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The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach

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I. INTRODUCTION

The international efforts to fight money laundering (often referred to as "anti-money laundering efforts" or AML) and to combat the financing of terrorism (often referred to as CFT) have a long history. The efforts of the Financial Action Task Force (FATF)[1] began in earnest in the mid-1980s with the original Forty Recommendations (the "Recommendations"),[2] which initially focused on committing member jurisdictions to adopt legislation and regulation to compel financial institutions to participate in the AML and CFT effort. It was not until the early 2000s when the FATF turned its attention towards other actors in the financial system, including lawyers, accountants, and other professionals denominated by the FATF as "designated non-financial businesses and professions" (DNFBPs).[3] For example, Recommendations 22 and 23 specifically impose on DNFBPs obligations initially applicable to financial institutions.[4] As is clear from these Recommendations,

1. Established in 1989, the Financial Action Task Force (FATF) is an international organization composed of thirty-four member states and two regional organizations. Member states are typically represented by their ministries of finance or, in the case of the United States, the Department of the Treasury. The FATF aims to set standards to encourage the implementation of legal and regulatory policy in its member states to combat money laundering and terrorist financing. The FATF issues Recommendations, revised periodically, that reflect the standard policy principles to effectively combat money laundering and terrorist financing. The FATF imposes an ongoing review process upon its member states to determine the efficacy of anti-money laundering (AML) and combating the financing of terrorism (CFT) policies implemented in each member state. The FATF Recommendations are non-binding on the member states; however, it has been recognized as one of the most effective international organizations in encouraging policy reform to combat money laundering and terrorist financing, and to preserve the integrity of the international financial system. *About the FATF*, Fin. Action Task Force, http://www.fatf-gafi.org/pages/aboutus/ (last visited Apr. 10, 2015).

2. The original FATF Forty Recommendations were issued in 1990. Fin. Action Task Force, The Forty Recommendations of the Financial Action Task Force on Money Laundering (1990), *available at* http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf. The Recommendations were revised in 1996, 2003, and most recently in 2012. *See* Fin. Action Task Force, The FATF Recommendations (Feb. 15, 2012) [hereinafter 2012 Recommendations], *available at* http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf. In 2004, an additional nine Special Recommendations were published and, until 2012, the FATF Recommendations were referred to as the "40+9 Recommendations." In 2012, the 40+9 Recommendations were revised and consolidated into the "2012 Forty Recommendations." *See About Us*, Fin. Action Task Force, http://www.fatf-gafi.org/pages/aboutus/historyofthefatf/ (last visited Feb. 11, 2015) (describing the progression of the Special Recommendations from 2001 to 2004 and their integration with the 2012 Recommendations). Throughout this article, unless otherwise provided, references to the "Recommendations" or the "Forty Recommendations" will refer to the Forty Recommendations published in 2012.

3. The FATF first defined "designated non-financial businesses and professions" (DNFBPs) in the June 2003 version of the Forty Recommendations. *See* Fin. Action Task Force, The Forty Recommendations 8 (June 20, 2003) [hereinafter 2003 Recommendations], *available at* http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf (Recommendation 24).

4. FATF Recommendation 22, entitled "DNFBPs: customer due diligence," states:

> The customer due diligence and record-keeping requirements set out in Recommendations 10, 11, 12, 15, and 17, apply to designated non-financial businesses and professions (DNFBPs) in the following situations:
>
> . . . .

FATF members are committed to applying a broad swath of the Recommendations, initially designed for financial institutions, most lawyers involved in transactional work (particularly those handling real estate, trusts and estates), and other corporate transactional matters.

In 2006, the FATF conducted its third evaluation of the United States as part of the periodic Mutual Evaluation process[5] built into the FATF system.[6] In the final report, it was determined that lawyers were noncompliant with the Recommendations applicable to them.[7] In particular, U.S. lawyers were found noncompliant with Recommendations 5, 6, and 8–11 (of the 2003 Recommendations) because U.S. lawyers have no formal customer due diligence (CDD) requirement. Moreover, U.S. lawyers were found noncompliant with Recommendations 13–15 and 21 (of the 2003 Recommendations) because U.S. lawyers did not have suspicious transaction reporting (STR) or no-tipping-off (NTO) obligations.[8] Since 2006, a combination of public and private sector institutions in the United States have worked together to develop mechanisms for involving U.S. lawyers in the AML and CFT process. These efforts have focused largely on education through: the development of the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money

(d) Lawyers, notaries, other independent legal professionals and accountants—when they prepare for or carry out transactions for their client concerning the following activities:
- 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.

2012 Recommendations, *supra* note 2, at 19–20. FATF Recommendation 23, entitled "DNFBPs: Other measures," states that Recommendations 18–21—relating to internal controls, higher risk countries, suspicious transaction reporting, and no-tipping-off, respectively—should apply to DNFBPs. *Id.* at 20–21.

5. As a condition to FATF membership, member states consent to a periodic review by FATF experts of their legal, regulatory, and operational systems' framework and compliance with the Recommendations. Experts also visit the member state to conduct interviews and to perform research to analyze the degree of compliance with the Recommendations, in addition to the effectiveness of the member state's AML and CFT policies. The reviewing team then produces a lengthy Mutual Evaluation Report (MER). The result of the MER is a comment on the risk posed by the member state's laws, policies, and institutional framework to the integrity of the international financial system with respect to the AML and CFT effort. *See* Fin. Action Task Force, Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations 3–4, *available at* http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf (last updated June 2014) (explaining the general scope and objectives of the fourth round of Mutual Evaluations, part of which the United States is currently in the process of reviewing).

6. Fin. Action Task Force, Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism, United States of America (June 23, 2006) [hereinafter U.S. Third Mutual Evaluation], *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf.

7. *Id.* at 300.

8. *Id.*

Laundering and Terrorist Financing by the American Bar Association (ABA);[9] the issuance of the ABA's May 2013 Formal Opinion 463: Client Due Diligence, Money Laundering, and Terrorist Financing;[10] and an enormous commitment by the ABA, The American College of Trust and Estate Counsel (ACTEC), and others to conduct seminars and other programs to educate lawyers on these important issues. The history and details of these efforts have been thoroughly addressed elsewhere, including this issue of the *New York Law School Law Review*.[11]

In the course of participating in many of these efforts, it has become clear to the authors that many U.S. lawyers have a defined and understandable skepticism about their role in these matters.[12] Some may believe that they have never been involved with, or will ever find themselves in, a situation where a current or potential client seeks advice where AML or CFT concerns arise. The predominant purpose of the educational efforts of the ABA, ACTEC, and others is to educate lawyers on the ways they might become inadvertently involved in such matters. Others seem to believe that—given the history of the relatively minimal regulation of lawyers in the United States and the traditional role of the states in governing the behavior of lawyers, particularly the role of

9. *See generally* Am. Bar Ass'n, Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (April 23, 2010) [hereinafter Good Practices Guidance], *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_gtfgoodpracticesguidance.authcheckdam.pdf (describing money laundering and terrorist financing, and providing risk and due diligence guidance for practitioners).

10. *See generally* Am. Bar Ass'n, Formal Opinion 463: Client Due Diligence, Money Laundering, and Terrorist Financing (May 23, 2013) [hereinafter Formal Opinion 463], *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_463.authcheckdam.pdf (offering guidance to lawyers and encouraging the implementation of risk-based control measures, in the context of preventing money laundering and the financing of terrorism, to avoid assisting in illegal conduct while preserving lawyers' continued obligations under the Model Rules of Professional Conduct ("Model Rules")).

11. See generally *New York Law School Law Review* issue 59.3, based on the April 25, 2014 symposium held at New York Law School, entitled: "Combating Threats to the International Financial System: The Financial Action Task Force." 59 N.Y.L. Sch. L. Rev. 417–602 (2014–2015).

12. For example, in 2003 and 2008, the ABA adopted the "gatekeeper" resolutions, which announced the ABA's position with respect to the prospect of the application of the FATF Recommendations to lawyers through federal legislative or regulatory action. The resolutions declare that the regulation of lawyers should remain a state matter and that the preservation of the principles of confidentiality must be preserved, while recognizing that lawyers have a role to play in the AML and CFT effort. Am. Bar Ass'n Task Force on Gatekeeper Regulation & the Profession, Section of Real Prop., Probate & Trust Law, Criminal Justice Section, Section of Litig., Section of Int'l Law & Practice, Report to the House of Delegates (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/leadership/recommendations03/104.authcheckdam.pdf; Am. Bar Ass'n, Adopted by the House of Delegates (2008) [hereinafter Recommendation 300], *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2008_am_300.authcheckdam.pdf. See the ABA's web site on the Gatekeeper Task Force for a great deal of information and resources regarding the ABA's position with respect to the U.S. lawyer's role in AML and CFT. *Task Force on Gatekeeper Regulation and the Profession*, Am. B. Ass'n, http://www.americanbar.org/groups/criminal_justice/gatekeeper.html (last visited Apr. 10, 2015). The ACTEC web site on the FATF and the lawyer's role offers the same. *Combatting Money Laundering; FATF and the Lawyer's Role*, Am. Coll. Trust & Est. Counsel, http://www.actec.org/public/fatf.asp (last visited Apr. 10, 2015).

the various state high courts in this regard—there is simply no way the federal government can or will impose mandatory AML and CFT requirements on lawyers.

It is instructive for U.S. lawyers to study the AML and CFT requirements that are imposed on U.S. financial institutions, which are designed to comply with the FATF Recommendations. Perhaps even more instructive is to understand how AML and CFT requirements are imposed on our fellow lawyers in the United Kingdom, since U.K. attorney-client relationships are similar to those in the United States and many of our U.S. legal traditions derive from English law and practice. Many U.S. private client, real estate, and transactional lawyers routinely work with their counterparts in the United Kingdom.

Exploring how the United Kingdom has applied the FATF Recommendations to solicitors serves two purposes. First, if the Recommendations (as they apply to DNFBPs) were ever to be implemented in the United States, their legislative or regulatory implementation would probably be similar to the United Kingdom's policy regime. Second, and more importantly, U.S. lawyers can only comprehend how such laws may alter their legal practice, as well as implicate and violate the Model Rules of Professional Conduct ("Model Rules"), by considering the actual terms and application of such laws.[13] Part II of this article describes the two major AML laws in the United Kingdom. Further, Part II explains how the laws apply to solicitors, details how the concepts of privilege and confidentiality are addressed by the laws, and provides a general explanation of how the system operates in practice. Part III offers commentary on the United Kingdom's AML approach through the lens of the traditional principles of U.S. legal ethics.

II. INTRODUCTION TO THE TWO MAJOR AML LAWS IN THE UNITED KINGDOM

The European Union adopted the First and Second Anti-Money Laundering Directives in 1991[14] and 2001.[15] These directives were based on the original Forty

13. In the United Kingdom's 2007 MER, DNFBPs earned better grades than U.S. lawyers for their participation in the AML and CFT effort. *See* U.S. Third Mutual Evaluation, *supra* note 6, at 299, 302–03; Fin. Action Task Force, Third Mutual Evaluation Report Anti-Money Laundering and Combating Financial Terrorism: The United Kingdom of Great Britain and Northern Ireland 283–85 (June 29, 2007), *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20UK%20FULL.pdf. The International Monetary Fund, amplifying the U.K. 2007 MER, noted that the implementation of The Money Laundering Regulations 2007 further improved DNFBPs' compliance with the Recommendations. *See generally* Int'l Monetary Fund, United Kingdom: Anti-Money Laundering/Combating the Financing of Terrorism Technical Note (July 2011), *available at* http://www.imf.org/external/pubs/ft/scr/2011/cr11231.pdf (providing an overview of the United Kingdom's anti-money laundering and terrorism financing legal framework).

14. Council Directive 91/308, 1991 O.J. (L 166) 77–83 (EEC). According to article 288 of the Treaty on the Functioning of the European Union, "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 171–72. Accordingly, each of the anti-money laundering directives was independently binding on the EU member states and it was incumbent on each state to implement policies consistent with each anti-money laundering directive.

15. Council Directive 2001/97, 2001 O.J. (L 344) 76–81 (EC).

Recommendations, and the Recommendations as modified in 1996.[16] Crucial to those directives (and the Recommendations) were the STR/NTO requirements, which improve the ability of investigative authorities to monitor financial activity to prevent the use of the economic system for money laundering or the financing of terrorism. In 2003, the FATF revised the original Forty Recommendations to extend the application of STR/NTO and CDD to DNFBPs.[17]

In 2005, the European Union adopted the Third Anti-Money Laundering Directive,[18] also based on the 2003 version of Recommendation 10.[19] European Economic Area countries, including the United Kingdom, were required to implement the Third Directive by the end of 2007.[20] This directive changed the procedures for customer identification and documentation, also known as "customer due diligence," expanding it to expressly require those subject to a CDD requirement to understand the nature and identity of the beneficial owner(s) of an entity, trust, or estate.[21] While the Second Directive required evidence gathering on the client, the Third Directive adopted more of a risk-based approach to ensure that those subject to a CDD requirement acquire the necessary information.

Among other legislation,[22] the United Kingdom adopted the Proceeds of Crime Act 2002 (POCA) to implement an STR/NTO regime with respect to money laundering for financial institutions and, soon after, expanded the application of the STR/NTO obligations to lawyers after the implementation of the 2003 FATF Recommendations.[23] The United Kingdom previously enacted limited STR obligations on lawyers with respect to certain major offenses, such as drug trafficking,[24] but POCA expanded the definition of money laundering to all crimes and all criminal property.[25]

In the United States, STR/NTO and CDD is nothing new for our financial institutions. The Bank Secrecy Act of 1970, as modified by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and

16. Laurel S. Terry, *An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance*, J. Prof. Law., 2010, at 3, 29.

17. *See* 2003 Recommendations, *supra* note 3, at 5 (Recommendation 12).

18. Council Directive 2005/60, 2005 O.J. (L 309) 15 (EC) [hereinafter 2005 EU Directive].

19. Terry, *supra* note 16, at 29 n.110.

20. 2005 EU Directive, *supra* note 18, art. 45.

21. 2012 Recommendations, *supra* note 2, at 14–15 (Recommendation 10).

22. Examples of other U.K. AML and CFT laws include the Terrorism Act, (2000) c. 11 (as amended by the Anti-terrorism, Crime and Security Act, (2001) c. 24); the Terrorism Act, (2006) c. 11; and The Transfer of Funds (Information on the Payer) Regulations, (2007) S.I. 2007/3298.

23. Proceeds of Crime Act, (2002) c. 29 (U.K.) (Business in the Regulated Sector and Supervisory Authorities) Order 2003 (effective Mar. 1, 2004; amended at pt. 2, sch. 9, para. 4(1)(f)(g) by S.I. 2003/3074, art. 3).

24. *See, e.g.*, Drug Trafficking Act, 1994, c. 37, § 52.

25. *See, e.g.*, Proceeds of Crime Act § 340 (defining criminal conduct as conduct that is illegal in the United Kingdom or would be illegal if it occurred there, and defining criminal property); *see also* discussion *infra* Part II.B.1.

Obstruct Terrorism Act of 2001 (USA PATRIOT Act),[26] imposes substantial CDD and STR obligations on "financial institutions," which is broadly defined but does not include most DNFBPs.[27] Those laws, but for their inapplicability to most DNFBPs, currently implement the major STR/NTO and CDD aspects of the FATF Recommendations in the United States,[28] however a thorough survey of these laws is beyond the scope of this article.

The next sections describe the Money Laundering Regulations 2007, POCA, and, specifically, the impact of these laws on solicitors in the United Kingdom.

A. U.K. Money Laundering Regulations 2007

The U.K. Parliament adopted the Money Laundering Regulations 2007 ("Regulations") to implement the CDD requirements of the European Union's Third Money Laundering Directive and 2003 FATF Recommendation 10.[29] This section explains how the Regulations apply to U.K. solicitors and describes the CDD requirements imposed on them and others.

1. Regulation 3: Relevant Persons and How Solicitors Are Subject to the Money Laundering Regulations 2007

Regulation 3 provides that, but for a few exceptions, the Regulations apply to "relevant persons," which includes financial institutions and DNFBPs.[30] Many aspects of legal practice may cause a solicitor to be a relevant person.[31] For example, real estate transactional services, certain aspects of trusts and estates practice, tax planning, and corporate formation services are all regulated activities for solicitors.[32] Litigation and advisory services are not regulated activities, and a solicitor performing such services is not under any CDD obligation pursuant to the Regulations, unless during the course of such representation the solicitor engages in some type of regulated activity. U.K. lawyers practicing exclusively criminal law or employment

26. *See* 31 U.S.C. §§ 5311–5332 (2013); *see also* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

27. 31 U.S.C. § 5312(a)(2).

28. The Bank Secrecy Act of 1970 (BSA), as modified by the USA PATRIOT Act, requires financial institutions to make suspicious activity reports and specifically prohibits tipping off. 31 U.S.C. § 5318(g). These parallel Recommendations 20 and 21. *See* 2012 Recommendations, *supra* note 2, at 19. Additionally, the BSA requires financial institutions to implement CDD measures. § 5318(i).

29. The Money Laundering Regulations, 2007, S.I. 2007/2157.

30. *Id.* ¶ 3(1).

31. See *id.* ¶ 3(1)(c)–(f) and the definitions for the same in ¶ 3(8)–(11), which track closely with the definitions of DFNBPs from FATF Recommendation 22. *See also* 2012 Recommendations, *supra* note 2, at 19–20 (Recommendation 22).

32. The Money Laundering Regulations, 2007, S.I. 2007/2157, ¶ 3.

litigation, for example, may never be subject to the Regulations. However, all other corporate, transactional, and trust work is regulated activity.[33]

2. Customer Due Diligence Obligations Under the Money Laundering Regulations 2007

In connection with 2003 FATF Recommendation 10 and the EU Directives' objective to maintain transparency in financial transactions for monitoring and investigative purposes, relevant persons must apply CDD. CDD can be summarized as identifying and verifying the identity of the client and the client's "beneficial owner," if different, for whom the solicitor is working at the beginning of the relationship, and maintaining and monitoring an ongoing client file, which contains the identifying information. A relevant person can be required to supply CDD files to investigative authorities and may be subject to criminal sanction for failing to comply with his CDD requirements.[34]

Under Regulation 7, a relevant person must apply CDD measures when he: "(a) establishes a business relationship; (b) carries out an occasional transaction; (c) suspects money laundering or terrorist financing; [or] (d) doubts the veracity or adequacy of documents, data or information previously obtained for the purposes of identification or verification."[35] "Customer due diligence measures" is defined in Regulation 5 as:

> (a) identifying the customer and verifying the customer'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 and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person 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; and
>
> (c) obtaining information on the purpose and intended nature of the business relationship.

In addition to the CDD requirements detailed above, a relevant person is required to monitor the relationship on an ongoing basis.[36]

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33. *Id.* It is the authors' understanding that, due to the breadth of Regulation 3, many solicitors and every full-service law firm behave in practice as though they were perpetually subject to the Regulations. As a matter of course, they conduct CDD regardless of whether a particular engagement falls into one of the foregoing categories because: (1) it is good practice to do so; and (2) clients for whom a solicitor is currently engaged to provide litigation or advisory services may eventually require services that would cause the solicitor to engage in regulated conduct that would give rise to a CDD obligation.

34. *See* The Money Laundering Regulations 2007, S.I. 2007/2157, ¶¶ 36–47.

35. *Id.* ¶ 7(1).

36. Generally, ongoing monitoring means scrutinizing client transactions as they occur during the course of the relationship (including the source of funds) and ensuring that the relevant data is kept current. *Id.* ¶ 8.

A particularly burdensome requirement for those who must perform due diligence (particularly solicitors) with respect to customers who are entities, such as corporations, partnerships, or trusts and estates, is to identify the "beneficial owner" of the entity.[37] Generally, a beneficial owner of a corporation, partnership, or trust is defined as an individual with at least a twenty-five percent interest in the shares or voting rights of a corporation, partnership, or trust capital, and any individual who exercises control over the entity.[38] The Regulations prohibit carrying out the transaction or establishing the business relationship if the CDD cannot be completed on time.[39] Relevant persons are required to maintain CDD records (for potential production to investigatory authorities), implement policies and procedures for performing CDD, and train their staff to both recognize situations that potentially implicate money laundering and terrorist financing concerns and understand their responsibilities when red flags are raised.[40]

3. Customer Due Diligence from the U.S. Perspective

Implementing a formal (i.e., statutorily imposed) CDD regime in the United States may or may not implicate the ethical obligations of U.S. lawyers. In fact, in Formal Opinion 463, the ABA advocated the position that not only is CDD not unethical, but it is proper if limited in scope.[41] The Conference of Chief Justices, relying in part on Formal Opinion 463, recently endorsed the ABA's Voluntary Good Practice Guidance,[42] which details recommended practices and procedures for CDD.[43]

Most U.S. lawyers likely perform informal due diligence on most clients, which may be of a higher level with certain engagements. The due diligence many lawyers perform is "informal"—that is, independent of any statutory or regulatory mandate. Best practices would require a thoroughgoing and careful review and, in practice, would likely parallel much of the CDD legally required of solicitors in the United Kingdom.[44] CDD can be "client unfriendly" and expensive. Nevertheless, many U.S. lawyers are selective with CDD. In contrast, the United Kingdom forces all solicitors to swing an indiscriminately broad sword, except when lawyers are carrying out only

37. *Id.* ¶ 5(b).

38. *Id.* ¶ 6(1)–(3).

39. The Money Laundering Regulations 2007, S.I. 2007/2157, ¶ 11(1). There is an exception where "a lawyer or other professional adviser is in the course of ascertaining the legal position for his client or performing his task of defending or representing that client in, or concerning, legal proceedings, including advice on the institution or avoidance of proceedings." *Id.* ¶ 11(2).

40. *Id.* ¶¶ 19–20.

41. Formal Opinion 463, *supra* note 10, at 2.

42. Conf. of Chief Justices, Resolution 7: In Support of the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (2014), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/resolution7.pdf.

43. *Id.*

44. Good Practices Guidance, *supra* note 9, at 8.

non-regulated activities. Statutory or regulatory mandated CDD is burdensome, as evidence in the United Kingdom bears out.[45]

More critical, perhaps, is the use to which the product of CDD may be made. The Regulations require relevant persons to make their CDD files available for production to the authorities in connection with a criminal investigation.[46] For U.S. lawyers, CDD is about client intake and compliance with ethical rules. It is not about future use by law enforcement, as in the case with the CDD required of U.K. solicitors.

B. The Proceeds of Crime Act 2002

The cornerstone of AML legislation in the United Kingdom is the Proceeds of Crime Act of 2002 (POCA),[47] which generally applies to all individuals in the United Kingdom. The primary AML provisions are contained in Part 7 of POCA, which impose criminal sanctions against individuals who participate in money laundering conduct in the United Kingdom. The statute also imposes criminal sanctions against individuals in certain industries and businesses who become aware of, or have reason to suspect, money laundering offenses and fail to report the same to the appropriate authorities.[48] Part 7 addresses the substantive offenses of money laundering (sections 327–329), failure-to-disclose offenses (sections 330–332), offenses for tipping off (sections 333A–D) or obstructing an investigation (section 342), and miscellaneous definitional and interpretative provisions.

Monitoring suspicious activity is an essential aspect of AML efforts.[49] POCA compels the disclosure of suspicious activity by (1) providing a defense to money laundering conduct for making a disclosure to criminal authorities and receiving consent therefrom to proceed with the conduct, and (2) making it a criminal offense when individuals and businesses in certain regulated sectors (including legal professionals in many practice areas) fail to disclose suspicious activity to the proper authorities.[50] Moreover, POCA protects the integrity of investigations by incorporating an NTO regime.[51]

FATF Recommendation 23 directs that STR requirements should apply to DNFBPs (including lawyers), subject to exceptions for professional secrecy and legal professional privilege.[52] POCA addresses legal professional privilege by carving out criminal sanctions for failing to disclose information discovered under the privileged

45. *See* Terry, *supra* note 16, at 30–31 (discussing the costs of compliance with the U.K. AML legislation).

46. *See generally* The Money Laundering Regulations, 2007, S.I. 2007/2157, ¶¶ 36–47 (describing powers of the authorities, criminal offenses, and civil penalties).

47. Proceeds of Crime Act, (2002) c. 29 (U.K.).

48. *See id.* § 330.

49. *See* 2012 Recommendations, *supra* note 2, at 19–20 (Recommendations 20–21).

50. *See infra* discussion Part II.B.2.

51. Proceeds of Crime Act § 333A; *see infra* discussion Part II.B.2–3.

52. 2012 Recommendations, *supra* note 2, at 20–21 (Recommendation 23) (stating that Recommendations 18–21 apply to DNFBPs); *see also* Interpretive Note to Recommendation 23, *in* 2012 Recommendations,

circumstances explained below. The England and Wales Court of Appeal clarified how privilege applies to the substantive crimes by looking to the purpose of POCA and its relationship to the First and Second EU Directives.[53]

The following section: (1) describes the substantive crimes of POCA and how English courts addressed the issue of legal professional privilege in the litigation context; (2) describes the crimes of failure to disclose, tipping off, and obstructing an investigation; and (3) explains how privilege and confidentiality are addressed by POCA.

1. The Substantive Crimes and the Disclosure Defense

Sections 327, 328, and 329 of POCA, respectively, impose criminal sanctions for the offenses of: concealing criminal property;[54] becoming concerned in an arrangement involving the acquisition or transfer of criminal property;[55] and acquiring, possessing, or using criminal property.[56] That this type of conduct is subject to criminal sanction is certainly uncontroversial and is parallel to the criminal laws in the United States regarding money laundering and terrorist financing.[57]

As previously mentioned, POCA applies to the proceeds of *all crimes*.[58] Before POCA, money laundering was primarily thought of as an attempt to deposit or otherwise negotiate a suitcase full of dirty money; after POCA, money laundering could mean facilitating the acquisition of improperly untaxed funds because such funds are "criminal property."[59] Criminal property is the product of "criminal conduct" *whenever* it occurred, even decades (or centuries?) before POCA.[60] Moreover, it is irrelevant whether the conduct is legal in the jurisdiction where the conduct occurred; so long as the conduct would constitute an offense in the United Kingdom, the proceeds thereof are criminal property.[61]

The United States' Money Laundering Control Act of 1986[62] imposes civil and criminal sanctions for conduct that are roughly equivalent to the substantive offenses of POCA.[63] U.S. lawyers should not participate in transactions when they know criminal

supra note 2, at 83 (stating that the STR obligation does not apply if the "relevant information was obtained in circumstances where [lawyers] are subject to professional secrecy or legal professional privilege").

53. *See* Bowman v. Fels, [2005] EWCA (Civ) 226, [41]–[42] (Eng.).

54. Proceeds of Crime Act § 327.

55. *Id.* § 328.

56. *Id.* § 329.

57. See *infra* notes 62–63 and accompanying text regarding the Money Laundering Control Act.

58. See *supra* note 25 and accompanying text regarding POCA's expansive application.

59. Proceeds of Crime Act § 340(2)–(4).

60. *Id.* § 340(4)(c).

61. *Id.* § 340(2)(b).

62. Money Laundering Control Act of 1986, Pub. L. No. 99-570, §§ 1956–1957, 100 Stat. 3207–18 (codified as amended at 18 U.S.C. §§ 1956–57 (2013)).

63. For example, POCA section 328(1) creates a criminal offense for an individual who "enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the

property is involved or suspect they may be facilitating terrorist financing because it is a crime to do either, just as it is for any other individual. Beyond avoiding criminal conduct, U.S. lawyers governed by the Model Rules have certain affirmative ethical obligations and are permitted to take certain actions when they know that their services are being used for criminal conduct and are permitted to take certain actions if they only suspect that their services are being used for criminal conduct. If a lawyer knows his services are being used for criminal conduct: he must not assist in, or counsel a client to engage in, the conduct;[64] he must advise the client of what he cannot do under the ethical rules or other law;[65] and he must terminate the representation if continuing the representation will violate an ethical rule or other law.[66] If a lawyer merely suspects, or reasonably believes, that the client is participating in criminal or fraudulent conduct, the lawyer is ethically permitted (but not required) to cease the representation if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."[67]

The same statement is not entirely true for solicitors in the United Kingdom. A U.K. solicitor has a defense to the crime of money laundering if he has made an authorized disclosure to the proper investigatory authorities and has received consent to proceed with the conduct. The disclosure and consent regime of POCA is a very foreign concept to U.S. lawyers who ordinarily would be faced with the choice of (1) actually committing a crime or incurring a civil penalty and breaching their ethical duties, or (2) being compelled by their ethical duty to discontinue a relationship when they know that their services are being used for criminal conduct.[68]

As discussed above,[69] in the United Kingdom, criminal property and the proceeds of criminal conduct have been so broadly defined under POCA that a solicitor could find himself actually involved with (or even merely having suspicions of) transactions or circumstances dealing with criminal property in contexts which are relatively minor—or even absurd.[70] For example, because there is no time or jurisdiction limitation on POCA, a solicitor could be facilitating the acquisition of criminal

acquisition, retention, use or control of criminal property by or on behalf of another person." Proceeds of Crime Act § 328(1). The Money Laundering Control Act creates a criminal offense for "[w]hoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1). Terrorist financing and providing material support to terrorists are also crimes under the Antiterrorism and Effective Death Penalty Act of 1996, as amended by the USA PATRIOT Act and the Intelligence Reform and Terrorism Prevention Act of 2004. 18 U.S.C. §§ 2339A–2339C (2013).

64. Model Rules of Prof'l Conduct R. 1.2(d) (2014).

65. *Id.* R. 1.4(a)(5).

66. *Id.* R. 1.16(a)(1).

67. *Id.* R. 1.16(b)(2).

68. *Id.* R. 1.2(d), R. 1.16(a)(1).

69. See *supra* notes 59–61 and accompanying text regarding the breadth of the definitions of criminal conduct and criminal property under section 340 of POCA.

70. *See* Proceeds of Crime Act, 2002, c. 29, § 340 (U.K.).

property when he represents a charity in acquiring funds held in a trust whose funds were the product of bootlegging in the United States during the Prohibition Era.

A defense to all three substantive offenses of POCA is to make an authorized disclosure and to receive the proper consent to proceed with the conduct.[71] An authorized disclosure is defined as a disclosure (also known as a suspicious activity report or SAR) made before the offense occurs to the proper authority,[72] which is ordinarily the National Crime Agency (NCA) (formerly the Serious Organised Crime Agency and the National Criminal Intelligence Service (NCIS)). Upon receiving a suspicious activity report, the NCA has a limited period to grant its authorization to proceed with the conduct.[73] A solicitor will make a disclosure as a defense to proceeding with suspected money laundering conduct under sections 327 through 329.

In the early years of POCA, section 328 was particularly disconcerting because oftentimes solicitors could see themselves "becoming concerned in an arrangement" for which criminal proceeds were at issue. Immediately, a solicitor's ethical duty of confidentiality was at odds with POCA's crime reporting and information gathering policy. The result was an alarming number of disclosures made, perhaps, out of an overabundance of caution.[74] Until 2005, and the decision of *Bowman v. Fels*,[75] the holding of the High Court of Justice in *P v. P* stood as the authoritative judicial interpretation of section 328 and, under that decision, the attorney-client privilege and the duty of confidentiality took a secondary position to POCA's reporting responsibilities.[76]

In *P v. P*, during the course of divorce proceedings, counsel for the wife suspected that a portion of the marital estate was criminal property.[77] Counsel became concerned that negotiating the settlement regarding these marital assets would cause the solicitors to become involved in an arrangement that would facilitate their client's acquisition of criminal property.[78] Counsel made a disclosure to the NCIS, which did not grant consent; however, the NCIS advised counsel not to inform the client that a disclosure had been made because such a disclosure would constitute the crime of tipping off under section 333.[79] The court, in holding that the wife's counsel was justified in making the disclosure and seeking appropriate consent, succinctly stated, "Issues of legal professional privilege do not seem [] to arise under sections 327, 328 or 329 and there is no professional privilege exemption in these sections."[80] One commentator

71. *Id.* §§ 327(2)(a), 328(2)(a), 329(2)(a).

72. *See id.* § 338.

73. *Id.* § 335.

74. Colin Tyre, *Anti-Money Laundering Legislation: Implementation of the FATF Forty Recommendations in the European Union*, J. Prof. Law., 2010, at 69, 77–78.

75. [2005] EWCA (Civ) 226 (Eng.).

76. [2003] EWHC (Fam) 2260, [49]–[50] (Eng.).

77. *Id.* ¶ 3.

78. *Id.*

79. *Id.* ¶¶ 3–4.

80. *Id.* ¶ 50.

suggested that this ruling may cause an overly cautious solicitor to warn all potential clients about his disclosure obligations before beginning any representation.[81]

The England and Wales Court of Appeal in *Bowman* overturned *P v. P* and clarified the application of legal professional privilege to section 328.[82] In similar factual circumstances, one party's counsel suspected that the other party had engaged in value-added tax evasion relating to work on property that was potentially subject to a settlement in litigation.[83] The suspecting solicitors believed that they could not resolve the litigation without NCIS consent, for fear of becoming concerned in an arrangement for their client's acquisition of criminal property and subject to penalty under section 328.[84]

The Court of Appeal looked to the purpose of POCA and its genesis from the First and Second EU Directives (which contain exceptions for professional secrecy and legal professional privilege)[85] for its interpretation that legal professional privilege *does* apply to the substantive offenses, including section 328. The Court of Appeal stated:

> [W]e conclude that the proper interpretation of § 328 is that it is not intended to cover or affect the ordinary conduct of litigation by legal professionals. That includes any step taken by them in litigation from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by judgment. We do not consider that either the European or the United Kingdom legislator can have envisaged that any of these ordinary activities could fall within the concept of "becoming concerned in an arrangement which . . . facilitates the acquisition, retention, use or control of criminal property."[86]

Thus, no disclosure is necessary if a solicitor suspects involvement in an arrangement related to the acquisition of criminal property in connection with the conduct or resolution of litigation. Moreover, a solicitor must not make a disclosure in such circumstances because otherwise he will violate the duty of confidentiality.[87]

While the Court of Appeal's decision gives comfort to solicitors (and perhaps barristers) in connection with pure litigation engagements, it leaves quite open whether privilege applies in engagements when litigation is not anticipated and is not part of the client's need. For most solicitors in private client practice, for example, the

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81. Philip Wylie, *P v P (Ancillary Relief: Proceeds of Crime)—Disclosure Under the Proceeds of Crime Act 2002 of Suspicions of Tax Evasion Gained During Ancillary Relief Negotiations*, 16 Child & Fam. L.Q. 203, 209–10 (2004).

82. Bowman v. Fels, [2005] EWCA (Civ) 226 (Eng.).

83. *Id.* ¶ 3.

84. *Id.* ¶ 4.

85. *See generally id.* (analyzing POCA's applicability to the legal profession in the context of the history and purpose of the EU Directives).

86. *Id.* ¶ 83.

87. Solicitors Regulatory Code Conduct, SRA Code of Conduct 2011 (Oct. 31, 2014), *available at* http://www.sra.org.uk/solicitors/handbook/code/content.page.

application of privilege to the substantive offenses of POCA remains a concern.[88] While the case may be read to create a privilege "exception" to the substantive offenses (sections 327 through 329) vacant from the text of these sections, solicitors must still determine if privilege is in fact applicable to any particular circumstance.

2. Failure to Disclose, Tipping Off, and Obstructing an Investigation

The information gathering and investigative policy of the United Kingdom went a step further than the EU Money Laundering Directives required by imposing criminal sanctions for failing to disclose suspected money laundering conduct.[89] In the United States, financial institutions and their agents can be civilly or criminally liable for failing to comply with reporting obligations under the Bank Secrecy Act.[90] POCA creates the same type of crime for a solicitor's failure to disclose when he has knowledge of, suspects, or even has reasonable grounds to suspect money laundering conduct. The crimes for tipping off[91] and obstructing an investigation[92] further bolster the FATF's and the United Kingdom's policies of promoting the investigation of criminal conduct by preventing bad actors from discovering that an investigation is ongoing and, in response, moving further underground.

Section 330 imposes a criminal sanction—separate and in addition to the substantive offenses—for individuals in the "regulated sector" who become aware of, suspect, or have reasonable grounds to suspect money laundering and do not make a required disclosure to the NCA.[93] In any of these instances, a solicitor in the regulated sector must inform the NCA, unless the information was gathered under privileged circumstances described below.[94] Operating in the regulated sector includes generally the same class of DNFBPs as the Regulations (i.e., solicitors performing any services other than litigation or advisory services).[95]

The failure to disclose offense is very different from the substantive offenses because the substantive offenses require active participation in money laundering conduct.[96] The crime of failure to disclose is having, at the very least, reasonable grounds to suspect that criminal conduct exists and not communicating this suspicion

88. In fact, the Court of Appeal alluded to such a concern with respect to the application of its holding. *Bowman*, EWCA (Civ) 266, ¶ 102.

89. This is referred to as "gold-plating" the EU Directives. Tyre, *supra* note 74, at 77–78.

90. 31 U.S.C. §§ 5321–5322 (2013).

91. Proceeds of Crime Act, 2002, c. 29, § 333A–D (U.K.).

92. *Id.* § 342.

93. *Id.* § 330(2)–(4).

94. *See* discussion *infra* Part II.B.3.

95. *See* Proceeds of Crime Act, 2002, c. 29, sch. 9, pt. 1 (U.K.) (describing the kinds of businesses and activities that fall within the regulated sector).

96. *Id.* §§ 327–329.

to the proper authorities. This obligation to inform applies even if the solicitor declines the representation.[97]

In addition, POCA creates two other crimes related to disrupting an investigation of suspected money laundering activity, which satisfy the NTO requirements of Recommendation 21, as applied to DNFBPs through Recommendation 23. In section 333A, entitled "Tipping Off: Regulated Sector," an individual commits an offense if: he discloses that an authorized disclosure has been made[98] or that an investigation is ongoing;[99] the disclosure is likely to prejudice the investigation; and the information came to the individual in the course of a business in the regulated sector. In section 342, entitled "Offences of Prejudicing Investigation," an individual commits an offense if he makes a disclosure that is likely to prejudice an investigation. Information about an ongoing investigation communicated to a bad actor might prejudice the investigation because the bad actor might conceal his conduct further, destroy evidence, or attempt to involve other actors to assist in avoiding detection.

The NTO aspect of the Recommendations and POCA is unfamiliar to U.S. lawyers because one of the traditional notions of U.S. legal ethics is the duty to inform and consult with the client. Model Rule 1.4(a)(3) states that a lawyer must keep his client informed of all material information related to the representation, and Model Rule 1.4(a)(5) states that a lawyer shall "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."[100] At the outset of a representation, a U.K. solicitor may inform a client about his disclosure obligations. However, after becoming aware of, suspecting, or developing reason to suspect money laundering conduct, he *must not* tell a client about the limitations on his services (which do not exist if he receives appropriate consent from the NCA), if that would lead to a tipping off or obstructing offense. Rather, the solicitor in the regulated sector *must* inform the investigative authorities when the client seeks the solicitor's assistance for criminal purposes; otherwise, the solicitor may be subject to a failure to disclose offense. Such NTO rules in the United States would run afoul of Model Rule 1.4 and would thus represent a significant alteration in a cornerstone of the attorney-client relationship.

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97. A plain reading of Part 7 of POCA does not state that an actual engagement or attorney-client relationship is a prerequisite to the obligation to disclose under section 330. A solicitor's obligations to report only arise if the suspicion derived from conducting business in the regulated sector, which would include meeting with a potential client. *See Proceeds of Crime Act 2002 Part 7—Money Laundering Offences*, Crown Prosecution Serv., http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_money_laundering/#S330_Failure_to_disclose (last visited Apr. 10, 2015) (explaining that, regarding the failure to disclose offense, a solicitor's obligation to report is contingent only on his conducting business in the regulated sector—not on the establishment of a formal engagement).

98. Proceeds of Crime Act, 2002, c. 29, § 333A(1) (U.K.) (as amended by Proceeds of Crime Act 2002 (Amendment) Regulations, 2007, S.I. 2007/3398, sch. 2, ¶ 4).

99. *Id.* § 333A(3).

100. Model Rules of Prof'l Conduct R. 1.4(a)(5) (2014).

3. How Privilege Is Addressed by POCA

Upon a first reading of POCA, it appears that solicitors are faced with the Hobson's choice of informing on their clients when some illegal conduct rises to the fore, or risk being sent to prison for maintaining the same client's confidences. This concern has motivated much of the resistance by the U.S. legal profession to a U.K.-style AML regime.

It is important to comprehend the nuances of POCA's disclosure-consent regime to understand how it works in practice. Parliament tried to tailor the statute to make disclosure requirements compatible with the basic notions of legal ethics and confidentiality. The England and Wales Court of Appeal restricted the application of the substantive crimes to preserve traditional principles of legal professional privilege in the litigation context. The FATF appreciates that this privilege is vital and, in the Interpretive Notes to its Recommendations, states that STR/NTO laws must be tailored to respond to circumstances where lawyers are subject to professional secrecy or legal professional privilege.[101]

In addition to the judicial application of privilege to substantive crimes (at least in the litigation context),[102] legal professional privilege is preserved in the exceptions to the offenses for failure to disclose[103] and for tipping off[104] or prejudicing an investigation.[105] The key provision for a solicitor's obligations under the disclosure regime is whether the "information or other matter came to [the solicitor] *in privileged circumstances*,"[106] which is defined as information communicated to a solicitor:

> (a) by (or by a representative of) a client of his in connection with the giving by the adviser of legal advice to the client,
>
> (b) by (or by a representative of) a person seeking legal advice from the adviser, or
>
> (c) by a person in connection with legal proceedings or contemplated legal proceedings.[107]

This definition of privilege is not unlike circumstances that give rise to a U.S. lawyer's duty of confidentiality.[108] However, under U.K. law, information communicated

101. *See* 2012 Recommendations, *supra* note 2, at 83 (Interpretive Note to Recommendation 23).

102. See *supra* text accompanying notes 82–88 regarding *Bowman v. Fels*.

103. Proceeds of Crime Act § 330(6), (10), (11).

104. *Id.* § 333D (as amended by Proceeds of Crime Act 2002 (Amendment) Regulations, 2007, S.I. 2007/3398, sch. 2).

105. *Id.* § 342(3)–(5).

106. *Id.* § 330(6) (emphasis added).

107. *Id.* § 330(10).

108. Model Rules of Prof'l Conduct R. 1.6, R. 1.18 (2014). The terms "privilege" and "confidentiality" tend to be used interchangeably in the context of analyzing POCA when such interchangeability is more the product of less-than-artful statutory drafting than any substantive distinction. For U.S. lawyers, when information is "confidential," the lawyer may not disclose the information unless he makes a disclosure under Rule 1.6(b) of the Model Rules. When information is "privileged," a lawyer cannot be compelled to testify regarding such matters, unless, for example, the crime-fraud exception applies and the evidentiary

to a solicitor for a criminal purpose is not privileged. The complexity comes from understanding whether the information is privileged or if the information was communicated to the solicitor with a criminal purpose. Section 330(11) states that "subsection (10) does not apply to information or other matter which is communicated or given with the intention of furthering a criminal purpose,"[109] which tracks the English common law of privilege and the crime-fraud exception. If this section applies, the privileged circumstances exception does not apply and, therefore, the general SAR obligation applies to a solicitor.

The Law Society (the United Kingdom's professional counterpart to the ABA and recognized as an authority on matters related to legal ethics) announced its interpretation of what qualifies as "privileged circumstances" in its Anti-Money Laundering Practice Note, which generally offers guidance with respect to a solicitor's compliance obligations under the Regulations and POCA.[110] The Practice Note received formal approval by Her Majesty's Treasury.[111]

Chapter 6 of the Practice Note details a solicitor's ethical obligations under POCA concerning legal professional privilege and privileged circumstances. The

privilege is vitiated. Restatement (Third) of the Law Governing Lawyers § 82 (2000). An understanding of the crime-fraud exception guides courts in addressing evidentiary issues; however, it does not clarify or help the lawyer in understanding the ethical duty of confidentiality under Rule 1.6. A disciplinary board sanctioning an attorney for breaches of confidentiality would look to other disciplinary board interpretations of the application of Rule 1.6 before looking to a court's interpretation of the crime-fraud exception in the context of privilege. Nevertheless, the general law of legal professional privilege under English law and the ethical duty of confidentiality are largely parallel to the U.S. rules. *See, e.g.*, Regina v. Special Comm'r & Another, [2002] UKHL 21, [2003] 1 A.C. 563 [27] (quoting Parry-Jones v. Law Society [1969] 1 Ch. 1, 6–7) (describing the "two privileges . . . between solicitor and client"). For purposes of POCA, Parliament used the term "privilege" in Part 7 as a talisman for providing that certain matters are not entitled to confidentiality and therefore may be subject to disclosure. The Law Society explains in more detail how the principles of the crime-fraud exception (which are principles of evidentiary privilege) apply to the disclosure-consent regime of POCA. *Chapter 6–Legal Professional Privilege*, Law Soc'y (Oct. 22, 2013), http://www.lawsociety.org.uk/support-services/advice/practice-notes/aml/legal-professional-privilege/ [hereinafter Practice Note Ch. 6] (listing practice note chapter 6.4.5). This comparison of privilege and confidentiality points to the rather subtle ways that attorney-client relationships differ between the United States and the United Kingdom. These differences become more pronounced as comparisons of confidentiality, secrecy, and evidentiary privilege are made among the legal traditions of other European countries. These different conceptions are worthy of consideration in understanding the FATF's Interpretive Note to Recommendation 23, precluding the imposition of STR requirements on DNFBPs where "the relevant information was obtained in circumstances where [DNFBPs] are subject to professional secrecy or legal professional privilege." 2012 Recommendations, *supra* note 2, at 83 (Interpretive Note to Recommendation 23). For a fascinating report that predates the FATF and details the divergent legal traditions of secrecy, confidentiality, and privilege in certain European countries, see D.A.O. Edward, The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community (1975), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/edward_enpdf1_1182334460.pdf.

109. Proceeds of Crime Act § 330(11).

110. Practice Note Ch. 6, *supra* note 108 (listing practice note chapter 6.5).

111. *HM Treasury Approves Law Society AML Practice Note*, Inst. Chartered Accountants Scotland, http://icas.org.uk/home/regulation-and-ethics/anti-money-laundering/hm-treasury-approves-law-society-aml-practice-note/ (last visited Feb. 11, 2015).

Law Society's explanation of the principles of confidentiality and attorney-client privilege is largely similar to traditional American notions embodied in the Model Rules.[112] As in the United States, one major carve-out for the legal professional privilege in the United Kingdom is the crime-fraud exception,[113] which is at the core of the privileged circumstances exceptions to POCA.[114] In the United States, this concept is embodied in the rule governing confidentiality of information learned from a client engagement, but the two concepts overlap when it comes to the issue of permissive and mandated disclosure. Legal professional privilege will not apply if the solicitor's services are sought to further a crime or fraud, and it is in the crime-fraud context that the privilege exceptions to POCA apply.[115]

When a client is seeking a solicitor's advice (in the regulated sector) with criminal intent,[116] and the solicitor suspects money laundering conduct, he must disclose under section 330(11) because the communications will not be considered made in privileged circumstances to allow section 330(b)(6) and section 330(10) to apply. If privileged circumstances do not pertain, and the solicitor does not make a disclosure, he will have committed a failure to disclose offense under section 330. Essentially, the disclosure-consent regime has required solicitors to keep the following question in mind for every client interaction: Is my client seeking my advice to further a criminal purpose? If the answer is yes, then the solicitor must disclose. If the answer is no, the solicitor must maintain the client's confidences because the matter is privileged. If the answer is unclear, the Law Society recommends waiting until firm evidence reveals itself to compel the solicitor to act.[117]

A few brief examples should demonstrate the somewhat narrow distinction between privileged circumstances requiring a solicitor to maintain the client's confidences and those that are not privileged, thus requiring disclosure or face potential criminal penalties under section 330.

i. Example 1: Privileged Circumstances Exception Applies—Disclosure Prohibited

A client comes into a solicitor's office to hire the solicitor in connection with terminating a trust established by his deceased mother under which the client is the

112. Practice Note Ch. 6, *supra* note 108 (listing practice note chapter 6.4.5).

113. *See* Model Rules of Prof'l Conduct R. 1.6(b)(2) (2014) (stating that an attorney may disclose client confidences to prevent a crime or fraud "in furtherance of which the client has used or is using the lawyer's services").

114. Practice Note Ch. 6, *supra* note 108 (listing practice note chapter 6.4.5).

115. *Id.*

116. Due to the breadth of the definitions of criminal property and criminal conduct under section 340 of POCA, discussed *supra* in Part II.B.1, it follows that "criminal intent" has a substantially lower threshold than our traditional conceptions of criminals or money launderers. Simply expressing a desire to acquire untaxed funds or inquiring about assisting in any transaction involving untaxed funds would vitiate privilege for purposes of section 330.

117. Practice Note Ch. 6, *supra* note 108 (listing practice note chapter 6).

sole beneficiary. He informs the solicitor that he suspects that a majority of the trust estate is derived from a decades-long fraud and scheme of embezzlement perpetrated by his mother against her former employer's business and personal assets as a result of her close personal relationship with the employer. The client asks, "Will you assist me in negotiating a settlement with the victims of my mother's less-than-virtuous conduct?" The solicitor would reasonably suspect that the trust is composed of criminal property. Additionally, the solicitor is being hired to potentially facilitate the acquisition of the criminal property although, after the settlement, the criminal property will have been "cleaned." In this situation, the client has no criminal intent in seeking the solicitor's advisory and transactional services. The solicitor may even suspect that the client does not have the purest intentions and could be engaged in money laundering activity; however, the privileged circumstances exception of section 330(10) would likely apply and the solicitor would not be subject to criminal sanction for failure to disclose under section 330(6).

According to *Bowman*, the legal professional privilege would apply in the ongoing settlement and litigation of the matter,[118] and there is little risk that the solicitor will be subject to section 328 for becoming concerned in an arrangement relating to the acquisition of criminal property lest he make a disclosure and receive consent to exempt himself under section 328(2)(a). Moreover, since legal professional privilege and the duty of confidentiality have not been vitiated because there is no inherent criminal intent, the solicitor must not disclose the information presented to him by the client, because otherwise he will be violating his ethical obligations to the client.

ii. Example 2: Privileged Circumstances Exception Does Not Apply—Disclosure Required

A slight variation on the previous fact pattern. Instead, the client says to the solicitor, "I would like for you to help me to acquire the funds in my mother's trust." In this fact pattern, the solicitor would have reasonable suspicion that the client is engaged in money laundering because he is seeking to acquire criminal property, which is a crime under section 329 of POCA. In the previous example, the client had no criminal purpose because he was seeking to "clean" the criminal property through a negotiated settlement. In this example, the privileged circumstances exception of section 330(10) would not apply because the client's statement revealed criminal intent (which reflects the low bar for criminal intent created by section 340). The solicitor would have to make a disclosure under section 330 and, upon receiving consent from the NCA, the solicitor could continue with the representation without running afoul of sections 327 through 329. Moreover, the solicitor must not reveal to the client that he has made a disclosure to the NCA if it is likely to prejudice the investigation (i.e., alter the client's behavior for the worse) or the solicitor will have committed a tipping off offense under section 333A.[119] With respect to the

118. Bowman v. Fels, [2005] EWCA (Civ) 226, [83] (Eng.).

119. It may seem harsh that POCA requires the solicitor to step into the mind of his client to determine whether the interaction is going to be covered by the privileged circumstances exception. All situations

solicitor's ethical limitations, it would be incumbent on the solicitor to independently gauge the scienter in his client's heart before making the personal decision to continue with or decline the representation.

iii. Example 3: Privileged Circumstances Exception Does Not Apply—Disclosure Required

A more precise variation on the previous fact pattern. Instead, the client says to the solicitor, "I would like for you to help me to terminate the trust into a shell company or a fancy trust so that the employer and his family can never recover these funds." In this fact pattern, the solicitor would suspect that the client is engaged in money laundering. As in the second example, the privileged circumstances exception of section 330(10) would not apply because the client is seeking the solicitor's services with a criminal purpose, only here the criminal purpose is more apparent. He is attempting to acquire criminal property and conceal the proceeds of crime—criminal offenses under POCA. The solicitor would be ethically permitted to decline the representation (and certainly an ethical solicitor would), but the solicitor must disclose to the NCA regardless to prevent criminal sanction under section 330. If the solicitor intends to proceed with the representation, he must make a disclosure and secure consent from the NCA to avoid sanctions under sections 327 through 329. Whether proceeding with the representation or not, after making the disclosure, the solicitor must be cautious to avoid committing the tipping off offense under section 333A.

III. COMMENTARY ON THE U.K. APPROACH

This analysis points to some important distinctions between the U.K. approach and current U.S. law and ethical rules. First, of course, is the major difference between a U.K. solicitor's obligation when a client seeks to further a criminal purpose, however benign that may be given the scope of POCA, and the obligation of a U.S. lawyer in the same situation. While the solicitor commits a crime if he fails to disclose, the U.S. lawyer's obligation is to decline or cease representation; while the U.S. lawyer may reveal information in certain limited circumstances, it is neither unethical nor a crime not to reveal (except to the extent that the conduct violates the applicable criminal statutes).[120]

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are certainly not going to be as clear-cut as the examples detailed above, which themselves are admittedly not 100 percent clear. Fortunately, the Crown Prosecution Service has stated that if a solicitor forms a genuine but mistaken belief that that the privileged circumstances exception applies, then he will be permitted to rely on the reasonable excuse defense for his failure to disclose his suspicions. Proceeds of Crime Act, 2002, c. 29, § 330(6)(a) (U.K.); *see Proceeds of Crime Act 2002 Part 7—Money Laundering Offences*, Crown Prosecution Serv., http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_money_laundering/#_Defences_to_section_330_ (last visited Apr. 10, 2015).

120. Consideration needs to be given to Model Rule 4.1, which provides in part: "In the course of representing a client a lawyer shall not knowingly . . . fail to disclose a material fact [to a third person] when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Model Code of Prof'l Conduct R. 4.1. (2014). Comment 3 to Model Rule 4.1 offers some useful guidance to the narrow applicability of this rule—"In extreme cases, substantive law [(e.g., the statute that criminalizes the client's actions)] may require a lawyer to disclose information . . . to avoid

Second, the U.K. approach of addressing matters of legal professional privilege through POCA is both complicated and worthy of the skepticism of the American Bar. The Solicitor's Regulatory Authority Code of Conduct (a rough equivalent to the Model Rules), Outcome 4.1 in particular, had to be modified in light of POCA to state that a solicitor must "keep the affairs of clients confidential *unless disclosure is required or permitted by law* or the client consents."[121] Such language is, at best, probably unnecessary and, at worst, represents a trampling of the traditional principles of legal ethical confidentiality.[122] As explained above, under POCA, the only client affairs that must be disclosed by law are those that are inherently not entitled to confidentiality because they are the product of the client's criminal intent. The modified language of Outcome 4.1 provokes the question: What confidential matters are (or will someday be) required by law to be disclosed?

IV. CONCLUSION

The response of the organized American Bar to the efforts by the FATF and others to seek the imposition of bank-style obligations on U.S. lawyers has been largely focused on the argument that current law, regulations, and ethical rules are sufficient.[123] When coupled with the Voluntary Good Practices Guidance, Formal Opinion 463, extensive educational efforts, and high-profile endorsements of these efforts, the authors believe that the imposition, by statute or otherwise, of the sorts

being deemed to have assisted the client's crime or fraud." *Id.* R. 4.1 cmt. 3. It is interesting to consider the reference to Rule 1.6, given that any disclosure of client information is prohibited unless permitted under one of the "may" rules of 1.6(b). If any of those "may" rules apply, then Rule 4.1 applies to require disclosure, but only if the lawyer himself may otherwise be viewed as "assisting" in the crime or fraud. As an example, a particular statute criminalizing murder may include a provision that makes someone who is aware of an impending murder, and does not reveal it, is an accomplice to the murder. This information is one of the "may" disclosures in Rule 1.6 and, arguably, Rule 4.1 makes it unethical to fail to disclose a material fact. How this bears on the statutes criminalizing money laundering and terrorist financing is beyond the scope of this article but may be worth further exploration. *See id.* R. 4.1, R. 1.6 (2014).

121. Solicitors Regulatory Code Conduct, SRA Code of Conduct 2011 (Oct. 31, 2014), *available at* http://www.sra.org.uk/solicitors/handbook/code/content.page (listing Outcome 4.1) (emphasis added). Rather than style standards for solicitor conduct as "rules" like the ABA, the Code of Conduct frames solicitors' required conduct in terms of "outcomes" that must be achieved to promote the interests of the client and the interests of the public. The Code of Conduct also lists "Indicative Behaviors," which will demonstrate that the desired Outcomes are being achieved. The Code of Conduct states that the solicitor must achieve Outcome 4.1, which mandates that affairs of the client are kept confidential unless disclosure is required or permitted by law or the client consents. *Id.*

122. It should be noted that Model Rule 1.6(b)(6) somewhat similarly provides that U.S. lawyers may reveal a client's confidences to comply with other laws or a court order. As this is a "may" rule, not a "shall" or "must" rule, the Model Rules are not fundamentally superseded by any statute requiring disclosure. Moreover, any such disclosure required by law is predicated by the lawyer's ethical duty to keep the client informed, which principle, as discussed above, is anathema to an NTO regime. Model Rules of Prof'l Conduct R. 1.4 (2014). Comment 12 to Rule 1.6(b)(6) provides: "When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4." *See id.* R. 1.6(b)(6) cmt. 12 (2014).

123. *See* sources cited *supra* note 12 (discussing the ABA's gatekeeper resolutions and position on the prospect of the Recommendations' application to U.S. lawyers).

of obligations imposed on U.K. solicitors is unnecessary and potentially destructive. Despite that view, however, it is useful to observe the obligations imposed on our U.K. colleagues resulting from the Recommendations and the complex maneuvering required for them to comply with those obligations. One could imagine how U.S. laws would be changed to add many private practitioners to the category of financial institutions in the Bank Secrecy Act and the USA PATRIOT Act. While the CDD elements themselves probably do not conflict with current ethical obligations, they would be expensive, time-consuming, and client "unfriendly." And what would be done with the product of the CDD?

The major issue would be imposing on U.S. lawyers the SAR/NTO rules. Any modification of federal laws and regulations would need to contain exceptions to address confidentiality and privilege in the appropriate circumstances specifically anticipated in the Interpretive Note to Recommendation 23. And it is exactly this awkward and imprecise fine-tuning that makes the approach of the American Bar preferable to the United Kingdom's.