

## **GUIDANCE NOTES - MONEY LAUNDERING**

### **A. THE SUBSTANTIVE LAW**

1. **The law in relation to money laundering is contained in the following Ordinances:**

- **the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405)**
- **the Organised and Serious Crimes Ordinance (Cap. 455)**

These Ordinances were substantially amended in July 1995 and introduced new criminal offences designed to prevent those who seek to launder the proceeds of drug trafficking or indictable offences from being able to use legitimate professional services for this purpose. The legislation contains important exceptions to the solicitor's normal duty of confidentiality to clients and to the duty to disclose relevant information to a client. Please refer to sections 25 and 25A of both Ordinances.

2. **All solicitors should be aware of the money laundering provisions in these Ordinances and the need to comply with them. If they do not, they may commit criminal offences by -**

- **assisting someone known or suspected to be laundering money generated by drug trafficking or any indictable offence;**
- **telling clients or anyone else that they are under investigation for an offence of money laundering; or**
- **failing to report a suspicion of money laundering.**

3. **The money laundering legislation does not require solicitors to be suspicious of clients without cause, or to detect money laundering, but solicitors should be aware of the legislation, be alert to any unusual circumstances, and make further enquiries of their clients where appropriate.**

**dealing (defined in section 2 of both Ordinances)**

4. **It is an offence under section 25 (1) of both Ordinances for any person to deal with any property if that person knows or has reasonable grounds to believe that the property in whole or in part directly or indirectly represents the proceeds of drug trafficking or of an indictable offence. *Dealing is punishable on conviction on indictment by a maximum of 14 years' imprisonment and fine* (section 25(3) of both Ordinances).**

5. It is a defence that the person concerned reported his knowledge or suspicions at the first available opportunity to an authorised officer, or, in the case of an employee of a solicitors' firm, to the appropriate person in accordance with the firm's internal reporting procedure.

#### **failure to report**

6. It is an offence under both Ordinances for any person who acquires knowledge or a suspicion of money laundering not to report that knowledge or suspicion to an authorised officer or, in the case of an employee of a solicitors' firm, to the appropriate person in accordance with the firm's internal procedure as soon as is reasonably practical after the information came to his attention. ***Failure to report knowledge or suspicion is punishable by imprisonment of 3 months and fine.*** Under section 25A(3) of both Ordinances disclosure in these circumstances does not constitute a breach of confidentiality or privilege.

#### **disclosure to client or other person ("tipping off")**

7. Under section 25A(5) of both Ordinances it is an offence if, knowing or suspecting that a disclosure has been made, he discloses to any other person any matter which is likely to prejudice any investigation which might be conducted following that first-mentioned disclosure. ***The maximum punishment on conviction for this "tipping off" offence is 3 years' imprisonment and a fine of \$500,000.*** (See section 25A(8) of both Ordinances).
8. It is a defence to the "tipping off" offence that the person concerned proves that he neither knew nor suspected that this was likely to be prejudicial to the investigation, or that he had lawful authority or reasonable excuse to do so. See section 25A(6) of both Ordinances.

### **B. SOLICITORS' DUTIES**

1. The duty to pass on information to the client which is relevant to the retainer (principle 8.03 of "The Hong Kong Solicitors' Guide to Professional Conduct") is overridden by the statutory prohibition created by the "tipping off" offence, and is one of the exceptional circumstances where the duty does not apply.
2. Subject to any relevant defence a solicitor is effectively prohibited from passing on information to the client concerning any matter which is likely to prejudice an investigation.

3. Consequently, where a solicitor knows or suspects that a client is involved in money laundering and a report is made, the solicitor should consider whether the trust and confidentiality necessary between solicitor and client is so affected that the retainer should be terminated. There is no necessary objection to a solicitor continuing to act. Whether or not the solicitor feels able to do so will depend upon all the circumstances. Advice may be sought from the Guidance Committee.
4. Should the solicitor consider that the retainer be terminated and that he is unable by virtue of the offences created by sections 25A(5) of both Ordinances to give the true reasons for the termination, he should consider informing the client that the reason is that a conflict of interest has arisen between himself and the client. See paragraph A.7 above.
5. In circumstances where to disclose the reason for ceasing to act for the client in Court proceedings would possibly result in the commission of an offence under section 25A(5) of either Ordinance, the solicitor should inform the Court of the possible conflict of interest between himself and the client but should not elaborate further.

### **C. PRACTICE INFORMATION**

1. All solicitors need to be aware of the legislation relating to money laundering. Conveyancing solicitors in particular need to be aware that the purchase and sale of properties may be used as a method of laundering the proceeds of crime. A solicitor who knows or suspects that this may be happening will need to consider the provisions of the relevant legislation.
2. Can you spot a money laundering transaction? The signs to watch for are:
  - **UNUSUAL SETTLEMENT REQUESTS** - Settlement by cash of any large transaction involving the purchase of property or other investment should give rise to caution. Payment by way of third party cheque or money transfer where there is a variation between the account holder, the signatory and a prospective investor should give rise to additional enquiries.
  - **UNUSUAL INSTRUCTIONS** - Care should always be taken when dealing with a client who has no discernible reason for using the firm's services, eg clients with distant addresses who could find the same service nearer their home base; or clients whose requirements do not fit into the normal pattern of the firm's business and could be more easily serviced elsewhere.
  - **LARGE SUMS OF CASH** - Always be cautious when requested to hold large sums of cash in your client account, either pending further instructions from the client or for no other purpose than for onward transmission to a third party.

- **THE SECRETIVE CLIENT** - A personal client who is reluctant to provide details of his identity. Be particularly cautious about the client you do not meet in person.
  - **SUSPECT TERRITORY** - Caution should be exercised whenever a client is introduced by an overseas bank, other investor or third party based in countries where the production of drugs or drug trafficking may be prevalent.
  - **POWER OF ATTORNEY** - Care should always be taken when dealing with a client who has no apparent reason for authorising a third party to deal with property on his behalf by way of creating a power of attorney or trust.
  - **SUSPECT PERSONALITY** - Caution should be exercised whenever a client is known or suspected to be a triad, drug trafficker or criminal or is introduced by a known or suspected triad, drug trafficker or criminal.
3. Principals in private practice should consider what procedures should be instituted, given the nature of their practice, to facilitate compliance with the legislation. The following steps are recommended:
- appointment of a compliance officer to ensure compliance with internal money laundering procedures;
  - initial and continuing training for staff in the requirements of the money laundering legislation and in the recognition and handling of suspicious transactions;
  - establishment of internal reporting procedures, including the appointment of a reporting officer as the "appropriate person" (who could be the same person as the compliance officer);
  - establishment of procedures for obtaining and keeping for a minimum period satisfactory evidence of clients' identity when appropriate;
  - establishment of procedures for keeping records of transactions for a minimum period when appropriate.
4. Reports for the purposes of section 25A of both Ordinances may be made to the Joint Financial Intelligence Unit, 16/F West Wing, Police Headquarters, Arsenal Street, Wanchai, Hong Kong or GPO Box 6555. Enquiries can be made on the JFIU Hotline 2866 3366.

*The information contained in these Guidance Notes has been endorsed by the Commissioner of Police.*

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