British Art Market Federation

Anti-Money Laundering

GUIDELINES FOR MEMBERS

The Principles of Conduct of The UK Art Market, adopted by The British Art Market Federation (published in 2000) declares that:

'Members have agreed to make themselves aware of relevant anti-money laundering laws and regulations and where applicable to report suspicions of money laundering to appropriate authorities and/or in-house anti-money laundering officers'.

The varied nature of the many businesses represented by BAMF makes it difficult to provide detailed rules relevant to all members. BAMF sets out below an overview of the anti-money laundering laws and regulations in force in the UK in December 2015 and some general best practice guidelines for members.

This note is not a comprehensive record of the UK anti-money laundering laws and regulations. In particular, client due diligence obligations set out in the Money Laundering Regulations 2007 are technical and complex. Members of BAMF doing business in the 'regulated sector' (mainly auctioneers and dealers qualifying as High Value Dealers) should familiarise themselves with these Regulations. Members operating across jurisdictions should take account of the anti-money laundering laws and regulations applicable in the various jurisdictions in which they do business.

BAMF does not advise on anti-money laundering and these guidelines do not constitute legal advice. Members should take their own advice and satisfy themselves that their anti-money laundering policy and procedures are adequate and appropriate to their business.

1. Introduction

The aim of money laundering laws is to prevent criminals exploiting legitimate businesses to turn the proceeds of criminal activity into apparently legitimate funds or assets. Assisting criminals to legitimise the proceeds of their crimes is itself a criminal offence.

The main UK legislation covering anti-money laundering is found in the:

- Proceeds of Crime Act 2002 (as amended)

http://www.legislation.gov.uk/ukpga/2002/29/contents

- Terrorism Act 2000 (as amended)

http://www.legislation.gov.uk/ukpga/2000/11/contents

- Money Laundering Regulations 2007 (as amended)

http://www.legislation.gov.uk/uksi/2007/2157/regulation/6/made

2. Proceeds of Crime Act

a. The Primary Money Laundering Offences

The Proceeds of Crime Act ('POCA') sets out the primary offences related to money laundering. These are:

- concealing, disguising, converting, transferring or removing criminal property from the UK
- entering into or becoming involved in an arrangement which facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person
- the acquisition, use and/or possession of criminal property.

These offences apply to everyone, and you commit an offence **if you know or suspect** that the property is criminal property. '**Criminal property**' includes cash, fine art, antiques and collectibles items.

The primary money laundering offences carry a maximum penalty of 14 years' imprisonment and/or an unlimited fine.

To establish a money laundering offence, it is not necessary for criminal conduct to have taken place in the UK - it is sufficient that the conduct would be criminal had it been committed in a part of the UK.

Money Laundering can be:

- any one of the three primary offences described above;
- attempting, conspiring or inciting another person to commit such an offence;
- aiding, abetting, counselling or procuring another person to commit such an offence; or
- an act that would constitute one or more of those things if it had been done in the UK.

b. Knowledge or suspicion

'Knowledge' includes actual knowledge, wilfully turning a blind eye or wilfully and recklessly failing to ask the questions which a reasonable and honest person would ask.

'Suspicion' must have an actual basis that extends beyond speculation as to whether an event has occurred or not. A useful way of considering whether activity is suspicious is to look for the presence of **red flags**.

Red flags may include:

- clients who are evasive or reluctant to provide adequate information relating to their identity or property or who provide information which appears to be false;
- clients who ask detailed questions about your procedures for reporting suspicious activity and/or financial matters to tax authorities;
- clients who knowingly wish to sell at an artificially low or inflated price;
- clients who make multiple low value cash payments for a single or connected transactions;
- clients who suggest unusually complicated structures for achieving a purchase or sale;
- clients who are Politically Exposed Persons (PEPs) or closely connected to PEPs e.g. government officials or persons who hold a prominent public function;
- clients known to be (or associated with) persons subject to criminal or regulatory investigation, prosecution or conviction;
- clients who live, operate or bank in higher risk jurisdictions such as countries where drug trafficking, terrorism and/or corruption are prevalent or where tax and money laundering regulations are less stringent.

c. Establishing a defence

One defence to money laundering is to report your knowledge or suspicion to the National Crime Agency ('NCA')
http://www.nationalcrimeagency.gov.uk/
Where you suspect that you may be engaging in an activity involving criminal property, it is necessary to obtain consent from the NCA to continue with that activity by making an authorised disclosure.

The procedure for reporting to the NCA is as follows:

- make a Suspicious Activity Report ('SAR') either through the 'SARs online' system preferred by the NCA or by printing off and sending the form. Forms and details of how reports can be sent are available on the NCA website
- if you want to go ahead with the activity you must seek consent from NCA by ticking the 'consent required' box on the form
- the NCA will respond within seven working days, starting on the first working day after your report is received by the NCA
- if consent is granted you may proceed with the activity
- if you have not heard from the NCA within the seven day period, the NCA is deemed to have given consent although it is best practice to follow up with the NCA prior to carrying out the activity
- If consent is not granted, a 31 calendar day moratorium period begins to allow the NCA to take further action. You may not proceed with the activity during this period.

d. **Secondary Offence – 'tipping off'**

It is an offence to 'tip off' *any* person in a way which is likely to prejudice a money laundering investigation. To avoid committing this offence, you should not disclose to anyone that you have filed a SAR or raised a matter for investigation.

The offence of 'prejudicing an investigation' carries a maximum penalty of five years' imprisonment and/or a fine.

3. **Terrorism Act**

The Terrorism Act ('TA') applies to dealings with funds or property ("terrorist property") used to support terrorism.

Dealers in cultural property from countries occupied by terrorists are at greatest risk of committing an offence under the TA, the most relevant one being the retention or control or facilitation of the retention or control of terrorist property. This offence carries a maximum penalty of 14 years' imprisonment and/or an unlimited fine.

To establish a defence to the terrorism offence you need to prove that you that you did not know and had no reasonable cause to suspect that the arrangement related to terrorist property. A defence can also be

established by filing a SAR with the NCA and, where appropriate, obtaining consent to carry out an activity involving terrorist property.

Importantly, unlike POCA, the TA makes it a **positive obligation to report your belief or suspicion** that another person has committed a terrorism financing offence if the information comes to you in the course of your trade or employment. Failure to disclose carries a maximum of 5 years' imprisonment and/or a fine.

The 'tipping off' offence also applies under TA (see above).

4. Best Practice

In order to manage anti-money laundering risks effectively, members of BAMF may wish to consider the following:

a. Appointing a Money Laundering Reporting Officer

This is a legal obligation if you are in the regulated sector. (See 6). Even if you are not in the regulated sector, there is merit in appointing a Money Laundering Reporting Officer ('MLRO'). In the case of very small businesses, the proprietor might like to take on this responsibility. The MLRO will be the point of contact within the business for all things related to anti-money laundering compliance and have overall responsibility for implementing anti-money laundering measures including reporting knowledge or suspicion of money laundering to the NCA.

b. Training your staff

This is a legal obligation if you are in the regulated sector. (See 6). Even if you are not in the regulated sector, it is necessary to train your staff to identify suspicious transactions and report them to your MLRO. New members of staff should be trained when they join the business and existing members of staff should receive refresher training periodically.

c. Identifying Clients

If you are in the regulated sector, you must identify clients and verify their identity. (See 6.) Even if you are not in the regulated sector, it is prudent to **identify** clients, and in doubt about the information they provide, to **verify** their identity. This is typically done by collecting two forms of identification such as a passport and a utility bill for individuals

and formation documents and details of beneficial owners and controllers for legal entities.

d. **Keeping Records**

If you are in the regulated sector, you must keep records of clients' identification for at least 5 years from completion of the transaction or the end of the business relationship. (See 6.) Even if you are not in the regulated sector, it is good practice keep a record of clients' identity for a minimum of 5 years.

e. **Adopting a Policy Statement**

This is a legal requirement if you are in the regulated sector, and the Regulations detail the policies and procedures you should adopt. Even if you are not in the regulated sector, adopting an anti-money laundering policy statement is advisable.

Your policy statement will explain how risks to the business will be assessed and notably how you will among other things, perform your client due diligence, training, record keeping functions.

Risk based approach

In recommending a risk based approach, the Government recognises that in a world of limited resources and competing pressures, effort must be concentrated on the situations which are most likely to be used by criminals, to launder money. Your risk based approach should therefore be tailored to your business and target attention and available resources to persons or activities most at risk of being involved with criminal activity.

A risk based approach should:

- identify the risks of money laundering that are relevant to your business, in other words, your business's risk profile
- assess the risks posed by your particular clients and any underlying beneficial owners, services, financing methods, delivery channels and geographical areas of operation, including the location of the seller, buyer, the artwork(s) and the source of funds
- design and implement controls to mitigate these assessed risks
- monitor the effectiveness and implementation of the controls and make improvements where required
- record what has been done and why.

Your risk profile

A good understanding of your unique risk profile and exposures is critical to the implementation of an appropriate risk based approach. What works for one business will not suit another.

5. Financial Sanctions

Guidance on countries and individuals/organisations subject to financial sanctions can be found on HM Treasury Sanctions List at**:**

http://www.hm-treasury.gov.uk/fin_sanctions_index.htm

This provides information on financial sanctions, including names of individuals, organisations and regimes which have been placed under financial restrictions/asset freezes. There is also a subscription service available to allow alerts to be sent on updates to the list. It is illegal to do business with any person or organisation on the list without a licence from HM Treasury.

6. Regulated Sector

You are in the 'regulated sector' if you qualify as a High Value Dealer. You are a High Value Dealer if you accept or make **cash** payments over the limit of €15,000[1] for a single transaction or a series of related transactions. Even if you do not deal in cash payments over €15,000, you may still be in the regulated sector if you provide financial services to clients (e.g. by giving them loans.) This is a complex area of law so take legal advice to determine whether you fall within the regulated sector.

a. POCA and TA offences in the Regulated Sector

The offences under POCA and TA are the same and include failure to report suspicious activity and tipping off, but higher standards of due diligence apply to businesses in the regulated sector.

b. The Money Laundering Regulations

If you are within the regulated sector, in addition to complying with POCA and TA, you must also comply with the Money Laundering Regulations 2007 (the 'Regulations').

[1] This limit is expected to reduce to €10,000 when the 4th EU Money Laundering Directive is implemented into UK law in 2016

These Regulations impose significant obligations on businesses in the regulated sector including the obligation to register with a designated supervisory authority and to identify and verify clients' identity.

Obligation to Register

If you qualify as a high value dealer you must register with HM Revenue & Customs (HMRC) by completing an application form available at https://www.gov.uk/guidance/money-laundering-regulations-register-with-hmrc. There is an initial registration fee and an annual renewal fee. HMRC will typically process your application within 45 days although it can take longer if they require further information.

Client Due Diligence

The client is the person or entity with whom you form a contractual relationship. This can be the owner of artworks on whose behalf you agree to sell, or the buyer of the artworks to whom you sell from your own stock or as agent.

Client due diligence includes:

- **identifying** clients and **verifying** their identity;
- identifying the **beneficial owner**, where applicable, and taking adequate risk based measures to verify their identity;
- obtaining information on the purpose and intended nature of the business relationship;
- conducting ongoing monitoring of the business relationship, to ensure activites are consistent with what you know about the client, and the client's risk profile; and
- maintaining records of these checks.

Note the distinction between: (i) ***Identification***: knowing or being told the individual or entity's identifying details - such as the name, address, DOB; and (ii) ***Verification***: obtaining evidence supporting the claim of identity (methods include: independent sources, documents, electronic verification and reliance on regulated professionals).

The Regulations explain when you may carry out 'simplified due diligence' and when you must carry out 'enhanced due diligence'. 'Enhanced due diligence' is particularly relevant if you are dealing with **clients who are not physically present**, or with Politically Exposed

Persons ('PEPs'). The Regulations further explain the meaning of '**beneficial owner**', e.g. individuals who own or control a company, and how to identify and verify them.

Failure to comply with the Regulations carries a maximum penalty of two years' imprisonment, a fine, or both.

NOTE: Amendments to current UK anti-money laws will be introduced between June 2016 and June 2017. You should review your internal anti-money laundering programme at the time.