

The Faculty of Advocates response to the Guidance Consultation GC17/7

The Office for Professional Body Anti-Money Laundering Supervision: A Sourcebook for Professional Body Supervisors

Introduction

1. This is the response of the Faculty of Advocates in Scotland (the “Faculty”) to the FCA Guidance Consultation (GC17/7) on the Sourcebook for Professional Body Supervisors.¹ It should be read in conjunction with the [joint letter](#) of 23 October 2017 from the three Bars.
2. The Faculty is the professional body for Advocates in Scotland and was established in 1532. It has 438 practising members and roughly 270 non-practising members. It is an independent referral bar and a regulatory and representative body which acts in the public interest. The Faculty prides itself on its long-standing commitment to the promotion of the Rule of Law, access to justice, protection of fundamental rights and the highest standards of ethics. Advocates are officers of the Court.

Regulation of Advocates

3. The Faculty is subject to strict professional Regulation. In terms of section 120 of the Legal Services (Scotland) Act 2010, the Court of Session has responsibility for regulation of admission to the public office of Advocate, removal from that office and regulation of the professional practice, conduct and discipline of advocates. By the Act of Sederunt (Regulation of Advocates) 2011, the Court has delegated those responsibilities, other than the admission to and removal from office, to the Faculty. Rules made by the Faculty

¹ <https://www.fca.org.uk/publications/guidance-consultations/gc17/7-sourcebook-professional-body-supervisors-anti-money-laundering>

in relation to those matters require the approval of the Lord President. Advocates are also subject to the Faculty's Code of Conduct.

Overview

4. The Scottish Bar remains almost exclusively an independent referral Bar, although there is a limited direct professional access scheme for non-litigation work. Members of the Scottish Bar do not handle clients' money and are not permitted to do work which solicitors do. They do not open or manage bank, savings or securities accounts. They are independent and are not permitted to form partnerships. They cannot accept instructions to act on behalf of any person or body from whom or from which they receive remuneration other than professional fees as an Advocate. They are instructed and paid by solicitors. Before receiving any new instruction, the solicitor will have already carried out due diligence of the client. Members of the Scottish Bar enter into no contract with either the instructing solicitor, or with the client.
5. The areas of practice in which members of Faculty engage are diverse and a very large proportion of members work on areas of law which simply do not fall within the umbrella of the Regulations. A recent membership survey has confirmed this.
6. Members of Faculty are obliged under the Code of Conduct to acquaint themselves with legislation in force in relation to proceeds of crime and money laundering, and to take appropriate steps to comply therewith. The Faculty publishes guidance for advocates to explain their obligations to comply with best practice for AML/CTF. The Guidelines are currently being updated to reflect the impact of the 2017 Regulations and creation of OPBAS.

Question 1: Do you have any comments on the proposed sourcebook for professional body supervisors? Would greater detail or a more prescriptive approach be helpful?

7. The obvious striking, and disappointing, feature of the guidance proposals is the failure to distinguish between individual professional body supervisors and to treat each as largely identical. Such an approach is over simplistic and does not begin to reflect the unique and very low risk position of the Faculty as an independent referral Bar.
8. There are extremely limited circumstances in which a member of Faculty accepts instructions directly from a 'client'. In reality, instructions are invariably received from a network of solicitors. It is simply inappropriate to yoke both branches of the legal profession in Scotland. On the one hand, there are approximately 11,000 solicitors in Scotland. They generally work in (large) firms with employees and substantial resources. They hold clients' funds and handle and transfer their assets. They are the primary gatekeepers and carry out CDD. On the other hand, there are only 438 practising advocates, all of whom are self employed and are not permitted to enter into partnerships or employ other lawyers. It is even more inappropriate to yoke the non-legal sector professionals to advocates.
9. The role of advocate presents significant practical difficulties for performing CDD. As the channel of communication is between advocate and solicitor, advocates have very little direct contact with clients. It is, in fact, not unusual for advocates never to meet the client directly. As such, advocates rely heavily on solicitors for performing CDD. Any CDD by an advocate would at best be duplication.

10. We also detect a lack of appreciation of the efforts made by the Legal Sector as a whole to address its obligations in a responsible and meaningful way, for example in terms of the role of the Legal Sector Affinity Group and its development of wide ranging and detailed guidance which is currently under consideration by HM Treasury.
11. The Faculty does not consider that greater detail or a more prescriptive approach would be helpful. Rather, given the unique position of Faculty, it would be unnecessary, draconian and counterproductive. In this context, less is more. (See under cost-benefit analysis below.) It is important that OPBAS honours its commitment “to minimise [the risk of imposition of new burdens] by ensuring its oversight is proportionate and not unduly burdensome”². In this context, we note that it is intended in the draft Oversight of Professional Bodies Regulations³ that the supervision requirements will extend beyond the supervisors to include past and present members of Faculty in light of the far reaching definitions of “unincorporated association” and “connected person”.⁴

² Consultation Paper para 1.12

³ The Oversight of Professional Body Anti-Money Laundering Supervision Regulations 2017

⁴ Regulation 6

Question 2: Do you have any comments on the FCA's cost-benefit analysis?

12. Despite the assumption behind the question, there has only been a superficial cost-benefit analysis conducted in the consultation paper. The intended benefit is presumably the worthy aim “to make it harder and more costly for criminals to benefit from their crimes”.⁵ However, in practice it is difficult to envisage what actual benefit a far more burdensome role for Faculty, and individual members, would create. There has never been any suggestion that advocates are other than a very low risk category. There has never been any suggestion that the Faculty or its advocates are failing in their duties or that they require tighter control. The Faculty has been, and will continue to be, very willing to engage with HM Treasury and the Legal Sector Affinity Group in developing best practices.

13. On the other hand, the proposed costs of OPBAS are staggering and manifestly disproportionate. It is noted that the estimated cost to run OPBAS is £2 million a year. We also note that it is anticipated that there will be an additional average cost to professional body supervisors of £39,800 per year of administration costs. This amounts to £875,600 for all 22 supervisors. We do not consider it in any way acceptable that a small body such as Faculty, with a very low risk profile, should be subjected to such a burdensome and financially onerous regime.

14. While we appreciate that the apportionment of costs between professional bodies is yet to be considered, some simple maths will serve to highlight our concerns. The fee for OPBAS is said to be £2,000,000. There are 22 professional bodies. On a pro rata basis that would amount to £90,909 each. However, there are said to be about 200,000

⁵ Consultation Paper para 3.9

professional persons to be overseen. Faculty has 438 practising members. This is 0.0022% of the total membership. If that exercise is carried through, then Faculty's share of the £2,000,000 fee would be £4,400. In addition to this as yet unknown share of the OPBAS annual fee, and without any discernible benefit to the fight against organised crime, Faculty is likely to be burdened with estimated annual administration costs of £39,800.

15. The Faculty would welcome the opportunity to work with the FCA and HM Treasury to seek to address these significant concerns.

The Faculty of Advocates

30 October 2017