

Appendix F:

Supplementary Anti Money Laundering Guidance for Insolvency Practitioners

APPENDIX F

F.1 Introduction

- F.1.1 The legislation which comprises the *UK AML Regime* applies to persons who carry on business in the *regulated sector* (the term *regulated sector* used by schedule 9, POCA is identical in scope to the 'relevant persons' referred to in Regulation 3 of the *2017 Regulations*). All references in this appendix relate to the *2017 Regulations* unless specified otherwise. Both 'relevant persons' and *regulated sector* include persons acting as an Insolvency Practitioner (IP) within the meaning of Section 388 of the Insolvency Act 1986 (IA86) or Article 3 of the Insolvency (Northern Ireland) Order 1989 (IO89).
- F.1.2 Regulation 8(2)(c) specifically provides for IPs to be 'relevant persons' for these purposes. Regulation 11(b) provides a definition of "IP" for the purposes of the *2017 Regulations*. For the purposes of this Appendix, IP means any individual licensed as an IP, whether trading as a sole practitioner, in partnership with others or in an incorporated business.
- F.1.3 IPs should refer to the Main Body Guidance (the Guidance) for detailed information about the legislation and associated offences, and comprehensive guidance on compliance with the various requirements imposed by the legislation. This Appendix is concerned principally with matters that are particular to those acting as IPs.
- F.1.4 For the purposes of this Appendix, a person is only acting as an IP in accordance with the definition provided in Section 388 Insolvency Act 1986 or Article 3 of the Insolvency (Northern Ireland) Order 1989. Those authorised as IPs often undertake activities outside of formal appointments (for example, acting as a Law of Property Act receiver, undertaking independent business reviews (IBRs), restructuring or advisory appointments or acting as a continuing money adviser under the Debt Arrangement Scheme) which may be other 'defined services' for the purposes of the *2017 Regulations*. In these circumstances the relevant sectoral guidance should be followed. See paragraph 1.2 of the Guidance for further information.
- F.1.5 In cases where the *2017 Regulations* do not apply IPs may nevertheless consider it appropriate to undertake *CDD* and other checks.
- F.1.6 Regulation 8(2)(e) provides for trust or company services providers (TCSP) to be relevant persons for the purposes of the *2017 Regulations*. The definition of a TCSP is provided by Regulation 12(2) and includes persons providing a registered office, business address, correspondence or administrative address or related services. An IP acting in their capacity as an office holder is understood to be a relevant person in their capacity as an IP and not as a TCSP, notwithstanding that the registered office of the entity in respect of which they have been appointed has been changed to that of the IP.
- F.1.7 As IPs undertake appointments with both solvent and insolvent entities, throughout this Appendix reference to 'insolvent entity' should be read to include solvent entities where applicable.

F.2 Risk-based approach

F.2.1 Chapter 4 of the Guidance sets out details regarding the risk-based approach and the types of risk that might be present.

F.2.2 The Guidance identifies four categories of risk: *client* risk, service risk, geographic risk, and delivery channel risk. These relate broadly to the *client* entity type, the nature of the service being provided, the location of assets or trading activities (including customers, suppliers and the control of the business), and risks associated with the interface between the *business* and its *client* where the *client* is more remote than normal. IPs should consider the extent to which these categories of risks apply in any particular insolvency appointment, having regard to the examples identified in APPENDIX D of the Guidance.

F.2.3 Additional examples of higher risk factors that may be encountered in the context of an insolvency appointment may include (but are not limited to):

<i>Client</i> risk factors	<ul style="list-style-type: none"> • Where the debtor, company officers or beneficial owners of the insolvent entity are the subject of a criminal investigation or civil recovery proceedings. • Where there have been cashflow issues in the business the IP should consider the possibility of fraud. • Where the debtor or the insolvent entity is a “relevant person” within the definition of Regulation 8 of the <i>2017 Regulations</i>, particularly when it has not recognised this.
Service risk factors	<ul style="list-style-type: none"> • Where the insolvency proceedings will involve the realisation or distribution of assets of the insolvent entity. • Where the IP cannot withdraw once appointment has been made.
Geographic risk factors	<p style="text-align: center;">Where any of the following are within a country or countries identified as presenting high risk factors:</p> <ul style="list-style-type: none"> • The country of incorporation or residence of the client; • The location of the beneficial owner; • The location of assets or trading activities conducted; • The location into which payments may be made. <p style="text-align: center;">(See APPENDIX D of the Guidance)</p>
Delivery Channel risk factors	<ul style="list-style-type: none"> • Where there is no personal contact with the debtor or the directors or beneficial owners of the insolvent entity.

- F.2.4 These categories of risk factors and lists of examples are not exhaustive. IPs must take steps to identify all relevant risks, the severity of the threat presented by them, and respond appropriately to them.

F.3 Customer Due Diligence

F.3.1 The provisions relating to Customer Due Diligence ('*CDD*') set out in the *2017 Regulations* apply in situations where the person subject to the Regulations (such as an IP) and their counterparty form, or agree to form, a *business relationship*. In the context of insolvency, there will always be a *business relationship* between the IP and the debtor or entity over which they are appointed.

F.3.2 In carrying out *CDD*, IPs must adopt a risk-based assessment, based on the known facts about the entity, its ownership and the nature of any business or trading activities conducted by it, to consider the risks of the assets being the proceeds of crime or terrorist property. The risk-based approach means that where there is a higher risk of *MLTF*, *CDD* procedures must be more extensive and may go beyond identification checks and reasonable verification, and include other procedures such as adverse media checks on the *client* and those associated with it and any other measure that seems appropriate in the circumstances of the case, on a risk sensitive basis. Chapter 5 of the Guidance deals in detail with *CDD*. Appendix B provides a non-exhaustive list of the documentation that IPs may wish to obtain when *client* verification is required.

F.3.3 Regulation 30 requires that *CDD* takes place before the establishment of a *business relationship* or the carrying out of the transaction. IPs should conduct *CDD* for example prior to:

- Agreeing to act as liquidator or provisional liquidator of a solvent or insolvent company or LLP;
- Agreeing to act as nominee in a company voluntary arrangement not preceded by another insolvency procedure;
- Agreeing to accept an appointment as administrator or special administrator;
- Agreeing to accept appointment as an administrative receiver (in Scotland, receiver);
- Agreeing to act as nominee or supervisor in an individual voluntary arrangement;
- Agreeing to act as a trustee (including interim trustee) in a bankruptcy, a sequestration or under a trust deed;
- Accepting instructions to prepare, or assist in preparing, a proposal for a company or individual voluntary arrangement where appointment as nominee will be sought;
- Agreeing to act as liquidator, provisional liquidator or administrator of an insolvent partnership;
- Agreeing to act as trustee of a partnership under Article 11 of the Insolvent Partnerships Order 1994;

- Agreeing to act as nominee or supervisor in relation to a partnership voluntary arrangement.
- F.3.4 The processes of identifying, verifying and assessing the customer must be conducted prior to consenting to the insolvency appointment and on a risk sensitive basis, periodically throughout the appointment.
- F.3.5 In very limited circumstances (for example a hostile appointment), it may not be possible to have completed the verification procedures before taking office (Regulation 30(3)). An initial *client* identification and assessment of risk must be completed before consenting to act and reviewed subsequent to appointment. IPs should be mindful that the circumstances in which legislation permits an office holder to resign do not include an inability to complete *client* identification and verification procedures.
- F.3.6 Where it is not possible to complete the *CDD* procedures before taking office, IPs should gather sufficient information to allow them to form a general understanding of the identity of the debtor, company officers or beneficial owners of the entity, including information about what the business did and where it traded, in order that the risk of *MLTF* can be assessed before completion of full *CDD* procedures. Information from online or subscription services may be a useful source of material for *CDD*, but IPs need to be satisfied that the information is reliable and up to date (see para 5.4.17 of the Guidance).
- F.3.7 In cases where an IP is appointed without any prior contact with the debtor, company officers or beneficial owners of the insolvent entity (such as appointments made via a creditor's decision procedure where an alternative IP is nominated by the creditors, or an appointment made as a result of a creditor's petition), IPs should complete their *CDD* procedures as soon as is practicable on appointment (within five working days is considered a reasonable period). Much of the necessary information may be obtainable from the IP who assisted with convening the decision procedure, or where appropriate, from a prior office holder (for example by them providing certified copies of the necessary documentation). In the situation where management of the *client* entity is hostile, and unwilling to provide further information, the IP should review other sources of publicly available information to enable reasonable verification of the *client* within the required timescale.

Appointment by court, Secretary of State or Accountant in Bankruptcy

- F.3.8 Where an IP is appointed by court order, by a decision or deemed consent procedure convened by the official receiver, the Accountant in Bankruptcy, or directly by the Secretary of State, without any prior involvement with the insolvent, some reliance can be placed on the order of appointment or the initial bankruptcy or winding-up order to evidence the identity of the insolvent as part of risk based *CDD* procedures. This would apply to the following cases:
- Appointment as provisional liquidator by order of the court;
 - Appointment as liquidator in a winding up by the court (whether by court order following an administration, via a decision procedure or deemed

consent procedure convened by the official receiver or directly by the Secretary of State);

- Appointment as administrator or special administrator by order of the court;
- Appointment as administrative receiver (in Scotland, receiver) or special manager by order of the court;
- Appointment as trustee in bankruptcy (whether via a decision procedure or deemed consent procedure or meeting convened by the official receiver, the Accountant in Bankruptcy or directly by the Secretary of State).

F.3.9 Any such reliance on the court order, the notice of appointment or the initial bankruptcy or winding-up order does not remove the need to consider the identity of the beneficial ownership of the entity, or remove the need to consider whether *MLTF* activity may have taken place. The IP will also need to consider the potential *MLTF* risks that may arise throughout the course of the appointment. Other information will still need to be obtained to assess these risks properly.

Use of CDD conducted by third parties

F.3.10 Under Regulation 39, IPs may rely on *CDD* conducted by certain third parties, rather than performing their own *CDD*. Where they do so IPs should have regard to paras 5.4.1 – 5.4.7 of the Guidance. In particular, the IP should still carry out a risk assessment and perform ongoing monitoring.

F.3.11 Where an IP is appointed administrative receiver (in Scotland, receiver) or administrator by a bank or other institution which is itself subject to the *2017 Regulations*, the IP may be able to obtain copies of *CDD* undertaken by the bank or other institution for use in the IP's *CDD*. Again, this process should be completed as soon as is reasonably practicable, so the IP should request copies of *CDD* on initial contact with the appointee. IPs must be satisfied that they have sufficient evidence of identity and enough information to assess the *MLTF* risks (see the risk factors in F.2.3 above) and must, therefore, conduct such further *CDD* as is necessary for these risks to be properly assessed. In the situation where management of the *client* entity is hostile, and unwilling to provide further information, the IP should review other sources of publicly available information, or electronic verification services to enable reasonable verification of the *client*.

Ongoing monitoring of *business relationships*

F.3.12 The *2017 Regulations* require ongoing monitoring of *business relationships*, under Regulation 28(11), including additional *CDD* measures, to be adopted at appropriate times during the course of a *business relationship* on a risk-sensitive basis. Paragraphs 5.2.5-5.2.8 of the Guidance deal in more detail with trigger points which might give rise to the need for updated *CDD*.

F.3.13 In a formal insolvency where trading has ceased, it is likely that ongoing *CDD* may only be required in cases where the office holder becomes aware of suspicious activity or is concerned about the veracity of previous *CDD* information.

- F.3.14 Where trading is continuing under the control of the IP, ongoing *CDD* should be undertaken to the extent dictated by the risk level identified. Additional *CDD* will also be required where the IP becomes aware that the previous *CDD* information was incorrect or is no longer up to date.

CDD on purchasers of an entity's assets

- F.3.15 In appointments where the IP becomes vested of the assets of the debtor, (bankruptcy in England & Wales and Northern Ireland and sequestration and trust deeds in Scotland), asset sales are conducted by the IP as principal. In such cases, the IP, being themselves a relevant person within the *regulated sector*, should apply the *occasional transaction* provisions and conduct *CDD* on the purchasers of assets for transactions amounting to 15,000 euros or more, whether as a single transaction or a series of linked ones.
- F.3.16 When appointed as a liquidator, administrator, administrative or other receiver, or supervisor of an Individual Voluntary Arrangement (IVA) or Creditors Voluntary Arrangement (CVA), an IP's *business relationship* is with the debtor or the entity over which they have been appointed, not with the purchasers of their assets. In such cases, *CDD* is not required to be undertaken on the purchasers of assets.
- F.3.17 Where an IP is appointed over an unregulated entity, the nature of the business of the debtor or entity does not change with the appointment of an IP, therefore, if the insolvent entity was not within the *regulated sector* prior to the appointment, it would not become a regulated entity simply by virtue of an IP being appointed. Therefore, an IP need not routinely carry out *CDD* on the purchasers of assets unless the business trades in goods, and those goods transactions exceed the high value dealer (HVD) threshold (cash transactions over 10,000 euros). IPs should therefore consider whether the insolvent entity trades in goods by way of business such that a previously unregulated entity could become an HVD, thereby requiring supervision by HMRC. IPs should note that guidance on the HMRC website says: "You must not accept or make high value cash payments until you have registered as a high value dealer". For guidance on where an IP is appointed over a regulated entity please see F.4.
- F.3.18 IPs should ensure that where an agency is being used to sell assets, for example auctioneers, and where *CDD* is required to be carried out on the purchaser of assets, that arrangements are in place to fulfil the IP's *CDD* obligations. The IP should carry out *CDD* on the purchaser prior to a binding contract to sell being completed. Where the agent is a regulated entity (for example an estate agent or solicitor) an IP may place reliance on the *CDD* conducted by the agent (subject to the cases at F3.8). The IP may authorise an agent to carry out *CDD* on their behalf, although the IP will remain fully responsible for compliance with the *CDD* requirements. Any authorisation or arrangements with agents to complete *CDD* on behalf of the IP should be documented in writing.

CDD on the payer of other funds

- F.3.19 Where an IP receives other funds from a third party, for example a third party contribution in an IVA or a bankruptcy, the IP should carry out *CDD* on the third

party and assess the associated *MLTF* risks. In an insolvency context, examples of factors which may be considered as part of the risk assessment would include:

- The relationship between the third party and the insolvent;
- The rationale for the third party contributing to the insolvent estate;
- The source of funds to the third party

CDD of the recipients of distributions and dividends

F.3.20 The recipient of a distribution or dividend is not a *client* for the purposes of the Regulations. The IP would not therefore usually be required to undertake *CDD* on these recipients. However, the IP should consider their exposure to financial sanctions. A full list of those subject to financial sanctions is published by the Office of Financial Sanctions Implementation ('OFSI'). It is prohibited to make funds or economic resources available, directly or indirectly, to, or for the benefit of, anyone subject to financial sanctions. The IP should ensure clear notes of such are held on the AML risk assessment for the duration of the engagement. An IP should also consider whether any other sanctions restrictions apply, such as trade, transport or immigration sanctions and conduct checks accordingly using the Foreign Commonwealth and Development Office's (FCDO) Sanctions List.

F.4 Appointments over regulated entities

F.4.1 Where an IP is appointed over an entity in the *regulated sector* then that entity remains subject to requirements of the *MLTF* regime. The entity's supervisor should be informed of the appointment. The IP should also take their own appropriate advice on who the relevant *AML supervisory authority* will be for their activities in relation to the entity, given that there may be more than one interested AML supervisor (i.e. the IP's supervisor and the entity's supervisor). The requirement for the regulated entity to conduct *CDD* on their own *clients* will remain unchanged.

F.4.2 Where an IP is appointed in an insolvency procedure over a relevant firm or sole practitioner, this would not make the IP a Beneficial Owner Officer or Manager ('BOOM') of that firm or sole practice for ML purposes. See F.7 below for further details on BOOMs.

F.5 Reporting suspicion of Money Laundering or Terrorist Financing

F.5.1 The definitions of money laundering, criminal property and criminal conduct are very broadly drawn. See Chapter 2 of the Guidance for the scope of the offences and the property that may be covered. IPs should be mindful of the risk of being a party to a course of action that may be in breach of the *UK MLTF Regime*.

F.5.2 IPs must comply with the requirements relating to the reporting of suspected *MLTF* and consider obtaining a *DAML* where appropriate in relation to dealing with potential criminal property.

F.5.3 IPs may become aware, or may form a suspicion, that past activities of a company or individual to which they have been appointed constitute an offence under the *UK AML Regime*. Such knowledge or suspicion will trigger a reporting requirement. For detailed guidance on suspicion and reporting see Chapter 6 of the Guidance.

- F.5.4 Where an IP intends to realise assets, distribute assets (including in specie) or make any payment from an entity which they suspect includes proceeds of crime, the IP should also consider whether they should submit a DAML SAR to the NCA, before proceeding with the transaction. On the basis that cash is a fungible asset, any funds suspected of being proceeds of crime will taint all funds in that bank account, and therefore any distributions from that account may require a *DAML* to protect the IP from committing an offence under *POCA*.
- F.5.5 Note that the requirement to report relates to suspicion of **any** criminal activity resulting in proceeds regardless of who may have committed the offence or where it was committed if the conduct would have been criminal if undertaken in the UK.
- F.5.6 In the absence of suspicion of fraud or dishonesty, the mere existence of a debt to HMRC will not trigger a reporting requirement. However, where a *client* is deliberately delaying payment to HMRC, this could become a refusal to pay the tax due. IPs should refer to Section 9 of the supplementary AML guidance for tax practitioners.

The Privilege exemption

- F.5.7 Privilege is unlikely to be relevant to insolvency appointments. Where they believe it may be relevant, IPs should refer to the Guidance (paragraphs 6.5.22 to 6.5.33).

Tipping off

- F.5.8 The *tipping off* offence arises when a person discloses that a report has been made or may be made to the authorities, and the disclosure is likely to prejudice an investigation that might be conducted. For further information on *tipping off* see Chapter 6 of the Guidance.
- F.5.9 IPs should be careful to ensure that reports to creditors, or reports to third parties which might be liable to disclosure (such as those made under the Company Directors Disqualification Act 1986, Company Directors Disqualification (Northern Ireland) Order 2002 or the Bankruptcy (Scotland) Act 2016), do not contain anything that might constitute *tipping off*.
- F.5.10 An IP will not be *tipping off* in providing routine access to their case files to their *anti-money laundering supervisory authority* in the course of their ordinary monitoring activity. IPs should be careful to ensure that their working papers or other records required to be maintained under insolvency legislation do not contain a copy of any report that has been made under the *UK AML Regime*.

Where the insolvent is within the regulated sector

- F.5.11 Where an IP is appointed to a company, partnership or individual which is itself carrying on business within the *regulated sector* (e.g. *external accountant, tax adviser, independent legal professional, 'estate agent' or 'high value dealer'*) the IP will need to ensure that the insolvent's own internal systems in relation to *MLTF* reporting comply with the legislation and continue to function during the course of the insolvency. However, the IP will also have to report suspicions encountered

during the course of their duties through the IP's own *MLRO*, in addition to through the insolvent entity's internal systems.

F.6 Obtaining consent to transactions involving potentially criminal property – Defence Against Money Laundering ('DAML') SARs

- F.6.1 A *DAML* request to the NCA is required under Section 338 of *POCA* where an IP engages in any arrangement that may facilitate activity involving suspected criminal property. Failure to do so would expose the IP to committing a money laundering offence. The NCA has seven working days (starting the day after submission of a report) in which to grant or refuse a *DAML*. If nothing is heard from the NCA by the end of this period the *DAML* is deemed to have been given. If within seven days the NCA gives notice of refusal, then *DAML* is only deemed to have been given after a further 31 days ('the moratorium period') passes without any restraint order or civil recovery property freezing order being granted (unless notice is received that the moratorium period has been extended). See Chapter 6 of the Guidance for applying for and receiving a *DAML*.
- F.6.2 The appointment of an IP may cause them to take control of tainted assets. If it is known or suspected prior to appointment that the assets are tainted, then a *DAML SAR* should be made prior to appointment. Where this is not possible because of the urgent requirement to preserve assets or other similar reasons, a *SAR* and *DAML* request should be made as soon as practicable afterwards.
- F.6.3 IPs should bear in mind that, where they suspect the assets of a company or individual to which they have been appointed may be criminal property, selling those assets, or using the company's or individual's funds, without a *DAML* will constitute an offence.
- F.6.4 IPs should consider submitting a *DAML SAR* to the NCA that covers all distributions and payments the IP intends to make from the tainted assets. However, the IP should note that any such *DAML* provided by the NCA in response to a *DAML SAR* may specify how the funds may be dealt with. If the IP has cause to change those dealings, or make additional distributions or payments, the IP will require a further *DAML* from the NCA via submission of a further *DAML SAR*.

F.7 Supervisory approval of Beneficial Owners, Officers and Managers (BOOMs)

- F.7.1 Regulation 7(1)(b) of the *2017 Regulations* provides that each of the professional bodies listed in Schedule 1 is the supervisory authority for relevant persons who are members of it, or regulated or supervised by it. An IP is supervised for *MLTF* purposes by the body that has granted their IP authorisation (their RPB). For High Value Dealers, the supervisor for *MLTF* purposes is HMRC. High Value Dealer is defined in Regulation 14(1) (a) as a firm or sole trader who by way of business, trades in goods, and where any transaction exceeds 10,000 euros in cash.
- F.7.2 Regulation 11(b) of the *2017 Regulations* defines IP to include any firm or sole practitioner so acting. Regulation 26(1) of the *2017 Regulations* requires that the BOOMs of relevant firms (which will include firms of IPs) or sole practitioners, be

approved by the *anti-money laundering supervisory authority* of the relevant firm or relevant sole practitioner. In mixed practices or practices with IPs authorised by multiple professional bodies, an IP should ascertain from their professional body what their expectations are, the registration processes and what agreements are in place with other supervisory authorities in terms of supervision for money laundering purposes.