers



# Cayman: To be noted

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- Although Cayman imposes AML obligations on attorneys, the jurisdiction is non-compliant as regards the requirement for supervision for compliance.
- However majority of firms are engaged in Relevant Financial Business , eg, Trust Co., Company Management, Mutual Funds, Corporate Services Providers, etc and are therefore supervised by the Monetary Authority;
- Authorities are in process of passing law to pass remaining supervisory responsibility to the FRA;
- Based on the FRA Report for 2009-2010 Attorneys made 3% of the 358 reports made to the FIU over the period.



# BVI Anti Money Laundering Regulations

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## Applies to Relevant Business:

- the provision of services to clients by legal practitioners, notaries public or accountants which involve transactions concerning any of the following activities:
  - (i) buying and selling of real estate;
  - (ii) managing of client money, securities or other assets;
  - (iii) management of bank, savings or securities accounts;
  - (iv) organization of contributions for the creation, operation or management of companies; and
  - (v) creation, operation or management of legal persons or arrangements, or buying and selling of business entities;



# BVI: Also Relevant Business

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- providing advice on capital structure, industrial strategy and related matters, and advice and services relating to mergers and the purchase of undertakings;



## Obligations: BVI 2009 Anti Money laundering and Terrorist Financing Code of Practice

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- Internal systems and controls, risk based approach, ensure compliance with reporting obligations, internal systems for reporting, systems for monitoring and testing, CDD measures in a variety of circumstances, record-keeping (including outsourcing), employee training screening.
- This code is issued under the Criminal Conduct statute thus has the status of subsidiary legislation



# Supervision

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- The Code gives the Financial Investigations Agency at Article 8 the power to carry out examinations of all entities to which the Code applies (except those already regulated by the FSC);
- It must issue a report of its findings and make recommendations for achieving compliance within a given time period;
- Failure to comply constitutes an offence under section 27(4) of the Act



## UK POCA section 330

### Failure to disclose: regulated sector

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- (1) A person commits an offence if each of the following three conditions is satisfied.
- (2) The first condition is that he—
  - (a) knows or suspects, or (b) has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering.
- (3) The second condition is that the information or other matter—
  - (a) on which his knowledge or suspicion is based, or (b) which gives reasonable grounds for such knowledge or suspicion, came to him in the course of a business in the regulated sector.
- (4) The third condition is that he does not make the required disclosure as soon as is practicable after the information or other matter comes to him.
- (5) The required disclosure is made to a nominated officer or a person authorised for the purposes of this Part by the DG of the NCIS in form manner prescribed;





# UK: Defences

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- (a) He has a reasonable excuse for not disclosing;
- (b) He is a professional legal advisor and the information came to him in privileged circumstances
- (c) He had no knowledge or suspicion and had not received the appropriate training



# UK: Privilege

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- Privileged circumstances if the information communicated by the client (or representative) in connection with the giving of legal advice by the adviser or given by a person seeking legal advice from the advisor, or by a person in connection with legal proceedings or contemplated legal proceedings.
- Doesn't include communications in furtherance of a criminal purpose.



## UK Money Laundering Regs 3(9)

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- Applies to “Independent legal professional” means a firm or sole practitioner who by way of business provides legal or notarial services to other persons, when participating in financial or real property transactions concerning—
  - (a) the buying and selling of real property or business entities;
  - (b) the managing of client money, securities or other assets;
  - (c) the opening or management of bank, savings or securities accounts;
  - (d) the organisation of contributions necessary for the creation, operation or management of companies; or
  - (e) the creation, operation or management of trusts, companies or similar structures,



## UK Obligations under Regs

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- Customer Due Diligence (including beneficial owner);
- Subject to treasury offices directives re: countermeasures;
- Record keeping,
- Appointment of a nominated officer
- Internal control and risk assessment procedures
- Procedures for recognizing suspicious transactions & PEPs
- Training

NB: Over period Oct 2007 to September 2010 Legal profession provided 2.4% of all SARS to SOCA



# Supervision: Money Laundering Regulations

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**24.—**(1) A supervisory authority must 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 requirements of these Regulations.

(2) A supervisory authority which, in the course of carrying out any of its functions under these Regulations, knows or suspects that a person is or has engaged in money laundering or terrorist financing must promptly inform the Serious Organised Crime Agency.

(3) A disclosure made under paragraph (2) is not to be taken to breach any restriction, however imposed, on the disclosure of information



# Supervisors

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- Each of the professional bodies listed in Schedule 3 is the supervisory authority for relevant persons who are regulated by it;
- Council for Licensed Conveyancers
- Faculty of Advocates
- General Council of the Bar
- General Council of the Bar of Northern Ireland
- Institute of Chartered Accountants in England and Wales
- Institute of Chartered Accountants in Ireland
- Law Society
- Law Society of Scotland



# Supervisory Powers

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- To require information & attendance;
- Entry and inspection without warrant (does not include information that attorney would be entitled to refuse to disclose on grounds of LPP, but may be require to provide name and address of client);
- Information only as necessary for discharge of duties;
- Supervisor may apply to court for order directing licensee to provide information;
- Guidance has been issued by many of these Supervisors
- The Law Society of Scotland (LSS) has made the requirement to comply with the MLRs part of its professional conduct rules, and has extended the requirement to all practices and all their business as if it were 'relevant business' under the legislation



# Law Society of England and Wales

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- Breaches of the Money Laundering Regulations are treated as a **material breach of the professional conduct rules, more specifically by bringing the profession into disrepute**. The LSEW has the power to impose administrative sanctions such as imposing conditions on a solicitor's practising certificate, intervening and taking control of a solicitor's practise, imposing fines and revoking a solicitor's practicing certificate (i.e. "striking off").
- The LSEW also utilizes administrative measures which can take the form of reports requiring a firm to improve an aspect of compliance





# LSEW Outreach (MEV Report)

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- In order to raise solicitors' awareness of money laundering and terrorist financing, the Law Society has applied resources towards communication and outreach with the profession in the following ways:
  - Anti-Money Laundering road shows;
  - The establishment of 11 regional groups for Money Laundering Reporting Officers ("MLROs");
  - A dedicated anti-money laundering area of the Law Society's web-site ([www.moneylaundering.lawsociety.org.uk](http://www.moneylaundering.lawsociety.org.uk));
  - An online AML discussion forum for MLROs;
  - A monthly e-newsletter that keeps solicitors up-to-date with key AML issues;
  - Guidance to practitioners via the "Ethics Helpline".



# Bowman v Fels: Litigation

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The judgment in *Bowman v. Fels*[2005-EWCA civ226] was concerned with the scope of s.328 of POCA, which creates the offence of facilitating money laundering.

The Court's conclusion was that the provision by a lawyer of professional services to a client by way of advice and representation in the conduct and settlement of litigation could never mean that he was "*concerned in an arrangement [for] ... the acquisition, retention, use or control of ... property*".

In other words, regardless of what suspicions or knowledge a lawyer might acquire in the course of acting professionally in litigation, he cannot commit an offence under s.328(1) while so acting, and as a result there is no need for him to make an authorised disclosure under s.328(2) in relation to any material obtained by him in the course of litigation.



## R v Duff (2002 EWCA Crim 2117)

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- Case as to whether a solicitor should have reported transactions where the suspicion was as regards past financial transactions;
- Guilty plea, sought reduction in sentence
- “Here was a case where a **solicitor** received £70,000 in cash in the space of a month. He became concerned about the matter in October 1998. The money had been put in part into fictitious names. He did not seek advice immediately in October 1998 but only sought it in April 1999. Clearly for the six months from October 1998 to April 1999 he was courting a risk that his suspicions were reportable. Thereafter he can perhaps claim some benefit for acting under legal advice. He was not, as we have said, entirely co-operative with the authorities at his initial arrest. We have set out the circumstances advanced to excuse that. Money laundering is, of course, a very serious matter and breaches of the legislation by professional people cannot be overlooked. We agree with the learned judge about that”.



## R v McCartan[2004] NICA 43

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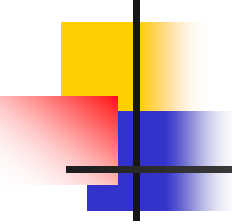
- The applicant is a solicitor mainly working in conveyancing .
- In July 2000 a mortgage broker, with whom the applicant had had a professional relationship for some three years, referred a client to the applicant. The client, a Mr Walsh, wished to buy a newly constructed dwelling in a development in Glengormley.
- The purchase price was £100,000 and a mortgage application had been made for £50,000. Before he referred the client to the applicant, Mr Anderson had alerted police to suspicions regarding Walsh's ability to produce £50,000. He nevertheless filled in and proceeded with the mortgage application on Walsh's behalf and the application was submitted to the mortgage company.
- The applicant was named on the application as the purchaser's **solicitor**. An offer for £50,000 was made on 2 October 2000 and monies were transferred on 8 January 2001 when the purchase was completed.



## R v McCartan[2004] NICA 43

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- The first offence relates to the failure of the applicant to alert police to suspicions that he is alleged to have had that Walsh was engaged in **money laundering** the proceeds of drug trafficking. At no time during the transaction did Mr McCartan meet purchaser. He could not have done so because purchaser was in prison. The applicant claims that he did not know that or that purchaser had a substantial criminal record.
- The applicant dealt at all times through an intermediary, who took £70,250 in cash and cheques to Mr McCartan's offices on 8 January 2001. as a deposit for the purchase of the house. The applicant did not see the **money** but simply made out a lodgment slip to enable the lodgment into the client account.
- He told police that at the time the **money** was deposited he became suspicious but he satisfied himself of Mr Walsh's antecedents by speaking to Mr. Anderson. According to the applicant, Mr Anderson told him that Walsh was a car dealer and was therefore accustomed to have large sums of **money** in cash.
- It was a guilty plea, CA varied the sentence to suspend balance.



## Canada: Proceeds of Crime (Money Laundering) and Terrorist Financing Act

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- The Act requires regulated persons and entities to report suspicious transactions and certain other financial transactions (later prescribed in regulations as those involving \$10,000 or more in cash). Reporting persons are prohibited from “tipping off” their client about having made the report. Reports must be made to the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”), a federal agency which was set up to receive and analyze financial intelligence and disclose it to police.



## Law Society of British Columbia v Canada (Attorney General) 2001 BCSC 1593.

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- Law society and the Federation of Law Societies of Canada tested the constitutionality of the application of the law to Canadian attorneys in the Supreme Court of British Columbia.
- Application for interlocutory relief granted. AG has agreed to general adjournment
- Allan, J: *“The proclamation of s. 5 of the Regulations authorizes an unprecedented intrusion into the traditional solicitor-client relationship. The constitutional issues raised deserve careful consideration by the Court. The petitioners seek a temporary exemption from the legislation until the merits of their constitutional challenge can be determined. I conclude that the petitioners have satisfied the tripartite test for the exemption they seek. They are entitled to an order that legal counsel are exempt from the application of s. 5 of the Regulations pending a full hearing of the Petitions on their merits.”*



# Canada: Other measures

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- Federation of Law Societies implemented own AML/CFT measures: No Cash Rule restricts acceptance over C\$7500 and Rules on Customer Identification and Verification Requirements.
- Proceeds of Crime Money Laundering and Financing of Terrorism Regulations, 2007: Applies to lawyers and firms Customer identification and due diligence, record-keeping, compliance and review programmes, appointment of an officer to implement these programmes.
- Not clear whether various law societies are supervisors for the purposes of the statutory obligations under the Regulations





# United States: ABA's Good Practice Paper

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- Adopted by the American Bar Association August 2010
- *“At the same time, this paper is not intended to be an academic exercise. The federal government is under pressure from FATF and others (including development agencies, the Organisation for Economic Co- Operation and Development, the International Monetary Fund, The World Bank, and the United Nations) to adopt legislation implementing some or all of the provisions of the Recommendations relating to the legal profession. An overarching purpose of this paper is to encourage lawyers to develop and implement voluntary, but effective, risk-based approaches consistent with the Lawyer Guidance, thereby negating the need for federal regulation of the legal profession”.*



## Areas Covered: Good Practice Paper

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- Guidance on how to assess the ML/TF risks;
- CDD: identification/verification of clients/beneficial owners and understanding the clients circumstances and business;
- Specified activities (real estate, managing assets, managing accounts, organization/creation of legal persons/trusts)
- Risk Categories: Geographical risks, client risks, service risks (e.g. "touch the money" services)
- Several cases given of high/low risk situations;
- Measures to mitigate include training, peer oversight, client acceptance standards, ongoing assessment of clients and services, enhanced and simplified CDD measures



## Where unacceptable levels of risk...

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ABA: Not every risk-based approach analysis of a potential client will inexorably lead to the conclusion that, with appropriate controls, the lawyer can accept and proceed with the proposed engagement. It may be possible that the lawyer's analysis will lead the lawyer to reject the engagement or to withdraw from the representation. Rule 1.16 of the ABA Model Rules of Professional Conduct governs declining or terminating the lawyer-client relationship. When faced with a situation where the lawyer is compelled to decline or terminate the relationship, the lawyer should comply with the requirements of the applicable rules of professional conduct, including Model Rule 1.16 or its equivalent

WHAT IS CLEAR IS THAT A VOLUNTARY APPROACH IS STILL NOT COMPLIANT WITH FATF.



# Summary

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- Many jurisdictions are struggling with this issue;
- In Jamaica, Minister can designate the profession which would open the door for imposing POCA AML obligations, including CDD, Record-keeping obligations of the regulated sector to report;
- Some activities under POCA not quite what's required under FATF;
- FATF only specifies attorneys in certain activities;
- FATF allows jurisdictions to indicate the scope of privilege;
- There is no current regime for AML/CFT supervision for DNFBPs, which is key to an effective DNFBP regime. Supervisors can provide guidance on privilege, sensible measures to deal with risk given size and types of practices, consider enforcement and monitoring issues;
- We propose incorporating in the POCA generic provisions relating to key powers of DNFBP supervisors : namely power to request information, power to inspect premises, power to treat breaches of law as breach of professional rules. All subject to normal rules of legal professional privilege.



# If Minister designates under 4<sup>th</sup> Schedule....

<b>POCA (obligations of regulated sector)</b>	<b>FATF</b>
<p>s. 94, 95 Suspicious Transaction Reporting</p> <p>s. 97 Tipping off prohibition</p> <p>r. 5 Policies/controls for ensuring high standards of integrity of employees, evaluation of history and background, training, independent audit, officer to implement these programmes;</p> <p>r. 6 customer identification, record-keeping, internal controls and communications;</p> <p>keeping employees aware of obligations;</p> <p>r. 15 internal reporting procedures</p>	<p>Rec 12 requires compliance with Rec. 5 (CDD);</p> <p>Recs. 6 (PEPS)</p> <p>Rec. 8 (Technology),</p> <p>Rec. 9 (Intermediaries and Introducers),</p> <p>Rec. 10 (Record keeping)</p> <p>Rec. 11(Unusual transactions)</p> <p>Rec. 16 requires DNFBP compliance with Rec 13 (Suspicious Transaction Reports);</p>



# Supervision of the profession

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- Rec. 24 requires a competent authority or SRO responsible for monitoring/ ensuring compliance with AML/CFT requirements, with adequate powers and resources.
- POCA section 91 speaks to Competent Authority who is designated by the Minister and who is authorized to monitor compliance and to issue guidance on how to prevent money laundering.
- Who would be the appropriate Competent Authority for the profession (Governmental or SRO)? Staffing? Financing? Methodologies?
- Regime will be ineffective without supervision to monitor compliance.



# Questions to consider

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- Supervisor? How is that financed?
- How to determine if your practice would be covered. Could we rely on declarations?;
- What's appropriate guidance on STR/LPP issues?
- Would profession report to GLC? Relationship between GLC and FID?
- What's appropriate guidance on non-STR issues to the industry that's appropriate and cost effective?;
- What's appropriate regime for monitoring that's appropriate and costs effective?
- What would the sanctions for non-compliance?



# Way Forward

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- Commitment of the authorities to continue discussions with the various DNFBNs as to the appropriate way forward and the shape of the regime.
- Need to realign POCA with FATF requirements;
- May require amendments to other supervisory laws (e.g. Legal Professions Act);
- Financial implications as well (public and private);
- Work with the GLC on potential approaches





The End

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Thank you