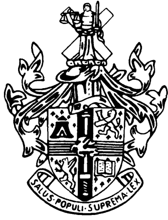

The City of Westminster and Holborn Law Society

The College of Law Legal Advice Centre 14 Store Street London WC1E 7DE
020 7291 1290

To: MLDconsultation@hm-treasury.x.gsi.gov.uk

From: The City of Westminster and Holborn Law Society

Draft Money Laundering Regulations 2007

I write on behalf of the City of Westminster & Holborn Law Society in my capacity of President. Our Law Society represents firms of solicitors in Central London, and in particular Holborn, and the City of Westminster.

Member firms of our Law Society conduct a considerable amount of private client business.

1. In the course of that, it is inevitable that both Probate [see para. 10 below] and trust work will play a major role, in the latter case primarily in the context of:

- making financial provision for those not of mature years; or
- under some form of incapacity; or
- to preserve the inheritance of a "first family" where the testator has had a second marriage.

These are all legitimate areas in which resort may be had to the use of the English law invention of trust without any presumption of a cover for moneylaundering or tax evasion.

2. While we appreciate that the vehicle of a trust may be used for either of those purposes in other jurisdictions, and that it is necessary for the new regulations to cover such usage, the way in which it is proposed to give effect to the Third Directive as regards domestic trusts will give rise to considerable difficulties in bona fide cases.

3. The terms of draft regulation 2(4) are extremely vague (and are therefore a totally unsuitable basis for the creation of criminal liability) because:

(a) the term *beneficial owner* is defined on an "inclusive", rather than definitive, basis;

(b) the concept, in (a), of *where the beneficiaries have been determined* is not one which is capable of being interpreted with legal certainty, for instance in relation to a contingent reversion;

(c) furthermore, even if it is possible to take the view that some interest (e.g. a life interest currently in possession) is within that concept, it is unclear what account falls to be taken of the possibility that that interest may be revoked where (as is often the case, e.g. in relation to Sharia widowhoods) the trustees have been given that power in

assessing whether that particular interest is worth more than 25% of the value of the trust fund; and

(d) in particular the question arises as to whether, in arriving at an attribution, it is of the essence that the composite value of all the interests in the trust fund must add up to 100%; furthermore

(e) in relation to (b), which applies where the beneficiaries have not yet been determined, a *class of persons* can be treated as the beneficial owner, account (seemingly) having to be taken of documentation (such as letters of wishes and the instructions given by the settlor or testator) not forming part of the formal settlement documentation, giving rise

(f) in relation to the traditional (pre-Budget 2006) "accumulation and maintenance" class consisting of grandchildren, to the weight needing to be given to a settlor's intention that the bulk of the trust fund should (in normal circumstances) end up in the lands of the senior male in the class according to the rules of primogeniture; and

(g) in relation to (c), it is unclear, in the case of a trust, in what circumstances an individual might be said to *control* part of the property. Could it be said, for instance, that a tenant for life under the Settled Land Act 1925 has, by virtue of the management powers given to him by statute, control of 100% of the assets?

(h) If so, the question arises as to what extent those entitled in remainder (e.g. widow's life interest and absolute entitlement to the eldest surviving male child) fall to be taken into account if, on an actuarial basis, any one of them has a value exceeding 25% of the value of the totality?

4. Clarity in regulation 2(4) is of the essence to the application of the Third Directive to Probate and trust work because regulation 4(1)(b) requires the solicitor to:

- identify the "beneficial owner";
- take adequate measures to verify his identity; and
- understand the ownership and control structure

<u>before</u>, pursuant to regulations 5(1)(a) or (b), 6(1) and 7(1)(b), either *establishing a business relationship* or *carrying out an occasional transaction*, i.e. <u>before opening a file</u>.

5. In the real world this would involve examining both the trust documents and a family tree before agreeing in principle to act - a time-heavy and therefore expensive process far more burdensome than that imposed upon a bank, to which the relaxation in regulation 6(4) has been made available.

6. Indeed, if approached by the trustees of a Sharia Will Trust with a view to their using their power of revocation of the widow's life interest, it may very well be that the trustees will not be able to obtain legal assistance because their prospective solicitors may be obliged to ask to see standard identification documentation for the widow and it would hardly be proper professional conduct to write to her to ask for this without revealing the purpose behind the enquiry.

7. It is understood that H M Treasury take the view that, in relation to situations such as the above, practitioners can rely on guidance from their supervisory body (i.e. via paragraph 17(1)(c) and Schedule 3, in our case the Law Society of England and Wales). Such an interpretation is not, however, to be devined from the Regulations themselves (which are the only legitimate source of the law). Regulation 18(1) provides for such a body to engage in *effective monitoring*.

8. The issue of dispensations – which is what would been needed in the above cases - cannot come within this wording. The explanation given in paragraphs 2.23 and 2.24 of the *Accompanying Narrative* is, in consequence, totally misconceived in relation to a situation where non-compliance with the letter of the law constitutes a criminal offence likely, on past performance, to be punished by imprisonment as well as professional disqualification.

9. In consequence the Society believes that the only possible way forward in relation to trusts is

- for regulation 2(4) to be reformulated in terms which specify (in relation to domestic trusts at any rate) exactly who is to be treated as beneficial owner; and for
- regulation 5(1)(a) and (b) to be modified to take account of the nature of the instructions, so that points such as that set out in para 6 above just do not need to be considered in limine.

10. In relation to Probates, provision does need to be made for the concept of personal representative to be taken into account.

- Under most Continental systems, the heirs take over the deceased's property and have to pay off the creditors.
- Under the English system, personal representatives are interposed and, for the protection of the creditors (who might not get paid if ID problems arose in relation to – for instance – a single overseas or "lost" legatee), it would be appropriate for the money laundering formalities to be deferred until the assets are assented to the beneficiaries under the Will or powers of appointment exercised preparatory thereto.

I hope that this information is helpful and that due consideration will be made to the points raised.

Yours sincerely

Sara Chandler
President
Associate Professor