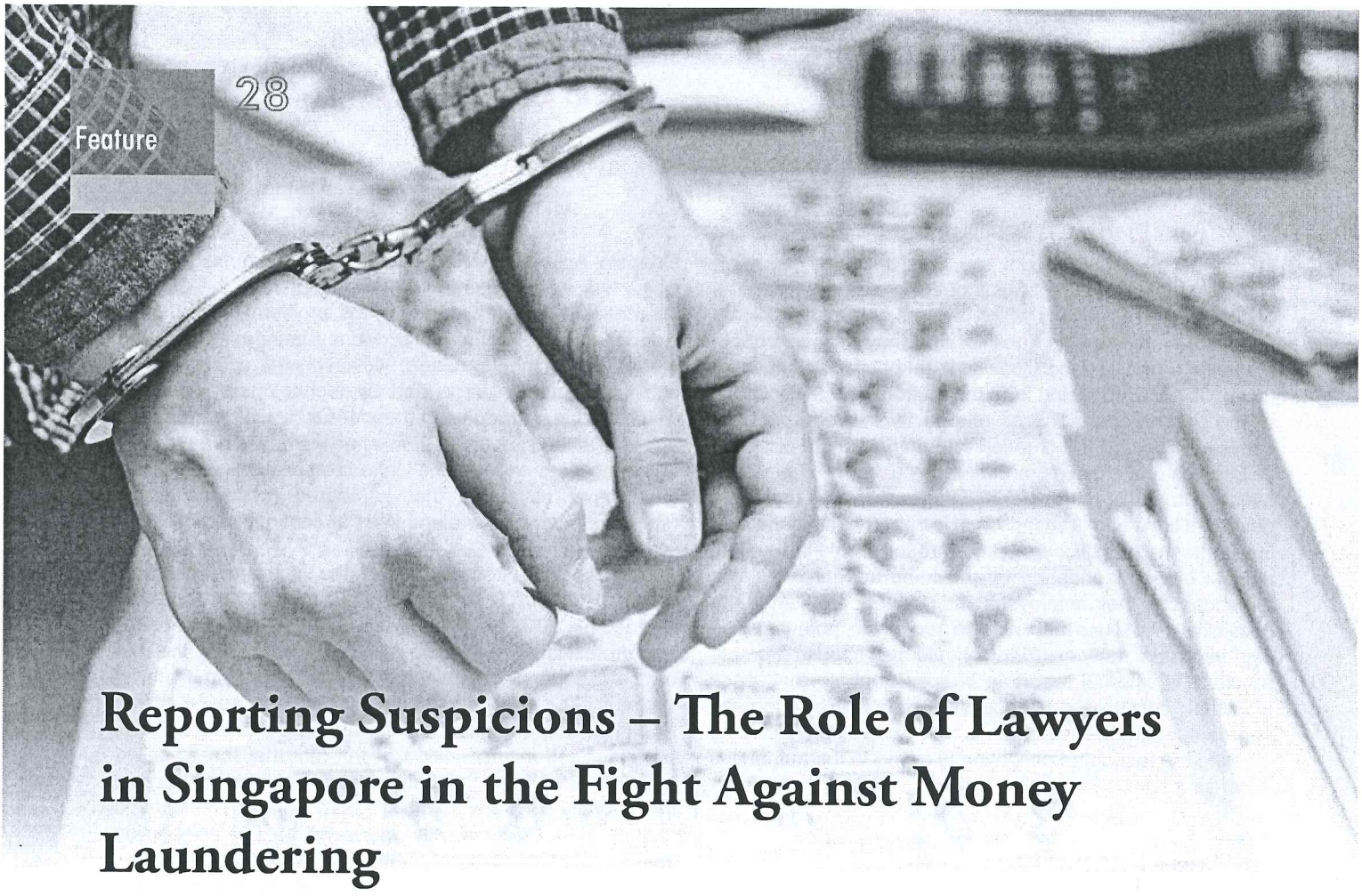

Reporting Suspicions – The Role of Lawyers in Singapore in the Fight Against Money Laundering

This article sets out the statutory requirements for legal practitioners and law practices to lodge a suspicious transaction report with the authorities where applicable, and identifies some potential 'red flag' situations which they should be mindful of.

Introduction

A report on anti-money laundering published in 2013 by the Singapore Ministry of Finance acknowledges that, as a thriving hub for business, financial services and transport, Singapore is susceptible to being used as a conduit for money laundering.[1] Over the course of the past two decades, Singapore has developed a robust regime to counter this risk, through a combination of tough regulation, rigorous supervision and effective enforcement. In light of this it is somewhat surprising that the results of a survey conducted by the Law Society of Singapore in June 2016 indicate a continued lack of awareness regarding money laundering risk among law firms and practitioners in Singapore. There appears to be a belief that "money laundering is something that happens to others not to me." As a result of these findings, the Law Society of Singapore has concluded that still more can – and should – be done to raise awareness amongst lawyers in Singapore about the risk of the profession being "misused" to launder money and our consequential responsibilities.[2]

The money laundering process generally involves three discrete stages: placement, layering and integration. The proceeds of criminal activity are first introduced into the financial system during the placement stage, often broken up into small amounts to decrease the risk of detection. These funds are then distanced from their illegitimate origins through a series of financial transactions during the layering stage. Having successfully disturbed the audit trail, through the integration phase the criminal will reinsert the ostensibly "clean" money back into the legitimate economy so that the funds can be used freely for his own personal benefit or for the financing of further criminal activity.

Lawyers are vulnerable to being misused or targeted by criminals involved in money laundering activities for a number of reasons, and at various different stages within the money laundering process. First, criminals may seek to engage legal services to lend a veneer of legitimacy to any transactions undertaken as part of the money laundering process. Second, firms are often required to hold significant sums of money on behalf of their clients in connection with the completion of a transaction. The act of passing money

through a firm's client account "cleanses" the money, allowing criminals to disguise the origins of the proceeds. Third, the confidentiality obligations which lawyers owe to their clients appeal to criminals who consider that they may be able to manipulate and use the cloak of legal privilege to conceal their criminal wrongdoing from the authorities. Finally, many of the professional services offered by lawyers, such as conveyancing and the creation and management of trusts, companies and charities, are methods used by criminals to conceal money or to transfer it to their associates under the guise of a legitimate transaction. It is therefore essential that law firms and practitioners take a proactive role in the fight against money laundering by providing adequate training to ensure that their employees and partners are alert to the possibility of misuse and able to recognise potential "red flag" indicators early on. Firms should also seek to promote a culture of internal reporting of suspicions so that, once identified, concerns are escalated internally through the appropriate channels and dealt with accordingly including meeting the requested obligation to report to the authorities in certain countries.

Legal practitioners have always been subject to the fundamental code of ethics of the profession, which requires lawyers to act with integrity and to uphold the rule of law by not supporting, facilitating or becoming unwittingly involved in criminal activity. Prior to the introduction of the current statutory regime, a lawyer practicing in Singapore would, I believe, have been ethically obliged to cease acting upon becoming aware of suspicious activity which could indicate money laundering. However, the statutory anti-money laundering obligations go beyond that ethical duty by requiring legal practitioners and firms not only to take reasonable steps to detect, but also to inform the relevant authorities should they suspect the involvement of their client (or any other party to the transaction) in, money laundering. Many in the profession around the world have expressed concerns that the reporting obligation undermines the independence of the legal profession and is incompatible with the duty of confidentiality which underpins the lawyer-client relationship. While such concerns are – of course – legitimate, we cannot lose sight of the fact that as lawyers we also have an ethical obligation not to allow the profession to fall into misuse by criminals. In any event this debate is somewhat undermined in Singapore as lawyers are under a statutory duty to report.

The FATF Recommendations

The foundations for Singapore's current anti-money laundering legislation were laid down in 1990 with the publication of the original Recommendations of the Financial Action Task Force (the "FATF Recommendations"). The Financial Action Task Force is an inter-governmental body which was established in 1989 in response to the growing international concern regarding the proliferation of money laundering on a global scale. Money laundering is by no means a new phenomenon. However, the scale of such activity – aided in large part by technological advances which enable individuals to transfer funds anywhere and at any time at the click of a button – has increased dramatically in recent years. Indeed, the United Nations Office on Drugs and Crime estimates that laundered money currently represents between two and five per cent of global GDP.[3]

Though initially directed only at the financial sector, the reach of the FATF Recommendations was subsequently extended in 2003 to cover certain non-financial businesses and professions – including lawyers – which play the role of "gatekeepers" in providing access points to financial systems. The rationale for broadening the scope of the FATF Recommendations in this way was according to FATF, twofold. First, in recognition of the fact that the so-called "gatekeepers" were uniquely placed, by virtue of the role that they play in many financial transactions, to monitor and identify any suspicious activity. Second, the Financial Action Task Force was concerned that such professionals were – unwittingly – assisting criminals by providing advice to them and acting as financial intermediaries. By requiring lawyers to be alert and proactive in their monitoring of clients, there was less chance that they could become unintentionally involved in any money laundering activity.

The FATF Recommendations themselves have no direct effect and merely prescribe a framework of recommendations to be followed by national legislatures when imposing anti-money laundering obligations through domestic legislation. However, the FATF Recommendations are universally recognised as the international standard for anti-money laundering and have been endorsed by more than 180 countries.[4] Singapore – as a member of the Financial Action Task Force since 1992 – was required to introduce legislation to give effect to their content (including, from 2003, the introduction into domestic legislation of so-called "gatekeeper legislation"). Singapore originally implemented such legislation in relation to lawyers in 2007 in the form of an amendment to the Legal Profession Act ("LPA").

The Current Legislative Regime

Legislation which Applies to all Individuals

The primary legislation which sets out the predicate offences relating to money laundering in Singapore is the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A) of Singapore ("CDSA"). Under

Part VI of the CDSA, it is an offence to assist another person to retain, transfer or use the benefits of criminal conduct. Any person who, in the course of his or her trade, profession, business or employment, becomes aware or has reasonable grounds to suspect that any property represents the proceeds of crime or was (or is intended to be) used in connection with any criminal conduct, must report his or her suspicions to a Suspicious Transaction Reporting Officer as soon as is reasonably practicable. Failure to do so is offence under the CDSA.

Part VA and its Application

The anti-money laundering practice rules relating specifically to lawyers are found in Part VA of the LPA ("Part VA"), the Legal Profession (Prevention of Money Laundering and Financing of Terrorism) Rules 2015 and the Law Society of Singapore's Practice Direction 1 of 2015 on the Prevention of Money Laundering and Financing of Terrorism (the "Practice Direction"). A recent amendment of these rules came into effect on 23 May 2015 and repeals the existing legislation which was in place prior to that date.

Part VA is stated to apply to legal practitioners and law practices in Singapore (including any Qualifying Foreign Law Practice, licensed foreign law practice or the constituent foreign law practice of a Joint Law Venture) only when such practices undertake certain specified transactions and activities which the Financial Action Task Force has identified as carrying a higher risk of money laundering. Such activities include conveyancing, the creation or management of companies or trusts, the acquisition or disposal of companies and transactions which are not usual.

To the extent that a transaction does not concern a "relevant matter," the obligations under Part VA and any secondary legislation (including the Legal Profession (Prevention of Money Laundering and Financing of Terrorism) Rules 2015) will not apply. However, this term is likely to be interpreted broadly and the Practice Direction suggests that lawyers err on the side of caution (and, if in doubt, seek guidance from the Law Society) when considering whether Part VA may apply. The Practice Direction further notes that firms should undertake customer due diligence on their clients irrespective of whether the transaction concerns a "relevant matter" for the purposes of Part VA, as a matter of good practice. Furthermore, lawyers should bear in mind that the CDSA may well apply even in circumstances where Part VA is not triggered.

Preventive Measures – What Do the Rules Require

Training

Awareness and vigilance are key to the successful identification of potential "red flags" and the prevention of money laundering. The anti-money laundering provisions set out in Part VA focus strongly on preventive measures, requiring each firm to take appropriate steps to identify, assess and understand its risk profile in relation to money laundering, having regard to the size of the firm and the practice areas in which it is involved, as well as the nature of the firm's client base. Firms are required to implement programmes for the prevention of money laundering which are sufficient, bearing in mind the relevant risk profile of the firm. Such programmes must include training for legal and support staff alike.

Customer Due Diligence

Firms must take reasonable measures to ascertain the identity of their client (or, in the case of a client which is a corporate entity, the natural persons who have a controlling interest in or exercise control over the client), the nature of the client's business and the source of funds of the client at the outset of any transaction which concerns a "relevant matter." The information compiled on the client must be kept up-to-date as the matter proceeds.

Part VA advocates a risk-based approach to customer due diligence, requiring firms and legal practitioners to undertake such investigations as are "commensurate with the level of risk of money laundering and financing of terrorism." The rationale behind the risk-based approach is to permit firms to focus on identifying and monitoring those clients which are considered to be higher risk, and in so doing, improving the likelihood that they will detect (and prevent) suspicious transactions. Firms are required to determine the risk profile of a client by having regard to a variety of factors. These are discussed in further detail below. It is generally not necessary to undertake full client identity checks in respect of existing clients, provided that there is no reason to suspect the client's involvement in money laundering and the lawyer is satisfied that the original documentation provided for the purposes of client identification was adequate and is unlikely to have changed.

Identifying "Red Flags"

Lawyers should ensure that they remain alert to the risk of misuse by money launderers by watching out for and recognising certain "red flag" indicators which may arise in every day practice. These can broadly be grouped into the

four categories listed below and which contain illustrative examples of potential risk factors.

1. Risk factors relating to the client

   a. the client is unwilling to disclose, or evades questions regarding, the source of its funds or its reasons for structuring the transaction in a certain way;

   b. the client is known to have been involved in criminal activity, has criminal connections or is a "politically exposed person";

   c. the client is unduly familiar with, or shows an unusual level of interest in, the specific requirements of the customer due diligence process;

   d. the client attempts to conceal his or her true identity, or the identity of its beneficial owners (eg, by avoiding personal contact without good reason, refusing to disclose information and documents which are required to enable the execution of the transaction or using false or counterfeited documentation);

   e. the client appears to be connected to the counterparties in any way which gives rise to doubt as to the true purpose of the transaction (eg, if the same parties are involved in more than one transaction over a short period of time);

   f. the client is based in a jurisdiction which the Financial Action Task Force has identified as a jurisdiction in which there is a higher risk of money laundering; or

   g. the parties are not the same as the persons actually directing the operation.

2. Red flags relating to the services requested

   a. receipt of instructions relating to the establishment of complicated trust or corporate structures in which money could be concealed;

   b. mandates which solely relate to routine aspects of forming a shell company, where the client does not seek legal advice as to the appropriateness of the company structure and related matters;

   c. back-to-back real estate transactions where the purported value of the property increases with each subsequent transaction in a manner that is out of sync with normal market dynamics;

   d. transactions which are aborted following the deposit of funds into the firm's client account;

   e. circumstances in which client money is deposited into the firm's client account before completion of the underlying work, or the incorrect amount is deposited; or

   f. litigation which appears to be a mere pretext for transferring funds from one entity or person to another.

3. Red flags relating to the client's source of funds

   a. circumstances in which an excessively high or low price is attached to any securities being transferred;

   b. funds are received from or required to be sent to a jurisdiction which the Financial Action Task Force has identified as a high risk jurisdiction or a jurisdiction to which the client has no apparent link;

   c. the provision of funding for the transaction or for transaction-related fees or taxes by a third party which is not a credit institution and has no apparent connection to the transaction;

   d. the unusual repayment of mortgages prior to the initially agreed maturity date; or

   e. use by the client of multiple or foreign bank accounts without good reason.

4. Red flags relating to the client's choice of lawyer

   a. the engagement of lawyers who lack competence or experience in the relevant area of law or in the type of transaction;

   b. a willingness on the part of the client to pay substantially higher fees than usual;

   c. the engagement of more than one firm in relation to a particular matter; or

   d. another firm terminating or refusing to enter into a relationship with the client.

The presence of "red flag" indicators in itself will not necessarily give rise to suspicions of money laundering.

However, once potential risk factors have been identified, lawyers and firms are required to consider whether they require further information in order to satisfy themselves that there are no reasonable grounds for suspicion of the client's involvement in money laundering.

Record-keeping

Under Part VA, lawyers are required to maintain records of transactions and any documentation obtained through customer due diligence measures for a period of five years following completion of the transaction (if an occasional transaction) or termination of the business relationship. The records must be sufficiently detailed to permit a reconstruction of the relevant matter and to provide evidence (if requested by any competent authority) for the prosecution of any offence committed.

The Law Society of Singapore undertakes regular inspections of firms to assess compliance with applicable anti-money laundering legislation. It may require firms to produce documents or information on request. It is therefore important that firms ensure their records are kept up-to-date and are adequate. In the wake of the 1MDB scandal, the Monetary Authority of Singapore announced earlier this year that it intended to set up a dedicated group to combat money laundering and strengthen enforcement. In line with this increased focus on enforcement, the Law Society of Singapore has indicated that it intends to step up inspections at firms.[5]

Reporting of Suspicious Transactions and the Offence of "Tipping-off"

Part VA requires a lawyer who knows, or who has reasonable grounds to suspect that any property represents the proceeds of (or is otherwise linked to) criminal activity, to disclose the matter to a Suspicious Transaction Reporting Officer or an authorised officer under the CDSA as soon as is reasonably practicable by way of filing a suspicious transaction report.

Failure to comply with the reporting obligation is an offence under the CDSA, though lawyers practising in Singapore will not be required to disclose information which is subject to legal privilege. The Practice Direction specifies that legal professional privilege "should be construed in accordance with the laws and ethical obligations of the legal practitioner under the jurisdiction in which he/she is fully admitted to practise generally" and suggests that practitioners consult with the Law Society of Singapore if they are in any doubt as to the extent of the privilege exception. It is therefore essential that any lawyer practising in Singapore understands the national laws relating to privilege in his or her home jurisdiction (whether Singapore or elsewhere) in addition to the applicable Singaporean anti-money laundering legislation in order to ensure that client confidentiality is not breached by the making of an suspicious transaction report where this is not required due to the privilege exception.

It is an offence to disclose to any other person that a suspicious transaction report has been made or to disclose any other matter which is likely to prejudice any investigation which may be conducted following the disclosure. To avoid tipping off, a lawyer may be required to stall for time while he awaits a response from the relevant authorities – the real reason cannot be given.

AML Obligations and the Lawyer-Client Relationship

As the guardians of justice, lawyers are under an ethical obligation to uphold the rule of law and not to assist their clients in the conduct of criminal activity, whether wittingly or otherwise. This ethical obligation requires lawyers to be alert to the potential misuse of their professional services by clients seeking to further a criminal agenda. Few would suggest that the statutory requirement to undertake ongoing customer due diligence set out in Part VA is anything other than a natural extension of that ethical obligation.

But what if a lawyer discovers information – either as a result of due diligence or otherwise during the course of a transaction – which leads him to suspect the involvement of his client in money laundering? Prior to 2007, a lawyer would probably have been required to stop acting for the client in such circumstances. However, he may have been under a professional and legal obligation to keep the affairs of that client confidential and not to disclose the circumstances in which he had ceased to act to any other person. The criminal would have been free to continue to pursue his criminal agenda by seeking the advice of another lawyer. Under the statutory regime, lawyers are now required to report such suspicions to the authorities.

Many have expressed concerns that the reporting requirement (and the related prohibition against "tipping-off") represents a complex ethical challenge to the confidentiality and loyalty requirements of the lawyer-client relationship and undermines the independence of the legal profession, turning lawyers into mere "agents" of the state.[6] However, lawyers are also under an obligation to uphold the rule of law. The reporting requirement set out in Part VA only arises in the context of activities that are (or are suspected to be) criminal. As such, the new statutory order arguably strikes a necessary balance between the two competing obligations;

the confidentiality obligation is overridden only where absolutely necessary in order to prevent lawyers from being misused and facilitating criminal financial flows, whether actively (by continuing to provide advice) or passively (by ceasing to act for the client but remaining silent and, in so doing, sending criminals on their way to try their luck with a different lawyer or firm).

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Notes

1 See <http://www.bochinche.com.sg/images/BCCLUNCHWEB.pdf>.

2 See <https://www.lawsociety.org.sg/portals/0/ResourceCentre/eshop/pdf/SLG_July_2016_Final.pdf>.

3 See <https://www.unodc.org/unodc/en/money-laundering/globalization.html>.

4 See <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf>.

5 See <https://www.lawsociety.org.sg/portals/0/ResourceCentre/eshop/pdf/SLG_July_2016_Final.pdf>.

6 Blake Bryant Goodsell, "Muted Advocacy: Money Laundering and the Attorney-Client Relationship in a Post 9/11 World." J Legal Prof 34 (2009): 211.

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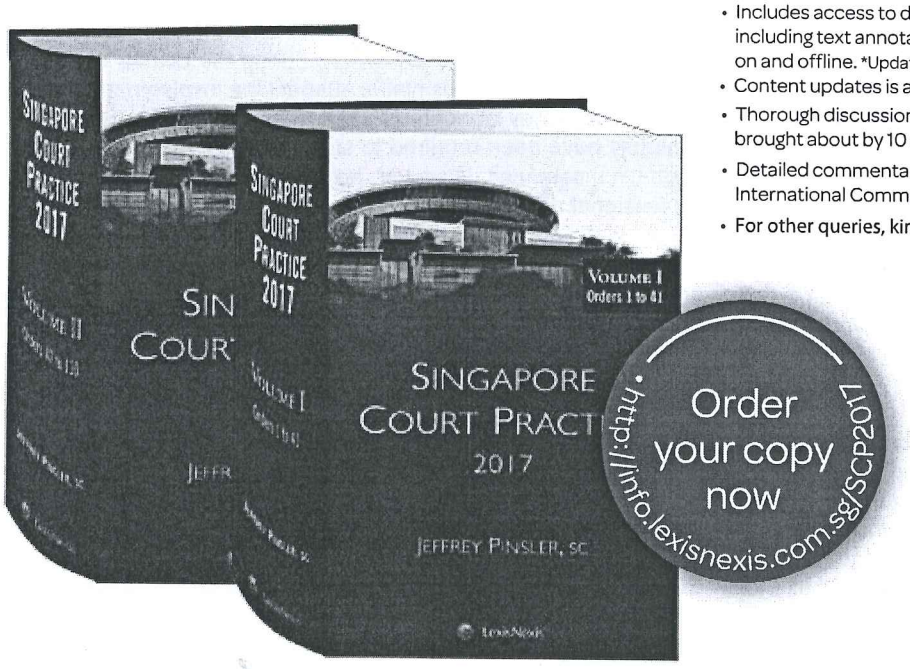
• The Honourable the Chief Justice Sundaresh Menon, in his foreword to Singapore Court Practice 2014



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