

**The Suspicious Transaction Reporting Responsibilities of Attorneys in
Terms of South African
Anti-Money Laundering Legislative Frameworks**

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Abstract

With the implementation of more and more stringent measures to prevent money laundering, criminals are resorting to the expertise of lawyers for assistance in the formulation of increasingly complex money laundering schemes.

The purpose of this research is to consider whether the South African anti-money laundering legislation places suspicious transaction reporting obligations, which are in line with and meet international directives, conventions and best practice frameworks, on attorneys. The study entails a consideration of the suspicious transaction reporting obligations of lawyers introduced by the Financial Action Task Force, the European Union, the United Kingdom and South Africa and provides an understanding of the concept of money laundering, the money laundering process and the areas in which lawyers are vulnerable to money laundering.

The research found that the suspicious transaction reporting responsibilities of attorneys in terms of South African anti-money laundering legislation are not in line with international frameworks and best practice.

Key words: Anti-money laundering; attorney; customer due diligence (CDD); European Union (EU); Financial Action Task Force (FATF); Financial Intelligence Centre (FIC); Financial Intelligence Centre Act (FICA); lawyer; money laundering; suspicious transaction reporting; United Kingdom (UK)

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GLOSSARY OF TERMS

Accountable institution

An accountable institution refers to a person listed in Schedule 1 of the Financial Intelligence Centre Act 38 of 2001 and includes attorneys, estate agents, gambling institutions, banks and foreign exchange dealers (FIC, 2012b: 66).

Anti-money laundering

Anti-money laundering refers to the steps taken to combat money laundering (IMF, 2012: 1).

Attorney, lawyer and legal professional

According to the definition contained in section 1 of the Attorneys Act 53 of 1979, an attorney is a practitioner who practises as such (FIC, 2012b: 66).

A lawyer is a member of a regulated profession and is constrained by the rules and regulations of that profession (FATF, 2008b: 5).

A legal professional is a legal practitioner who practises for own account, as a partner or as an employee of a professional firm and does not include in-house professionals employed by other businesses or legal professionals employed by government bodies. A legal professional includes a lawyer (FATF, 2008b:5).

The terms “attorney”, “lawyer” and “legal professional” will be used interchangeably and synonymously to refer to legal professionals who practise their profession independently for own account as sole proprietors, as partners, as members of corporate professional firms or as professional employees of professional firms and who belong to a professional body.

Combating the financing of terrorism

Combating the financing of terrorism refers to the steps taken to prevent the financing of terrorism (IMF, 2012: 1).

Customer due diligence and know your customer

Customer due diligence consists of identifying and verifying the identity of a customer, identifying the beneficial owner, ascertaining the business of the customer and the purpose of the transaction and conducting ongoing due diligence of the business relationship and oversight of the transactions entered into with the customer to ensure that these are in line with the understanding of the business of the customer (FATF, 2003b: 5).

Know your customer was essentially the term given to customer due diligence prior to the coming into effect of the 2003 FATF Recommendations (De Koker, 2012: 8–3).

The terms customer due diligence and know your customer will be used interchangeably and synonymously.

The terms client and customer will also be used interchangeably and synonymously.

Designated categories of offences

Designated categories of offences consist of participation in organised crime and racketeering, terrorism and terrorist financing; trafficking in humans, illicit drugs, illicit arms and stolen goods; corruption and bribery; fraud; murder and grievous bodily harm; kidnapping; robbery and theft; smuggling; extortion; forgery; counterfeiting currency; counterfeiting and piracy of products; piracy; environmental crime; smuggling and insider trading and market manipulation (FATF, 2003b: 1 & Glossary 12).

Designated non-financial businesses and professions

Designated non-financial businesses and professions include casinos, real estate agents, dealers in precious metals, dealers in precious stones, lawyers and trust and company service providers. The term “lawyer” should be read restrictively as applying to legal professionals who practise their profession independently for own account as sole proprietors, as partners, as members of corporate professional firms or as professional employees of professional firms (FATF, 2012d: 112–113).

European Commission

The European Commission is the executive body of the European Union which, inter alia, proposes new laws to the European Parliament and the Council of the European Union (FATF, 2012c: 1).

Financial Action Task Force

The Financial Action Task Force is an inter-governmental structure whose focus is exclusively on combating money laundering and terrorist financing (De Koker, 2012: 1–12).

Financial Action Task Force Recommendations

The Financial Action Task Force Recommendations constitute an international framework for the implementation of anti-money laundering and counter-terrorist financing measures by individual countries and effectively set the minimum standard for such implementation (FATF, 2012d: 9).

Financial institutions

Financial institutions refers to any person or entity who operates a business that provides a host of financial services, which include accepting deposits, advancing loans, financial leasing, the transfer of money or value, trading in foreign exchange, issuing and managing means of payment such as debit and credit cards and the administration of funds on behalf of other persons (FATF, 2003b: 16–17).

Financial Intelligence Centre Act 38 of 2001 (SA)

The Financial Intelligence Centre Act 38 of 2001 (SA) refers to the complete Act as amended from time to time (FIC, 2012b: 1).

Financial Intelligence Centre Amendment Act 11 of 2008 (SA)

The Financial Intelligence Centre Amendment Act 11 of 2008 (SA) amended FICA and provided for, inter alia, additional regulatory, supervisory and enforcement powers and the imposition of administrative penalties and came into effect on 1 December 2010 (De Koker, 2012: Com 2–9).

Financial intelligence unit

A financial intelligence unit is a central national agency which receives, and where appropriate requests, reviews and distributes to the relevant authorities financial information disclosed to it in circumstances where the financial information is related to the suspected proceeds of crime or where legislation required such disclosure, in order to combat money laundering (He, 2005: 255).

Financing of terrorism

Financing of terrorism refers to the raising and distribution of funds to terrorists to finance their attacks (IMF, 2012: 1).

Gatekeepers

Gatekeepers are those persons who “protect the gates to the financial system” and include lawyers (FATF, 2011: 19–20).

Know your customer

See the definition under “customer due diligence and know your customer” above.

Lawyer

See the definition under “attorney, lawyer and legal professional” above.

Legal professional

See the definition under “attorney, lawyer and legal professional” above.

Legal professional privilege

Legal professional privilege refers broadly to the protection from disclosure afforded to communications between an attorney and his or her client which were made in confidence with a view to the client obtaining legal advice (Itsikowitz, 2006: 73).

Money laundering

Money laundering is the process followed to convert the proceeds of criminal activity in such a manner as to disguise their illicit origin and to create an appearance of legitimacy (Preller, 2008: 234).

Money laundering process

The money laundering process follows three stages, namely, placement, layering and integration. The first stage involves the placement of the illicit funds into the financial system, the second involves moving the funds through numerous transactions in order to conceal the source of the funds and the third involves the reintroduction of the funds into the formal economy, free of any link to its criminal history (Schneider & Windischbauer, 2008: 394–396).

Politically exposed person

A politically exposed person is a natural person who is or has been entrusted with a prominent public function and such person's direct family and close associates (Salas, 2005: 9).

Suspicious transaction

A suspicious transaction refers to circumstances that form the basis of a belief, which is more than simply a feeling, although in support of which proof cannot be provided (Sweet & Maxwell, 2009: 5, 664), but which is more than mere speculation and is founded on some basis (Gelemerova, 2009: 41) that funds are related to the proceeds of crime or to terrorist financing (FATF, 2003b: 5–6).

Suspicious transaction report

A suspicious transaction report refers broadly to a report filed by a financial institution or a designated non-financial business or profession in circumstances in which it is suspected, or there are reasonable grounds to suspect, that funds are related to the proceeds of crime or to terrorist financing (FATF, 2003b: 5–6).

ABBREVIATIONS

AML	Anti-money laundering
CDD	Customer due diligence
CFT	Combating the financing of terrorism
DNFBPs	Designated non-financial businesses and professions
EC	European Commission
EEA	European Economic Area
EEC	European Economic Community
EU	European Union
FATF	Financial Action Task Force
FATF 1990	FATF 40 Recommendations issued in 1990
FATF 1996	FATF 40 Recommendations issued in 1996
FATF 2003	FATF 40 Recommendations issued in 2003
FATF 2012	FATF 40 Recommendations issued in 2012
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act 38 of 2001 (SA)
FICA 2008	Financial Intelligence Centre Amendment Act 11 of 2008 (SA)
FIU	Financial Intelligence Unit
IBA	International Bar Association
IMF	International Monetary Fund
JMLSG	UK Joint Money Laundering Steering Group
KYC	Know your client
MLR	Money Laundering Regulations (UK)
PCA	Proceeds of Crime Act 2002 (UK)
PCC	Public Compliance Communication
PEP	Politically Exposed Person
POCA	Prevention of Organised Crime Act 121 of 1998 (SA)
POCDATARA	Protection of Constitutional Democracy Against Terrorism and Related Activities Act 33 of 2004 (SA)
SA	South Africa

SOCA	Serious Organised Crimes Agency (UK)
STR	Suspicious transaction report
UK	United Kingdom
UNODC	United Nations Office on Drugs and Crime

The Suspicious Transaction Reporting Responsibilities of Attorneys in Terms of South African Anti-Money Laundering Legislative Frameworks

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

As far back as 1996, the International Monetary Fund (IMF) estimated that money laundering accounted for transactions to a value of up to US\$1,5 trillion and it was suggested that money laundering, as an international industry, ranked third to the oil trade and foreign exchange industries (Preller, 2008: 234). In 2006, it was estimated that organised crime worldwide accounted for transactions to the value of US\$1,7 trillion, the proceeds of which would require laundering to create an aura of legitimacy around these funds (Schneider & Windischbauer, 2008: 392). It was further estimated that during the early part of the twenty-first century, proceeds of crime accounting for £200 billion were channelled through London's financial institutions (Kruger, 2008: 36). In 2001, it was estimated that somewhere between \$2 billion and \$8 billion were laundered through South African organisations each year (Goredema, Banda, Munyoro, Goba, Fundira & Capito, 2007: 86).

Money laundering carries with it a number of negative consequences for national economies. For instance, it has been found that money laundering can cause national exchange rates to depreciate, resulting in an increase in the cost of imports and a decrease in the value of exports, essentially decreasing the wealth of the country. Money laundering can also cause distrust in the financial system, which in turn stunts economic growth. It is suggested that by permitting the laundering of illicit funds, individual national economies and the international financial system as a whole are placed at risk (Van Jaarsveld, 2004: 688–689).

It has been alleged that anti-money laundering efforts are futile and that illegal drugs (which form a major part of the source of anti-money laundering efforts) will continue to be sold, that the stakeholders in the illegal drug industry will continue to earn huge profits and that these profits will continue to find their way into the financial system. Despite certain negative perceptions about anti-money laundering legislation, the international community has created an international framework rendering it illegal to launder money and in terms of which threshold and suspicious transaction reporting by financial intermediaries is required (Reinart, 2004: 131–132).

In the 1980s law enforcement authorities recognised that crime could be more effectively dealt with by criminalising money laundering and, over the subsequent two decades, the international campaign against money laundering gathered momentum. This gave rise to many countries adopting anti-money laundering legislation of one sort or another which effectively criminalised the laundering of the proceeds of illicit origin. The legislation also gave rise to an infrastructure for the detection and investigation of suspicious transactions, which included a requirement to identify customers and to verify the customers' particulars and, should a customer engage in a suspicious transaction, an obligation to report this information to the relevant authority (De Koker, 2012: Com 1-8–Com 1-9). During this period a number of international conventions, which provided for an international anti-money laundering framework, came into existence and the Financial Action Task Force (FATF) was formed. The FATF focused exclusively on combating money laundering and combating the financing of terrorism (CFT). Subsequently, the FATF issued its Forty Recommendations to address money laundering and these recommendations are revised regularly (De Koker, 2012: Com 1-12–Com 1-13).

The move to international anti-money laundering (AML) legislation is evidenced by the 1988 Vienna Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention), the Council of Europe's 1991 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and by the creation of the FATF on Money Laundering by the G-7 Economic Summit Group in 1989, whose purpose it is to develop and promote policies to combat money-laundering, and which issued its Forty Recommendations in 1990. These Forty Recommendations have been endorsed by more than 130 countries and have generally set the programme and

benchmark for international AML controls (Shaughnessy, 2002: 26). The Forty Recommendations have since been revised and reissued in 1996, 2003 and 2012 (FATF, 2012d: 7–8).

The Vienna Convention recognised AML legislation as a means to deprive criminals of the proceeds of their illicit conduct, albeit at the time only in the narcotics trade (UNODC, 1988: 3). The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990 recognised that an effective countermeasure to serious crime was to deprive criminals of the proceeds of their illicit activity and that an effective AML regime was necessary to achieve this (Basel Institute on Governance, 1990: 2). It is therefore evident that more than two decades ago an international move to reinforce and amplify the existing controls in place to combat money laundering was already occurring (Shaughnessy, 2002: 25).

The European Community Council Directive 91/308/EEC recognised the need to prevent the financial system from being used for money laundering through the cooperation of credit and financial institutions, and also recognised that money laundering could be carried out through other types of professions (EUR-Lex, 1991: Preamble). The Directive extended AML legislation beyond the narcotics trade to other unspecified areas of criminal activity and created an obligation to report suspicious transactions (EUR-Lex, 1991: Articles 6 & 12). The 2000 United Nations Convention Against Transnational Organised Crime (the Palermo Convention) criminalised the laundering of the proceeds of crime and the offences to which the Convention was to be applied included certain serious offences, organised crime, corruption and the obstruction of justice (UNODC, 2000: 8–9). The Palermo Convention covered financial institutions and bodies susceptible to money laundering and required the implementation of domestic legislation with an emphasis on suspicious transaction reporting (UNODC, 2000: 9).

European Union Directive 2001/97/EC recognised that with the tightening of controls in the financial sector, a trend towards the use of non-financial businesses for money laundering was developing and that suspicious transaction reporting duties should be extended to professions, such as independent legal professionals (EUR, 2001: Preamble). The Directive extended the definition of criminal activity to specifically include not only drug-

related offences, but also serious crimes such as fraud and corruption and further brought, inter alia, independent legal professionals, when acting for their clients in certain specified transactions, under its purview (EUR, 2001: Articles 1 & 2a). Directive 2001/97/EC essentially placed “gate-keeping” obligations on lawyers and other independent legal service providers (Shaughnessy, 2002: 31). In addition, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005 recorded that all persons who engaged in activities that were susceptible to money laundering were required to report their suspicions concerning any activity that might involve money laundering (Council of Europe, 2005: 8).

Current AML regimes are made up of two legs, that is, prevention and enforcement. The focus of prevention is on deterring criminals from making use of institutions to convert and/or move their illicit proceeds. Prevention comprises the conducting of customer due diligence, the creation of reporting obligations, a supervisory function and the imposition of sanctions for non-compliance. The key objective of enforcement is the punishment of criminals who attempt or manage to penetrate the prevention measures (Goredema, 2005: 29–30).

1.2 MONEY LAUNDERING AND SUSPICIOUS TRANSACTION REPORTING

Schneider and Windischbauer (2008: 387) suggest that the term “money laundering” originated in the United States and was used to describe the Mafia’s attempts to cleanse their illicit funds via cash-intensive laundromats. Money laundering can broadly be defined as the process followed to convert the proceeds of criminal activity in such a manner as to disguise their illicit origin and to create an appearance of legitimacy (Preller, 2008: 234). In South Africa, money laundering is criminalised under sections 4 to 6 of the Prevention of Organised Crime Act 121 of 1998 (POCA). These sections by and large criminalise the concealing or disguising of property forming the proceeds of unlawful activity, the assisting of a person to retain, control or benefit from the proceeds of unlawful activity and the acquisition, use or possession of property forming the proceeds of unlawful activity (Bourne, 2002: 488).

Terrorists make use of the financial system to move their funds internally within their organisations and externally between organisations to finance their nefarious deeds. Although terrorist organisations vary in size from large centralised organisations to smaller decentralised organisations that operate independently, they all require funding not only to launch terrorist attacks, but also to fund the costs of sustaining and extending the organisational structure and to create an environment conducive to continuing their activities. Funding for their activities is obtained from legitimate quarters, such as through the abuse of charitable organisations and legitimate commercial enterprises and from the terrorists themselves. Crime also serves as a source of income and varies from petty crime to organised fraud and illicit drug trafficking. Financing is also obtained from those states that support terrorism. Interrupting a terrorist organisation's ability to move funds freely will therefore serve to frustrate its objectives and to restrict its ability to carry out terrorist attacks. To achieve this, it is necessary to put in place measures to safeguard the financial system from criminal abuse (FATF, 2008c: 4).

Finance is vital to sustaining both crime and terrorism and, therefore, in relation to crime generally and in those instances where the proceeds of crime are used to fund terrorism, most crime is profit driven. It is these proceeds of crime that criminals seek to legitimise by converting, concealing or disguising their illicit origin and, in so doing, ensure that they are able to enjoy the fruits of their exploits and that they are able to fund future criminal and terrorist activities (FATF, 2010b: 12). Although the core objective of terrorism is to coerce a particular section of the community into performing or refraining from performing any particular act, and although financial gain is not generally the focus of terrorist activity, whereas it often is in relation to other forms of criminal conduct, terrorist organisations nonetheless require funding in order to achieve their objectives (FATF, 2002: 3).

Central to a life of crime is the maintenance of a lifestyle which exudes success. This requires the conversion of cash derived from illicit activity into material possessions, into property and business investments and into the financial system. The money launderer seeks to ensure that the illicit funds are made available for legitimate expenditure or to fund further illicit activity, to ensure that the source of the funds is sufficiently obscured so that the funds are protected from seizure should the illegal activity be detected and to

ensure that the funds are placed in the legitimate financial system and are available for transfer to other persons and destinations (Ross & Hannan, 2007: 136).

The money laundering process essentially follows three stages, namely, placement, layering and integration. The first stage involves the placement of the illicit funds into the financial system, the second involves moving the funds through numerous transactions to conceal the source of the funds and the third involves the reintroduction of the funds into the formal economy, free of any links to its criminal history (Schneider & Windischbauer, 2008: 394–396).

The International Monetary Fund (IMF) points out that money laundering and terrorist financing activities can negatively affect the stability and integrity of financial institutions and systems, foreign investment, international capital flows and even a country's financial stability. Money launderers take advantage of the complexities of the global financial system and the differing national AML regimes in place, especially of those jurisdictions with weak or ineffective AML controls (IMF, 2012: 1).

AML regulation is designed, firstly, to detect money laundering which, in turn, leads to the identification of the illegal activity which gave rise to the illicit funds; secondly, to prevent criminals from enjoying the fruits of their exploits by increasing the costs of legitimising their illicit funds and thereby reducing the benefits of crime; and, thirdly, to protect the integrity of the financial system by preventing illicit funds from entering it. This latter objective is particularly important in relation to small states whose financial systems are vulnerable to inflows of illicit funds and outflows of state assets and funds arising from theft or corruption within the state (Ross & Hannan, 2007: 138).

One of the most important and effective measures in the campaign against money laundering is considered to be suspicious transaction reporting obligations (He, 2005: 254). Since 1990, the various international AML frameworks have focused on this type of reporting. The documents that refer to such reporting obligations include the various versions of the FATF Recommendations, the 1991 EC Directive (Council Directive 91/308/EEC) and its 2001 amendment and the Palermo Convention. Since 1990, the obligation to report suspicious transactions has evolved from the absence of an obligation

to report, to an option to report, to an obligation to report. Similarly, the focus of this reporting obligation has extended from banks, to financial institutions and to non-financial institutions and professions (He, 2005: 252–254). As money laundering schemes become more complex, criminals often seek the assistance of professionals, such as lawyers. Lawyers offer a wide range of services, including those in the areas of the purchase and sale of property, the formation of corporate vehicles and the performance of financial transactions on behalf of their clients, all of which are vulnerable to money laundering activities (He, 2010: 28). Lawyers not only provide advice, they also offer an extra layer of respectability to money laundering operations (Mugarura, 2011: 181). As such, lawyers are both capable of and play a central role in the AML process (Ali, 2006: 273).

Initially, the aim of suspicious transaction reporting legislation was to inhibit tax evasion and money laundering and the formation of an underground economy, as well as to facilitate the identification of the financiers and beneficiaries of crime, who had up to that stage remained undetected despite the efforts of traditional investigative methodologies (Chaikin, 2009: 238–239). These rather modest initial goals have been amplified to include serving as a means to discourage crime by restricting the profitability thereof, restricting the availability of funds to finance future crime, aiding in the detection and prosecution of crime and safeguarding the integrity of the financial system (Chaikin, 2009: 239). A mandatory suspicious transaction reporting regime is seen as vital to fostering cooperation between financial systems and law enforcement authorities (He, 2005: 252).

1.3 ATTORNEYS AND SUSPICIOUS TRANSACTION REPORTING

The “Gatekeeper Initiative” originated from a Moscow Communique issued in 1999 at a meeting of the G-8 finance ministers and called for professional gatekeepers, such as lawyers, to tackle money laundering in the international financial system (Shepherd, 2012: 34). It came about as a result of an international view that lawyers should be required to carry out similar AML due diligence procedures as those carried out by banks and financial institutions, as lawyers, it was felt, may be better placed to identify and discourage money laundering. Since 1999, lawyers have been considered to be “gatekeepers” in recognition of the important role they play in AML measures (Baghdasarian, 2003: 725–726).

Gatekeepers are essentially those persons who safeguard the entry points to the financial system and through whom those wishing to make use of the financial system, which would include money launderers, would need to pass. Gatekeepers include professionals such as lawyers, accountants, tax advisers and trust and company service providers, who provide financial expertise (FATF, 2010b: 44). With the implementation of more and more stringent measures to prevent money laundering by financial institutions, criminals are turning to the expertise of professionals, such as lawyers, partly because money laundering is becoming a highly complex and professional industry and is becoming increasingly difficult for ordinary persons to carry out, but also in recognition of legal professional privilege in most countries (He, 2006: 62–64).

A trend pointing to the increased use of professionals in complex money laundering schemes has been identified, particularly in instances of major financial fraud and organised crime (FATF, 2010b: 44). Lawyers are attractive to criminals because they are in the business of managing other people's money and, more particularly, because the use of lawyers affords criminals the benefit of legal professional privilege (Ali, 2006: 273). A review of various cases reveals that lawyers have been used to create corporate vehicles, open bank accounts, transfer proceeds and purchase property, all of which served to facilitate the laundering of the proceeds of corruption (FATF, 2011: 20).

Investment in real estate is recognised as a regular means employed by organised crime to launder its tainted proceeds. In investing their illicit proceeds in immovable property, criminals make use of intermediaries such as lawyers, which, in turn, provides an extra layer between the criminal, his illicit proceeds and the property transaction and thereby enables the criminal to distance himself further from the transaction (FATF, 2010b: 41–42). Added to this, a lawyer's reputation and the fact that lawyers are subject to ethical standards adds credibility to the transaction and reduces suspicion concerning the criminal's activities (FATF, 2010b: 44). Further legal services offered by lawyers that are attractive to money launders, whether provided intentionally or unintentionally, include advice on how to avoid leaving an audit trail and how to avoid raising the suspicions of financial institutions, the introduction of funds into the banking sector via a lawyer's trust account, the creation of corporate vehicles and trusts to obscure the link between the illicit

funds and the criminal, and the creation of sham legal documents to create an air of legitimacy around tainted funds (Bell, 2002: 19–21).

It is further suggested that as lawyers assist criminals and money launderers to launder their illicit funds, either wittingly or unwittingly, by allowing these funds to flow through their trust accounts, lawyers should be prevented from accepting funds into their trust accounts in the absence of an underlying professional transaction in which they are providing legal advice (Middleton, 2008: 34–35).

Lawyers and other professionals, such as accountants, are in a unique position as they are likely to have knowledge of their clients' transactions, to have access to their clients' contracts and accounting records and to have a more complete understanding of their clients' economic activities. As such, they are likely to be better placed to distinguish between false and authentic information than financial institutions would be. This places them in an ideal position to play an important role in AML measures (He, 2006: 65, 68).

The 2003 version of the FATF Forty Recommendations (FATF 2003) requires lawyers to conduct customer due diligence procedures, which include the identification and verification of the identity of the client in relation to certain transactions, and to retain records of the transactions with the client (FATF, 2003b: 4-7). FATF 2003 further requires that lawyers submit suspicious transaction reports should they suspect that funds are the proceeds of criminal activity (FATF, 2003b: 8).

The FATF Recommendations form the international benchmark against which FATF members' domestic AML legislation is evaluated (Leong, 2007: 148). South Africa has implemented its AML measures by and large by means of the promulgation of the Financial Intelligence Centre Act 38 of 2001 (FICA) (FATF, 2009: 8). This Act similarly requires attorneys to identify and verify their clients and to retain records of business relationships and transactions, and imposes a duty on attorneys to report suspicious transactions (Itsikowitz, 2006: 76–77).

South African attorneys are designated as accountable institutions in terms of Schedule 1 of FICA and, as such, are obliged to meet the compliance obligations imposed on

accountable institutions by FICA (Van der Westhuizen, 2003a: 3). Attorneys are, however, exempt from compliance with the obligation to identify and keep records of their clients, save for in certain specified transactions. It should be noted, however, that as the reporting obligation created in terms of section 29 of FICA applies to any person who carries on, is in charge of, manages or is employed by a business, and is not restricted to accountable institutions, this obligation will be unaffected by this exemption (Van der Westhuizen, 2003a: 5–6).

1.4 FINANCIAL ACTION TASK FORCE

The FATF was formed in 1989 in response to growing concern around money laundering and the impact it could have on the banking system and financial institutions. The mandate of the FATF was to examine money laundering techniques and trends, to review the steps taken at national and international level to combat money laundering and to ascertain the further steps required to combat money laundering. In April 1990, the FATF produced its first set of Forty Recommendations (FATF 1990), which essentially formed the blueprint for the creation of national legislation necessary in the fight against money laundering. These Forty Recommendations have been revised periodically and these revised versions were issued in June 1996, June 2003 and again in February 2012 (FATF, 2012c; FATF, 1997: 10). The FATF works in conjunction with the IMF, the World Bank and the United Nations in its endeavours to combat money laundering (Dellinger, 2008: 428). The IMF has recognised the significance of an international effort in combating money laundering as the absence of such an effort would result in criminals channelling their illicit funds through jurisdictions with weak or no AML regimes, a principal concern being the effect that money laundering will have on such a country's economy (Dellinger, 2008: 433).

The FATF regulatory framework is supported by a monitoring and evaluation process and countries that fail to meet the minimum standards set by the FATF are subjected to pressure to comply by international bodies such as the IMF and the World Bank and, furthermore, will be subjected to trade sanctions by FATF-compliant member countries (Ross & Hannan, 2007: 139).

The focus of the FATF 1990 was on financial institutions, although the door was left open to extend the application of the recommendations to professions dealing with cash (FATF, 1990: 2). The recommendations required the immediate implementation and ratification of the Vienna Convention, the criminalising of the laundering of the proceeds of drug-related offences and the possible criminalising of the laundering of the proceeds of other offences (FATF, 1990: 1). The option of either permitting or requiring the reporting of a suspicion that funds were the proceeds of criminal activity was also provided for (FATF, 1990: 3).

The FATF Forty Recommendations were revised in 1996 (FATF 1996). Although the focus remained on financial institutions, specific recommendations were identified which ought to be applied to professions (FATF, 1996: 3). The application of the recommendations was extended beyond drug-related offences to serious criminal offences (FATF, 1996: 2, 10) and suspicious transaction reporting was no longer discretionary but became peremptory (FATF, 1996: 4).

After the terrorist attacks of 11 September 2001, the FATF undertook a review of the measures in place to combat money laundering and extended these measures to terrorist financing. This exercise produced the FATF 2003 and the Special Recommendations on terrorist financing. Although these standards set by the FATF were not legally binding, the members of the FATF committed themselves to incorporating these standards into their domestic legislation (Salas, 2005: 2).

The FATF 2003 provided for further clarification concerning the criminalising of money laundering in serious offences (FATF, 2003b: 3), the carrying out of customer due diligence (CDD) measures where a suspicion of money laundering existed (FATF, 2003b: 4-5) and specific recommendations being applied to lawyers and other independent legal professionals (FATF, 2003b: 7). Furthermore, lawyers and other independent legal professionals were required to report their suspicions that funds originated from criminal activity (FATF, 2003b: 7–8). These recommendations can be grouped into three categories: Recommendations 1 to 3 deal with the criminal offence of money laundering, legislative standards and confiscation proceedings. Recommendations 4 to 25 deal with the steps to be taken by financial institutions and designated non-financial businesses and professions (DNFBPs) to prevent money laundering and terrorist financing, and

recommendations 26 to 40 deal with the organisations, authorities and other measures that should be in place in a regulatory regime designed to combat money laundering and terrorist financing (Dellinger, 2008: 429).

In addition, the FATF maintains two lists of non-compliant jurisdictions. The first identifies those jurisdictions that pose a money laundering and terrorism financing risk and those whose AML/CFT frameworks are flawed and who have not committed to a programme with the FATF to address those flaws. The second identifies those jurisdictions whose AML/CFT frameworks, while flawed, have committed to a programme with the FATF to address those flaws (FATF, 2013a).

The 2012 revised version of the Forty Recommendations (FATF 2012) has shifted the focus to a more risk-based approach which, it is believed, will result in a more effective money laundering prevention regime (FATF, 2012d: 8) and more clarity is provided and a more practical approach is taken in relation to CDD and beneficial ownership (De Koker, 2012: 1-16). This version further requires that money laundering be criminalised on the basis of the Vienna and Palermo Conventions and that money laundering be criminalised in all serious offences (FATF, 2012d: 12).

1.5 EUROPEAN UNION DIRECTIVE 2005/60/EC

The European Union (EU) has been meticulous in its implementation of the FATF Recommendations. With the issue of these Recommendations and each of their subsequent revisions, the structures of the EU have reacted expeditiously in adopting Directives effectively implementing the latest version of the FATF Recommendations (Tyre, 2010: 69–70).

The members of the EU favoured a single application of the FATF Recommendations to all EU member states rather than the individual implementation thereof by each member state (Salas, 2005: 2). This resulted in the FATF 2003 being adopted by the European Parliament and Council as the Third Anti-Money Laundering Directive of 26 October 2005 (Tyre, 2010: 71).

European Union Directive 2005/60/EC (the third Directive) extended the definition of criminal activity to “serious crime”, which included drug-related offences, fraud, corruption and all offences that involved jail sentences for certain minimum or maximum periods (EUR, 2005: Item 4, Article 3).

The third Directive essentially addressed money laundering and terrorist financing at the EU level and focused on the implementation of measures to avoid the misuse of the financial system by money launderers and terrorist financiers (Salas, 2005: 2). This Directive thus seeks to align the European Economic Area’s (EEA) AML and CFT regime with the FATF Recommendations (Katz, 2007: 207).

The third Directive prohibits money laundering and terrorist financing and requires that customers be identified and that their identities be verified. In addition, the Directive requires that an understanding of the business of the customer and the nature of the business relationship to be entered into with the customer be ascertained (Salas, 2005: 7, 9). Under the Directive, CDD must be carried out not only when a new business relationship is established or when there is some doubt as to the veracity of previously obtained customer information, but also where there is a suspicion of money laundering or terrorist financing (Katz, 2007: 209).

The third Directive deviates from previous Directives in that those persons who fall within its ambit are identified on the basis of specific categories of persons, as opposed to being identified on the basis of the nature of certain specified activities in which they engage (Katz, 2007: 208). The Directive adopts a risk-based approach in relation to CDD and extends the prohibition against the tipping off of the client to lawyers (Tyre, 2010: 71). The Directive further requires independent legal professionals to report their suspicions relating to money laundering and terrorist financing (Salas, 2005: 11).

The third Directive is, however, only of application to lawyers in relation to certain specified transactions and any other transactions fall outside of the scope of the Directive (Tyre, 2010: 74–75). Thus, Article 22 (EUR-Lex, 2005) of the Directive, which requires lawyers to report their suspicions that money laundering or terrorist financing is occurring, has

occurred or is being attempted, would only be binding on lawyers when acting for and on behalf of their clients in the transactions listed in the Directive.

1.6 ANTI-MONEY LAUNDERING LEGISLATION IN THE UNITED KINGDOM

With London being a major international financial centre, the United Kingdom (UK) plays an important role in determining and supporting AML strategies (Leong, 2007: 141).

The first money laundering offences in the UK were contained in the Drug Trafficking Offences Act 1986 and later the Drug Trafficking Act 1994. As the titles of the Acts suggest, the money laundering offences were confined to the proceeds of drug trafficking offences. Subsequently, the Criminal Justice Act 1993 extended the money laundering offences to the proceeds of non-drug related offences. With the promulgation of the Proceeds of Crime Act 2002 (PCA), the criminal law relating to money laundering was consolidated into one piece of legislation and extended the money laundering offences to the proceeds of all crime (Leong, 2007: 142).

The PCA, the Money Laundering Regulations of 2003 (since replaced by the Money Laundering Regulations of 2007) and relevant guidelines issued by the Treasury make up the framework of the UK AML regime (Preller, 2008: 235).

The Money Laundering Regulations were introduced to ensure compliance with the European money laundering Directives and made provision for client identification and verification, record keeping, suspicious transaction reporting obligations and employee training and extended money laundering obligations to notaries and other legal professionals (Leong, 2007: 143). The Money Laundering Regulations 2007 issued by the Treasury apply to lawyers and essentially implement the provisions of the third Directive (UK, 2007b: 6, 47) and require a lawyer to perform CDD measures where a business relationship is established, where an occasional transaction is attended to, where money laundering is suspected and where there is uncertainty around the veracity of prior information or documents provided (UK, 2007b: 12).

The PCA classifies as offences, inter alia, the transfer, acquisition and use of the proceeds of crime, the facilitation of a transaction with the proceeds of crime and the failure to make a suspicious transaction report. Thus, should a lawyer render services to a client whom he suspects of tax evasion, he may himself commit an offence (Tyre, 2010: 77–78).

The PCA provides that a person who knows, suspects or has reasonable grounds to suspect a money laundering transaction is obliged to report this information. This effectively extends the obligation outside that of the regulated sector to all citizens who may inadvertently acquire such knowledge. An example offered of the potential implication of this clause is of a friend of a businessman who accepts the businessman's offer of a free holiday at the businessman's villa in Spain, where he knew or formed a suspicion that the villa was purchased with funds which were not declared to the fiscus. This person would subsequently be obliged to report his knowledge or suspicion or risk falling within the purview of one of the money laundering offences contained in the Act (Bosworth-Davies, 2007: 204–205).

In terms of the Act, lawyers are required to make a suspicious transaction report in circumstances where they know, suspect or have reasonable grounds for knowing or suspecting that a person was involved in money laundering, provided that the information upon which this knowledge or suspicion is premised was acquired during the course of a business in the regulated sector (Itsikowitz, 2006: 82).

1.7 DEVELOPMENT OF ANTI-MONEY LAUNDERING LEGISLATION IN SOUTH AFRICA

Initially, the focus of money laundering in criminal law was on the drug trade and, as a result, the Drugs and Drug Trafficking Act 140 of 1992 (since repealed) was promulgated, which criminalised the laundering of the proceeds of specific drug-related offences and required only financial institutions, stockbrokers and financial instrument traders to report suspicious transactions involving the proceeds of such offences (De Koker, 2002a: 3).

The Proceeds of Crime Act 76 of 1996 (since repealed) extended the scope of the statutory money laundering provisions beyond drug-related offences to any criminal

activity and the ambit of the suspicious transaction reporting obligations was extended to any person who carried on or was in charge of a business (South Africa, 1996: ss 28 & 31).

POCA criminalised the laundering of the proceeds of all forms of crime and of the proceeds from a pattern of racketeering. Initially, the suspicious transaction reporting obligations rested on any person who was in charge of a business or who carried on a business; however this obligation was further extended with the promulgation of FICA (De Koker, 2002a: 4; South Africa, 1998: s 7 [since repealed]). FICA broadened the suspicious transaction reporting obligations of the since repealed section 7 of POCA to any person who carries on a business, who manages or is in charge of a business or who is employed by a business (FIC, 2012b: 26).

FICA places a number of compliance responsibilities on various persons and entities and, more particularly, on accountable and reporting institutions. These compliance responsibilities are amplified in the Money Laundering and Terrorist Financing Control Regulations, issued in terms of FICA (De Koker, 2012: Com 6-5–Com 6-6). The Financial Intelligence Centre (FIC) is established under FICA and has as its primary objectives the identification of the proceeds of unlawful activities and the combating of money laundering and terrorist financing activities (De Koker, 2012: Com 5-3). FICA also makes provision for the issue of exemptions which exempt accountable institutions from compliance with certain obligations. Both FICA and the regulations further make provision for the issue of guidelines by the FIC concerning any obligations created in terms of FICA and the FIC has put in place Public Compliance Communications (PCCs) to provide assistance with certain interpretation aspects relating to FICA (De Koker, 2012: Com 6-6).

FICA identifies specific persons and organisations as accountable institutions and places obligations on them to establish and verify the identity and to keep records of their clients, to report certain transactions to the FIC, which would include suspicious transactions, to put in place internal rules and to provide their employees with training in order to equip them to identify and respond to suspected money laundering (Van der Westhuizen, 2003a: 3). Included in the reporting obligations of accountable institutions are cash transactions with a value above a specified threshold (Bourne, 2002: 490). Section 28 covers cash

threshold reporting and creates a reporting duty in respect of cash transactions in excess of R24 999,99 (De Koker, 2012: Com7-41). Accountable institutions include attorneys, estate agents, gambling institutions, banks and foreign exchange dealers (FIC, 2012b: 66). Although most of the obligations arising from FICA are placed on accountable institutions, as indicated earlier, the obligation to report suspicious transactions extends to anyone who carries on, is in charge of, manages or is employed by a business (Van der Westhuizen, 2003a: 3).

The Protection of Constitutional Democracy Against Terrorism and Related Activities Act 33 of 2004 (POCDATARA) focuses on the combating of terrorism and terror financing and led to the amendment of FICA to broaden its ambit beyond the combating of money laundering to include the combating of terrorism, with a specific focus on the combating of terror financing. POCDATARA further extended the reporting obligations in terms of FICA to include those transactions known or suspected to be linked to terrorist financing (De Koker, 2012: Com 4-3). POCDATARA introduced section 28A into FICA, which places a reporting duty on accountable institutions to file a report should they come into possession or have control of property connected to terrorism (De Koker, 2012: Com7-47).

The focus of AML measures has thus shifted from depriving drug traffickers of the proceeds of their past crimes, to using the measures as a net to catch a range of criminals and to prevent future crimes. The recent trend in AML legislation is to require a broad group of professional service providers to act as de facto deputies in this campaign. The FATF recommends that lawyers be subject to AML measures, noting that amendments to the EU Directive (EU Directive 2001/97/EC) compel lawyers to join the fight against money laundering (Shaughnessy, 2002: 26–27).

De Koker (2002b: 32) notes that an attorney's trust account is vulnerable to money laundering and mentions an example of a new client paying funds into such a trust account, with a request that the attorney assist the new client with a real estate transaction. Thereafter the new client cancels the instruction and requests the repayment of the funds. These funds would often be repaid using a trust cheque and, in so doing, the funds would be given an air of legitimacy and would effectively have been laundered through the attorney's trust account.

1.8 RESEARCH PROBLEM

South Africa was admitted as the thirty-second member country of the FATF in June 2003 and it is believed that the enactment of FICA played a significant role in this decision. As a full member of the FATF, South Africa is expected to contribute significantly to the detection and prevention of money laundering activities throughout Africa (Van der Westhuizen, 2003a: 1). In the FATF Mutual Evaluation Report for South Africa of 2009 it is recorded in the Executive Summary that South Africa has sought to structure its AML regime according to the relevant United Nations Conventions and the FATF international standards and that the suspicious transaction reporting regime is being implemented effectively (FATF, 2009: 6, 9); however, it was noted that despite this, funds had been laundered via lawyers, with two identified problem areas being drug-trafficking and corruption (FATF, 2009: 16). It was further noted that there was some uncertainty relating to the interpretation of legal professional privilege in the context of the suspicious transaction reporting obligations of attorneys (FATF, 2009: 167).

A fundamental pillar of international AML and CFT regimes is the reporting of suspicious transactions by financial institutions and DNFBPs (Chaikin, 2009: 238). The FATF 2003 Recommendations 13 to 16 deal with the reporting of suspicious transactions (Chaikin, 2009: 240) and place suspicious transaction reporting obligations on lawyers when transacting in certain defined areas of activity (FATF, 2012d: 29). The corresponding provision in FICA is section 29, read with the FIC's Guidance Note 4, which places suspicious transaction reporting obligations on any person who carries on, is in charge of, manages or is employed by a business. The obligation would arise in circumstances relating to the business itself or transactions to which the business is a party (FIC, 2008: 9).

In addition, the FATF reports that both international organisations and its own members have noted an increasing involvement of lawyers in money laundering cases (Shaughnessy, 2002: 29–30). This would seem to indicate that there would be benefit in researching and considering whether the South African suspicious transaction reporting regime concerning attorneys is in line with international guidelines and best practice. The

UK has been a forerunner in the implementation of AML legislation, having had counter-terrorist financing legislation in place prior to the adoption of the 1991 first AML Directive and having gone beyond the scope of that required by both the first and second Directives in its implementation of the PCA (Tyre, 2010: 76–77). The assumption is accordingly made that the EU and the UK are at the forefront in the application of AML measures. The problem that will be researched will be premised on the statement that the responsibilities of attorneys in terms of South African AML legislation are not in line with international frameworks and best practice regarding suspicious transaction reporting.

1.9 RESEARCH OBJECTIVES

Money laundering and terrorist financing are a worldwide occurrence and, accordingly, require international cooperation to mitigate the threats posed by both. As a result, a number of international directives, conventions and best practice frameworks have been developed as an international standard against which to measure domestic AML and CFT regimes (Leong, 2007: 140). It is particularly important that an international standard be set and that all countries meet this standard and strengthen their financial systems, as criminals will seek out and exploit those jurisdictions with weak AML regimes in order to continue their laundering operations (Baghdasarian, 2003:138).

In 2002, the FATF reported that lawyers perform various functions and provide certain benefits to those who wish to launder the proceeds of crime. Lawyers' trust accounts are used for the placement and layering of funds; using their specialised knowledge, lawyers create corporate vehicles and trusts through which funds are laundered; lawyers provide the financial advice that is required in complex money laundering schemes; and the use of lawyers and the corporate entities that they create lends an air of respectability to the money laundering operations of their clients. Added to this, the attorney-client privilege affords the protection of a veil of secrecy over the money laundering operations of the client (Schneider, 2006: 27–28). Lawyers, similar to a number of other professionals, are vulnerable to money laundering and have been used both knowingly and unknowingly to launder the funds of their clients (Schneider, 2006: 38). Lawyers are therefore well positioned to identify the proceeds of crime and terrorist-related funds, which is the reason

that the FATF encourages its members to ensure that inter alia lawyers are included in their suspicious transaction reporting regimes (Schneider, 2006: 40).

With this in mind, the research seeks to establish whether the South African AML legislation places obligations on attorneys concerning suspicious transaction reporting which are in line with and meet international directives, conventions and best practice frameworks. As mentioned earlier, in order to achieve success in the fight against money laundering, it is imperative that similar money laundering controls are implemented nationally across all jurisdictions, failing which criminals will simply move their money laundering operations to those jurisdictions with weaker or no controls. As such, for the purpose of this research, the assumption is made that the EU and the UK are at the forefront in the implementation of AML measures; therefore, the suspicious transaction reporting regimes introduced by the FATF, the European Union (EU), the United Kingdom (UK) and South Africa will be considered. The research will involve forming an understanding of the suspicious transaction reporting provisions of the AML frameworks of the FATF, the EU, the UK and South Africa concerning the suspicious transaction reporting obligations of lawyers. It will also entail forming an understanding of the areas in which lawyers are vulnerable to money laundering. Further areas of research will also be identified and recommendations will be made for amendments to the South African AML legislation.

The research will not cover the reporting obligations of attorneys outside of those areas identified in Exemption 10 of FICA, which include assisting a client with the buying and selling of a business undertaking, the management of a client's investment and the representation of a client in a financial or real estate transaction. The research will only cover those obligations imposed on attorneys by FICA and the Money Laundering and Terrorist Financing Control Regulations promulgated under FICA, such as know your client (KYC), CDD, keeping records, internal rules, training, legal professional privilege and oversight, insofar as they are relevant to a suspicious transaction reporting regime. The research will further not cover cash threshold reporting as required in terms of section 28 of FICA or combating the financing of terrorism (CFT). With regard to CFT, the assumption is made that attorneys are more vulnerable to money laundering than terrorist financing.

1.10 RESEARCH APPROACH AND DESIGN

The approach to this research entails an understanding of the concept of money laundering, the money laundering process and the role that attorneys play in the process. The development of international money laundering frameworks, conventions and best practices, commencing with the Vienna Convention of 1998 and ending with the FATF 2012, concerning suspicious transaction reporting obligations and related provisions, will be considered.

The development of money laundering legislation in South Africa and the standards set by the FATF framework will be considered in relation to South Africa's FICA, with a particular focus on suspicious transaction reporting and the related provisions. An analysis of the FATF suspicious transaction reporting framework will be made and compared with section 29 of FICA.

The research will further entail an analysis of the suspicious transaction reporting obligations of the UK and the EU and a comparison of these with the FATF framework.

The research will ascertain whether the South African AML legislation places on attorneys suspicious transaction reporting obligations that are commensurate with international directives, conventions and best practice frameworks and the extent to which there is compliance with international frameworks in this regard by the UK and the EU.

This research will not address the financing of terrorism, the combating of terrorist financing and the reporting obligations contained in sections 28A and 29 of FICA concerning terrorist financing and related activities. It should be noted that the focus of the research will be on FATF 2003, as FATF 2012 was only recently published in February 2012 and, as such, very little by way of academic writing is available for purposes of this research.

The research design will entail a review of the available literature on the chosen topic and the application thereof to the chosen topic. The source of the literature will be reports and guidelines issued by the FATF, the EU, the FIC and other international bodies whose

objects include the monitoring of and reporting on money laundering trends. This information will be obtained from their official websites. Further sources will be professional rules, guidelines, articles and journals of the governing bodies of the legal profession in South Africa and the UK, as well as relevant legislation and case law. In addition, further sources will be academic articles and academic books relevant to the topic.

The terms “lawyer”, “notary”, “independent legal professional”, “attorney” and “solicitor” will be used interchangeably and synonymously to refer to legal professionals who practise their profession independently for own account as sole proprietors, as partners, as members of corporate professional firms or as professional employees of professional firms and who belong to a professional body. The FATF Recommendations refer only to lawyers who practise as sole proprietors, partners or employed professionals within professional firms and not to “in house” professionals employed by other businesses or to professionals employed by government (FATF, 2003b: 16). Similarly, the definition of attorney in Schedule 1 of FICA refers to an admitted attorney who practises as such.

1.11 RESEARCH METHODOLOGY

The methodology to be employed in researching the problem is a literature review. In order to write a literature review, it is necessary to identify, review and analyse the publications relevant to the chosen topic (O’Neil, 2010: 3). A literature review comprises gathering information by reading about and understanding the subject matter, selecting and representing this information in the review, analysing, synthesising and evaluating this information and ultimately creating a new text from all these activities (Badenhorst, 2008: 155). According to Hofstee, a good literature review will provide the reader with a survey and analysis of the published works relevant to the investigation and will be comprehensive, critical and contextualised (Hofstee, 2006: 91). It will essentially provide an overview of the published works preceding the literature review (Hofstee, 2006:91). The research is limited to a review of the available literature up to 30 June 2013.

The literature that has been read should be presented in a well-organised and structured fashion, should be fair in the manner in which it presents the views of authors and should fairly represent the authors' arguments and reasoning (Mouton, 2001: 90, 123).

In this research study the focus will be on literature relating to AML, with a particular focus on lawyers' suspicious transaction reporting obligations, international AML frameworks, legislation and the role of lawyers in AML regimes.

Although the latest version of the FATF Forty Recommendations was published in 2012, the focus of the research will be on the 2003 version and, where there have been changes in the 2012 version affecting lawyers and their reporting duties, the research will highlight these changes for information and clarification purposes. The assumption is made that member countries had, at the time of the research, not had sufficient opportunity to adapt their legal frameworks in line with the 2012 version.

1.11.1 Advantages and Disadvantages of a Literature Review

A literature review covers a subject of current interest and is not limited to internet resources because most academic writing is contained in recognised journals and books (Mouton, 2001: 91). It covers the latest literature in respect of both content and method (Krathwohl, 1988: 41) and requires the researcher to consult a wide range of sources on the proposed research problem, which includes textbooks, annual reviews, review articles, government documentation and internet search engines (Lunenburg & Irby, 2008: 138).

A literature review is restricted to secondary sources and is not an opportunity to present the researcher's own research data. Secondary literature refers to those works that were previously published by other scholars (Hofstee, 2006: 91). As such, it is important to choose the sources for inclusion in a careful and unbiased manner and to ensure that those sources accurately represent the work, conclusions and contributions of other scholars (Hofstee, 2006: 121).

A literature review requires more than a mere summary of the available resources and requires the researcher to read widely, which leads to an improved level of understanding

of the chosen topic (Mouton, 2001:91). It further evaluates the sources that both do and do not support the research problem statement (Krathwohl, 1988: 44).

A literature review may, however, be limited by the availability of sources on the chosen topic (Hofstee, 2006: 121). Where there is a wealth of sources, the difficulty may arise not in deciding what to include, but rather in what to exclude (Bak, 2004: 51). The extent of the research required will therefore depend on the topic. It is thus necessary to maintain a balance between reading widely and keeping a focus on the desired outcome of the study (Bak, 2004: 51).

1.11.2 Literature Search Methodology

A search of the University of Pretoria's online library e-resource databases was conducted, with a focus on Proquest and HeinOnline, using key words which included: money laundering, anti-money laundering, lawyers AML European Union, European Union AML directives, EU AML directives, United Kingdom AML, UK AML, customer due diligence, know your customer, CDD, KYC, gatekeepers to financial system, gatekeepers initiative, lawyers AML United Kingdom, suspicious transaction reporting, suspicious transaction activity, suspicious and unusual transactions, designated non-financial businesses and professions, reporting obligations of attorneys, attorneys and AML, lawyers and AML, attorneys' profession and AML, FICA and De Koker. The search provided access to a number of electronic journal articles. Although the focus was on articles published during the preceding ten years, where relevant, articles dating further back were considered.

Access to a large national law firm's law library was arranged, which provided access to a number of academic books covering both the South African AML regime and international frameworks.

Further searches were conducted on the official websites of the legal profession, including those of the *De Rebus* (the official journal of South African attorneys), the Law Society of England and Wales, the Federation of Law Societies of Canada and the International Bar Association.

Further searches were conducted on the official websites of local and international AML bodies, including those of the FIC, the Council of Europe, the Institute of Security Studies, the European Union, the FATF, the IMF, the United Nations Office on Drugs and Crime, the IBA Anti-Money laundering Forum and the Official Home of UK Legislation. Although the focus was on research published during the preceding ten years, where conventions, directives and so on were published in documents older than ten years, these documents were used.

Finally, a search for theses and dissertations completed at South African universities on AML suspicious transaction reporting was conducted and these provided a further source of articles and reports.

1.12 OUTLINE OF CHAPTERS

1.12.1 Chapter 1: Introduction

This chapter provides an overview of the concept of money laundering and the money laundering process. Further, it discusses the background to the development of anti-money laundering frameworks at an international level, which led to the formation of the FATF, and within the EU, the UK and South Africa, with a focus on suspicious transaction reporting and the role of lawyers in an AML regime. It also discusses the research problem, the outcome the research seeks to achieve, the scope and limitations of the research and the assumptions made and provides a brief overview of each chapter.

1.12.2 Chapter 2: Areas of Money Laundering Vulnerability for Lawyers

This chapter discusses why the services of lawyers have become attractive to money launderers, describes those services and explains how money launderers exploit those services to launder their illicit gains.

1.12.3 Chapter 3: The Financial Action Task Force and Suspicious Transaction Reporting

This chapter discusses the history of the FATF and the FATF Recommendations with a focus on the 2003 version of the FATF Forty Recommendations and, more particularly, on the suspicious transaction reporting duties of lawyers and the related recommendations. It

covers the areas of suspicious transaction reporting, CDD and maintaining records, compliance programmes, protection and disclosure, legal professional privilege and oversight, insofar as these are relevant to lawyers.

1.12.4 Chapter 4: Suspicious Transaction Reporting Responsibilities of Lawyers under the European Union and the United Kingdom Anti-money Laundering Frameworks

This chapter discusses the AML frameworks in place in both the EU and the UK, with a particular focus on the suspicious transaction reporting duties of lawyers falling within both the EU and UK frameworks and the related provisions. It covers the areas of suspicious transaction reporting, CDD and maintaining records, compliance programmes, protection and disclosure, legal professional privilege and oversight, insofar as these are relevant to lawyers.

1.12.5 Chapter 5: South African Anti-money Laundering Framework and the Suspicious Transaction Reporting Responsibilities of Attorneys

This chapter discusses the AML framework in place in South Africa with a particular focus on the suspicious transaction reporting duties of attorneys falling within its framework and the related provisions. It covers the areas of suspicious transaction reporting, CDD and maintaining records, compliance programmes, protection and disclosure, legal professional privilege and oversight insofar as these are relevant to attorneys.

1.12.6 Chapter 6: A Comparative Analysis of the Financial Action Task Force, European Union, United Kingdom and South African Suspicious Transaction Reporting Responsibilities of Lawyers

This chapter compares the suspicious transaction reporting duties of lawyers and the related provisions under the FATF, EU, UK and South African AML frameworks in respect of those areas set out in chapters 3 to 5 above.

1.12.7 Chapter 7: Conclusion and Recommendations

This chapter comprises a summary of the findings of the research study and a discussion on the limitations of the study, and forms a conclusion in relation to the research problem. It also makes certain recommendations and identifies further areas for research.

CHAPTER 2: AREAS OF MONEY LAUNDERING VULNERABILITY FOR LAWYERS

2.1 INTRODUCTION

Money laundering is an activity used to camouflage the origin and nature of illicit funds, to provide a veneer of legitimacy around the funds and to thereby permit the funds to be re-introduced into commerce (He, 2010: 15). Traditionally, money laundering methods included the smuggling of cash, depositing cash into banks and purchasing assets. However, with the advent of AML measures, these methods are likely to form the basis of the filing of a suspicious transaction report (STR), with the result that money launderers have turned to professionals for assistance in formulating more complex schemes to launder their funds (He, 2010: 28). The increased levels of sophistry required in establishing money laundering schemes, such as the formation of complex business structures, have caused money launderers to shift their focus to professionals such as accountants, lawyers and company formation agents (Mugarura, 2011: 181).

The services provided by professionals permit criminals to evade preventative controls, detection and the oversight of authorities (FATF, 2010b: 46). Money launderers resort to professionals, such as lawyers, because money laundering is an intricate activity which overlaps with complex financial and legal systems and is challenging for money launderers to carry out without the expertise of professionals. Lawyers also provide varied services, such as the formation of corporate vehicles, the buying and selling of property and the carrying out of financial transactions, all of which are susceptible to money laundering offences, whether the lawyer participates wittingly or unwittingly (He, 2006: 64). There are also instances where it is either a legal requirement or customary to make use of lawyers' services to attend to certain transactions (FATF, 2013b: 34).

The FATF has reported that both international organisations and its own members have noted the increasing involvement of lawyers in money laundering cases (Shaughnessy, 2002: 29–30) and a trend pointing to the increased use of professionals in complex money

laundering schemes has been identified, particularly in instances of major financial fraud and organised crime (FATF, 2010b: 44). The main areas in which lawyers have been identified as being vulnerable to money laundering are the use of the lawyers' trust accounts, services provided in relation to the purchase of real property and services related to the formation and management of companies, trusts and charities (FATF, 2013b: 23).

2.2 PROFESSIONAL STATUS OF LAWYERS

Lawyers are regulated by their governing structures and are subject to a code of ethics and disciplinary action should they transgress the code. This in itself affords public respect for lawyers and as a result there is less likelihood of suspicion concerning any financial activities carried out by lawyers on behalf of their clients, making lawyers more attractive to money launderers for the laundering of their illicit funds (He, 2006: 64). The involvement of lawyers therefore creates a veil of respectability and legitimacy around illicit transactions (Burdette, 2010: 36). The social status accorded to lawyers also shields such transactions from suspicion (Gallant, 2004: 42–43). Added to this is the protection afforded by legal professional privilege behind which money launderers and their illicit dealings take refuge (He, 2006: 64).

Lawyers who practise as sole proprietors are particularly vulnerable to criminals as they do not have proper management oversight and compliance controls and their infrastructure is inadequate to support sophisticated AML measures (FATF, 2010b: 46). In addition, those practices that focus primarily on the achievement of unrealistically high fee targets may unintentionally promote an ethos of greed and, in the absence of adequate AML compliance systems, may result in individual lawyers becoming vulnerable to exploitation by criminals who wish to make use of their services for money laundering purposes (FATF, 2010b: 46).

2.3 SERVICES PROVIDED BY LAWYERS

2.3.1 Generally

The FATF has identified the establishing of corporate vehicles, the formation of trust arrangements and the provision of financial advice as being areas in which lawyers are susceptible to misuse by money launderers. Furthermore, a lawyer's trust account can be used for layering and obscuring funds by capitalising on the benefits of legal professional privilege and the use of a lawyer's services lends an air of respectability to the activities of the money launderer (Shaughnessy, 2002: 30).

Money laundering activities have become more complex, requiring the assistance of lawyers. As alluded to earlier, lawyers offer a wide range of services in areas such as the purchase and sale of property, the formation of corporate vehicles and the performance of financial transactions on behalf of their clients, all of which are vulnerable to money laundering activities (He, 2010: 28). Lawyers also assist with the formation of charities and other non-profit organisations and may be appointed as trustees of these entities (FATF, 2013b: 75). With the increased regulation of the financial sector, money launderers have turned their focus to other intermediaries with expertise in managing other people's money, such as lawyers, particularly commercial lawyers. The use of lawyers has the added benefit of legal professional privilege, which can be exploited by criminals (Ali, 2006: 273). Lawyers are especially vulnerable in the areas of conveyancing transactions, the formation and administration of trusts, the formation of companies and the provision of management services, particularly those where the lawyer assumes control of the client's assets (Ali, 2006: 273).

Although the services of lawyers have become essential to criminals in facilitating their money laundering schemes, these services are not necessarily provided knowingly to criminals. Lawyers can be approached for advice on how not to leave an audit trail, or how to make use of the services of a financial institution without attracting suspicion from such an institution through which the illicit funds may flow (Bell, 2002: 19). A lawyer may also be in a position to introduce a client to somebody who is able to intentionally assist the client in a money laundering scheme. Alternatively, a lawyer may introduce a client to other service providers, such as a financial institution, as a client of good standing and such an introduction may gain the services of the service provider and go some way to alleviating any suspicion which may otherwise have manifested in the service provider (Bell, 2002:

20–21). A power of attorney may form an integral part in a money laundering arrangement. This power of attorney may be prepared by an attorney and/or be in favour of an attorney (Bell, 2002: 21). The creation of false legal documentation is also used to facilitate money laundering schemes. A sham loan document, for example, may be used to create an aura of legitimacy around the proceeds of crime and a deed of sale can be crafted to appear as if the funds for the transaction have been loaned, whereas the transaction is in fact a cash transaction (Bell, 2002: 21).

Lawyers may also be used to initiate and conduct sham litigation between parties associated with a money laundering scheme, in which an amount of money is claimed by the one party from the other. The litigation is subsequently settled on the basis that the defending party agrees to pay a sum of money to the claimant, usually less than the original amount claimed to avoid suspicion. Alternatively, the action is not defended at all, judgment is passed in favour of the claimant and the debtor party pays the amount claimed. Either method creates an appearance of legitimacy around the payment (Laszlo, 2005: 136).

Research by the FATF has determined that the areas from which most STRs submitted by lawyers originate are the real property sector and the corporate vehicles and trusts services sector (FATF, 2013b: 27).

2.3.2 The Real Estate Sector

Investment in real estate offers criminals the opportunity to mask the source of funds and the identity of the beneficial owner of the property, both of which are necessary ingredients for a successful money laundering operation (FATF, 2007: 5). The involvement of a lawyer in a real estate transaction provides an additional tier between the criminal and the transaction (FATF, 2010b: 43). The transaction process involved in the purchase and sale of real estate can be used to satisfy the elements of placement, layering and integration in a money laundering scheme. In this regard, the property transaction may be a legitimate transaction or a sham transaction (Bell, 2002: 20).

Lawyers often become involved with the proceeds of crime while performing an intermediary function in commercial and financial transactions on behalf of their clients.

For instance, in a real estate transaction, lawyers receive cash into their trust accounts and issue cheques on behalf of their clients for the purchase of the real estate (Schneider, 2006: 32). As such, real estate is a common instrument used to facilitate money laundering and the nature of the real estate purchased varies from family residential property in which the launderer resides to income-generating property which is used to create the appearance of ostensibly legitimate income for the launderer. Real estate can also be acquired for use in the commission of further crimes (Schneider, 2006: 32). A common method of laundering the proceeds of crime and of concealing assets purchased with such proceeds is to register the real estate in the names of nominees, such as family, friends and close associates of the criminal and, at times, in the name of the lawyer of the offender (Schneider, 2006: 34).

2.3.3 Corporate Vehicles and Trusts

The FATF has raised concerns about the misuse of corporate vehicles for money laundering purposes and has noted the ease with which these vehicles can be created and dissolved. This renders them susceptible to misuse by those involved in financial crime in that they are used to hide the origin of funds and the ownership of the vehicles (FATF, 2006: 1).

The creation of corporate vehicles and trusts is also a mechanism used to conceal the connection between the proceeds of crime and the criminal (Bell, 2002: 20). Accordingly, criminals favour shell and front companies as a means to launder their illicit proceeds (He, 2010: 24). A shell company is a company that does not have funds, an infrastructure or a physical presence, whereas a front company has legitimate commercial activities and income. Both forms of legal entities are used by money launderers to lend an air of credibility to the source of their illicit funds (He, 2010: 24). At times, shell companies are used simply to open and operate bank accounts, the motivation being to provide the offender with a corporate cloak behind which to conceal his identity and through which he can launder money. Lawyers are often employed to register such legal entities (De Koker, 2002a: 11). Front companies are often funded by the proceeds of crime or the proceeds of crime are co-mingled with the legitimate income of the business. Where the offender launders cash, the legitimate business involved would usually be a cash-intensive business, such as a bar, a restaurant and a cash loan business (De Koker, 2002a: 12).

Criminals have a preference for corporate vehicles for a number of reasons: they are able to maintain control over the entities; financial institutions are less likely to query large fluctuations in the account activity of companies; the transfer of funds from one jurisdiction to another is not unusual as part of the ordinary business activities of a company; certain businesses are cash-intensive and therefore large cash deposits would not cause suspicion; the connection between a criminal and the ownership of the company can be concealed via complex ownership structures; and the cost of forming a company is minimal (He, 2010: 25).

Complex multi-jurisdictional structures consisting of various corporate entities and trusts spread across different jurisdictions are often used to perpetrate fraud schemes, making it virtually impossible to identify the architect behind the scheme. These structures are used to launder the funds of these nefarious activities (FATF, 2006: 3). Because lawyers have the necessary skills to form these structures (He, 2010: 25), they are used in various capacities to effect money laundering activities with the aid of corporate vehicles. These include attending to the formal processes necessary to incorporate the company, including lodging the incorporation documentation with the relevant regulatory authority, opening bank accounts for the company and forming the board of directors. A lawyer may be appointed as a director, officer, trustee or shareholder of the company and, if the company legitimately enters into commerce, the lawyer may be appointed to manage the legal, commercial, administrative and financial affairs of the company. However, should the company not conduct any legitimate business, the lawyer may be involved in fabricating accounting records and legal documentation. The lawyer's practice address may also be offered as the registered address of the company and the lawyer's trust account used as a conduit through which to channel the proceeds of crime to the corporate entity (Schneider, 2006: 34–35).

Lawyers have the expertise to provide advice on the complex environments of finance, law and corporate governance, understand the rules of business and are able to fashion strategies around, inter alia, investment and corporate structures. This expertise is sought out by criminals who seek to distance themselves from the illicit source of their funds and to legitimise these funds for eventual employment in lawful ventures. The services of

lawyers are thus sought to create corporate structures and trusts, to transfer funds and to negotiate business agreements. The benefits of these services for the offender include the obscuring of the source of illicit funds, access to the financial system and the concealing of the audit trail to hinder the law enforcement authorities' endeavours to trace the funds (FATF, 2010a: 41).

In the more sophisticated money laundering operations, lawyers convert large amounts of illicit cash into other more expedient forms of value, such as monetary instruments, to avoid arousing suspicion. These funds are then transferred to tax haven jurisdictions, where lawyers incorporate companies, open bank accounts and establish trusts as part of the money laundering scheme (Schneider, 2006: 38–39).

2.4 A LAWYER'S TRUST ACCOUNT

As mentioned earlier, gatekeepers are those persons who safeguard the entry points to the financial system and through whom those wishing to make use of the financial system would need to pass. These gatekeepers include lawyers who provide financial expertise (FATF, 2010b: 44). A lawyer's trust account has therefore become particularly attractive to money launderers because, with the tightening of AML controls by financial institutions, such a trust account represents an opportunity for criminals to enter the financial system. Accordingly, lawyers are able to receive cash deposits into their trust accounts, issue cheques, assist with the purchase and sale of equities and transfer or receive funds internationally (Bell, 2002: 19). Furthermore, the financial institution at which the trust account is held will not be aware of the identity of the client on whose behalf the attorney is transacting (Middleton, 2008: 35).

A lawyer may unintentionally provide a criminal with access to the financial system by receiving the proceeds of crime into his trust account. In this way the illicit proceeds become commingled with other legitimate client funds held in the trust account and become indistinguishable from these. Moreover criminals are able to launder their tainted funds with little risk involved (Van Jaarsveld, 2011: 176). A lawyer's trust account can be used to hold the proceeds of crime in trust for the benefit of the offender, a nominee or a corporate vehicle associated with the offender. Illicit funds can also be converted to less

suspicious assets via a lawyer's trust account and a lawyer's trust account can be used to conceal the ownership of the proceeds of crime and as a conduit between the money laundering vehicles employed in a larger money laundering scheme, such as the conversion of the illicit funds into real estate and other assets, the payment of the funds to corporate vehicles and nominees, and the general transfer of the funds (Schneider, 2006: 36). An attorney's trust account is therefore an attractive means for placing illicit cash into the financial system (De Koker, 2002a: 12).

The cash received and handled by lawyers that has been accumulated by their clients from criminal activities may be linked to an underlying transaction, such as the purchase of real estate. On the other hand, there may be no underlying professional service tying the cash to the lawyer and it may simply be deposited into the lawyer's trust account and held for the benefit of the offender, from where it is used to purchase assets, such as motor vehicles, for the offender (Schneider, 2006: 37).

A further benefit of the involvement of a lawyer as a service provider in a fraudulent scheme, such as in an advance fee fraud scheme, where the lawyer provides guarantees to potential investors that their funds are secure and, in turn, receives their funds into his trust account, is the lending of an appearance of legitimacy to the scheme, which may result in the scheme appearing more attractive to investors (Bell, 2002: 20).

In real estate transactions the actual purchase of immovable property using tainted funds is not the only way in which attorneys' trust accounts are vulnerable to money laundering. De Koker mentions an example of a "new client" paying funds into an attorney's trust account, with a request that the attorney assist the client with an immovable property transaction. Shortly thereafter the client cancels the instruction and requests the repayment of the funds. These funds are then often repaid using a trust cheque and, in so doing, are given an air of legitimacy because they originate from a lawyer. Consequently, they will have been effectively laundered through the attorney's trust account under the pretext of an immovable property transaction (De Koker, 2002b: 32).

2.5 LEGAL PROFESSIONAL PRIVILEGE

The services of lawyers are particularly attractive to money launderers owing to the protection afforded to them by legal professional privilege, which creates a barrier for authorities seeking access to documentary evidence or particulars of discussions (Bell, 2002: 20). Criminals seek this type of protection in order to delay, impede or thwart any investigation or prosecution by the authorities (FATF, 2013b: 23). Legal professional privilege is therefore a significant obstacle for investigative authorities in conducting an effective investigation (Middleton, 2008: 35) and effectively results in a veil of secrecy being drawn over the money laundering operations of the client (Schneider, 2006: 27–28).

2.6 THE INVOLVEMENT OF LAWYERS IN MONEY LAUNDERING SCHEMES

Lawyers have been used to launder the proceeds of corruption by establishing corporate vehicles, opening bank accounts, transferring illicit proceeds and purchasing property, as well as by employing any other means necessary to avoid AML measures, including using legal professional privilege to conceal the identity of politically exposed persons (PEPs) (FATF, 2011: 20). There have furthermore been a number of recorded instances where lawyers have been used to establish corporate vehicles, open bank accounts and purchase property with the specific intention of avoiding the AML measures put in place to identify PEPs (FATF, 2011: 20).

In the case of an armed robbery, an accused was approached by a lawyer with a proposal to invest the proceeds of the robbery in a nightclub. The lawyer negotiated the transaction between the seller of the nightclub and the accused; however, the name of the accused was left blank in the sale agreement. The lawyer then paid the seller a deposit in cash, prepared a further sham sale agreement in the name of another purchaser and manipulated his trust account records to conceal both the identity of the purchaser and the amount involved in the transaction (De Koker, 2002b: 35).

In a more complex money laundering scheme, a lawyer extended his operation over 16 financial institutions, some of which were located offshore. He transferred client funds into his offshore accounts, from where the funds were transferred to accounts held in Caribbean jurisdictions and in the USA. The lawyer then caused credit cards to be issued in false names and handed these to his clients to enable them to withdraw funds from

ATMs. He managed to keep the scheme concealed because he was highly regarded within the community, a fact that was largely attributable to the quality of his clientele (Ali, 2006: 273).

In another matter, a lawyer permitted a client who trafficked in narcotics to make cash deposits into his trust account, from where the lawyer disbursed the funds into the mortgage loan accounts held over various properties, of which the client was the beneficial owner. This allowed the client to convert the illicit proceeds into properties and to launder the funds (He, 2010: 27).

Lawyers for the son of the president of a West African country, who was also a cabinet minister of that country, received funds into their trust accounts, from where the funds were transferred into bank accounts opened for the PEP. As a lawyer's trust account would not be subject to the same standard of CDD as would an account of a PEP, the lawyers were able to evade the enhanced AML controls of the financial institutions. The funds were then used by the PEP to purchase real estate and aircraft (FATF, 2011: 20).

As this demonstrates, there can be little doubt that lawyers assist criminals and money launderers to launder the proceeds of crime, although it is conceded that the lawyers are not necessarily always aware of this (Middleton, 2008: 34).

2.7 SUMMARY

With the advent of AML measures (He, 2010: 28) and with the increased levels of sophistry required to establish money laundering schemes, such as the formation of complex business structures, money launderers have shifted their focus to professionals such as lawyers (Mugarura, 2011: 181). The involvement of lawyers creates a veil of respectability and legitimacy around illicit transactions (Burdette, 2010: 36).

Lawyers offer a wide range of services in areas such as the purchase and sale of property, the formation of corporate vehicles and the performance of financial transactions on behalf of their clients, all of which are vulnerable to money laundering activities (He, 2010: 28). Lawyers are especially vulnerable in the areas of real property transactions, the formation

and administration of trusts, the formation of companies and the provision of management services, particularly those where the lawyer assumes control of the client's assets (Ali, 2006: 273). The areas from which most STRs submitted by lawyers originate are the real property sector and the corporate vehicles and trusts services sector (FATF, 2013b: 27).

The transaction process involved in the purchase and sale of real estate can be used to satisfy the elements of placement, layering and integration in a money laundering scheme and the transaction can be a legitimate transaction or a sham transaction (Bell, 2002: 20). Further, corporate vehicles and trusts are used to conceal the connection between the proceeds of crime and the criminal (Bell, 2002: 20), with criminals favouring shell and front companies as a means of laundering their illicit proceeds (He, 2010: 24).

A lawyer's trust account is, furthermore, attractive to a money launderer because, with the tightening of AML controls by financial institutions, it represents an opportunity for criminals to enter the financial system (Bell, 2002: 19). Finally, legal professional privilege also protects the money laundering operations of the client by casting a veil of secrecy over such schemes (Schneider, 2006: 27–28).

CHAPTER 3: THE FINANCIAL ACTION TASK FORCE AND SUSPICIOUS TRANSACTION REPORTING

3.1 THE FORMATION OF THE FINANCIAL ACTION TASK FORCE

Since the 1970s there has been an increasing worldwide focus on curbing money laundering by encouraging countries globally to endorse and implement vigorous measures to counteract such activities. Much has been achieved in this regard through the efforts of the FATF. This campaign has permitted law enforcement authorities to follow the audit trail of criminal proceeds, to locate the offender, to use the proceeds as evidence against the offender in a criminal prosecution and to confiscate the illicit benefits of crime. As a result, perpetrators have sought to camouflage the illicit source and ownership of their proceeds of crime. Accordingly, it is believed that if criminals are prevented from achieving this goal, they will be unable to enjoy the fruits of their illegal conduct (Gordon, 2011: 503–505; Reddington, 2011: 1).

The FATF was established at the G-7 Summit in Paris in 1989 by the heads of state and government of the G-7 countries and the president of the European Commission. Its establishment was in reaction to an ever-increasing concern over money laundering and the risks that money laundering posed to the financial system and financial institutions. The FATF membership increased from its initial 16 members to 28 over the period 1991 to 1992 and to 31 in 2000. At present the FATF membership comprises 36 members, which include the European Commission (the executive body of the European Union which, inter alia, proposes new laws to the European Parliament and the Council of the European Union), the United Kingdom and South Africa (FATF, 2012c: 1). South Africa became the 32nd member of the FATF in June 2003 (FATF, 2003a: 3). There are also a further eight FATF-styled regional bodies, which include the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG). ESAAMLG was formed in 1999 with the aim of countering money laundering in the region through the implementation of the FATF Recommendations. ESAAMLG has 15 members, one of which is South Africa, and the

members take part in a voluntary self-appraisal to ascertain the extent to which they are in compliance with the FATF Forty Recommendations (ESAAMLG, 2013: 1).

In 1990, the FATF, in fulfilling its mandate to counter money laundering, published its original Forty Recommendations. These were intended to serve as a framework for governments and financial institutions when implementing AML measures. With the evolution of money laundering trends and methodologies, and the associated risks posed to the international financial system, the Forty Recommendations were revised in 1996. In addition, in 2001 the FATF's mandate was extended to include terrorist financing which resulted in the publishing of the Eight Special Recommendations to combat the financing of terrorism (FATF, 2012a: 14).

The FATF is therefore an inter-governmental organisation that sets the criteria for the implementation of appropriate AML/CFT measures. Its Forty Recommendations form the international benchmark against which countries' implementation of AML/CFT systems is measured (FATF, 2012d:7).

In its efforts to remain relevant and in the discharge of its mandate, the FATF published a revised version of the Forty Recommendations and the Eight Special Recommendations in 2003 in order to address the continually evolving money laundering and terrorist financing threats and, in 2004, the FATF added a ninth Special Recommendation (FATF, 2012a: 14). The FATF's Forty Recommendations and 9 Special Recommendations are intended to provide a structure for combating money laundering and terrorist financing. The measures used to combat money laundering include the identification of customers, the construction of a profile of the customers' lawful activities, the maintaining of a record of the documentation used to identify the customer and a record of the customers' transactions, oversight of the customers' transactions to ensure that the transactions are in accordance with the profile compiled of the customer, the scrutinising of any unusual or anomalous transactions and the reporting of any suspicious transactions to the relevant authority (Gordon, 2011: 508–509). By its implementation, the FATF AML/CFT framework therefore essentially seeks to prevent criminals from accessing and abusing the financial system (Gordon, 2011: 511).

The FATF Forty Recommendations are considered to be the international minimum standard in the fields of AML/CFT (Chaikin, 2009: 239) and more than 182 countries and jurisdictions (Shehu, 2010: 142) have approved the recommendations (Chaikin, 2009: 238) and committed themselves to implementing the recommendations domestically (Chaikin, 2009: 239–240). Since its formation, the FATF has appraised its members' AML measures by means of self-assessment and mutual assessment processes and, after conducting peer reviews of its members to ascertain their levels of compliance with the FATF Recommendations, publishes mutual evaluation reports. These reports analyse the measures implemented by each member to prevent the illegal abuse of the financial system (Johnson, 2008: 47–48; FATF, 2013c: 1). The next round of mutual evaluations is due to commence in 2013 (IRBA, 2013: 7).

The FATF is also responsible for monitoring money laundering trends and methodologies, for devising strategies to counter money laundering and for publishing regular typology reports to create an awareness of these developments (Burdette, 2010: 9). A recent example of these efforts is contained in the FATF Guidance on the Illicit Tobacco Trade, in which it is reported that lawyers have been identified as being used to relocate the funds derived from this illicit activity and concealing not only the identity of the handlers of the funds, but also the origin of the funds (FATF, 2012b: 37).

In 2012, having had the benefit of both the mutual evaluation process and experience, having identified the lacunas in the 2003 version of the recommendations, and in keeping with its efforts to combat the ever-evolving money laundering and terrorist financing threats, the Forty Recommendations and Nine Special Recommendations were revised and integrated into one set of Forty Recommendations (FATF, 2012a: 14–15).

A fundamental component of AML regimes is therefore the reporting of suspicious transactions to Financial Intelligence Units (FIUs) by financial institutions and DNFBPs. Recommendations 13 to 16 of FATF 2003 deal with these suspicious transaction reporting obligations (Chaikin, 2009: 238, 240). An FIU is a central national organisation which receives and, where permitted, accepts, analyses and distributes to the appropriate authorities disclosures of financial information relating to the proceeds of crime. Those FIUs whose functions meet these criteria become eligible to join the Egmont Group of

Financial Intelligence Units, which is an informal group that meets regularly to discuss ways of cooperating in the areas of AML, especially in the areas of training and the sharing of information and expertise. The group was formed in 1995 and the South African FIU is a member of the group (EGMONT, 2013: 1). The FATF has, thus, through its Forty Recommendations, and by creating an environment in which financial institutions and DNFBPs are required to be vigilant and to report suspicious or unusual activities to the FIUs, established the foundation for an international AML control system (Gelemerova, 2009: 33).

The identification of suspicious transactions relies on the judgement of those institutions upon whom reporting duties rest. The efficient exercise of this judgement is, in turn, dependent on the employment of appropriate systems to identify suspicious transactions, which includes, inter alia, effective CDD measures and forming a profile of the customer. A suspicion would therefore arise in those circumstances where, for instance, the transaction does not correspond with the customer profile, is abnormally large or makes no commercial sense (Shanmugam & Thanasegaran, 2008: 341). The relevant recommendations that will be traversed in this discussion are therefore Recommendations 5, 10, 11, 12(d), 13, 14, 15 and 16 of FATF 2003.

3.2 CUSTOMER DUE DILIGENCE AND MAINTAINING RECORDS

The measures applied to identify suspicious transactions include the conducting of CDD, the profiling of customers, the monitoring of transactions to ensure that they are aligned with the customer's profile and, if not, the investigation of the transaction to ascertain whether it may involve the proceeds of crime. Should the latter enquiry be answered in the affirmative, a report should be made to the FIU (Gordon, 2011: 511). CDD entails the identification and verification of clients' identities, where appropriate the determining of the beneficial owner of the client, obtaining the necessary information to understand the nature and purpose of the business relationship with the client and conducting ongoing CDD (FATF, 2008b: 13). Although CDD does not specifically use the term "customer profile", the process effectively requires that a financial institution ascertain the reason for and nature of the intended commercial relationship and that it form an understanding of the customer's business and the customer's risk profile, including the source of the customer's

funds (Gordon, 2011: 513). A further component of CDD is the retention of certain client records for a defined period of time (Van Jaarsveld, 2004: 689). Financial institutions are required to carry out CDD when forming a new business relationship, when attending to an occasional transaction, when there is a suspicion of money laundering and when the financial institution doubts the integrity of the information provided by the customer (FATF, 2003b: Recommendation 5, 2).

It is presumed that unless a financial institution understands the profile of its customer, it will not be in a position to pre-empt its customer's actions and therefore could not reasonably be expected to differentiate between suspicious activity and normal conduct (Van Jaarsveld, 2011: 209). Transactions which have no legal purpose, are not of a nature ordinarily entered into by the customer or have no apparent economic rationale should thus attract attention. It follows, therefore, that it is imperative that apposite CDD procedures are implemented to ensure that transactions can be properly evaluated to determine whether an STR should be filed (Van Jaarsveld, 2011: 234–235).

A financial institution is entitled to determine, on a risk-sensitive basis, the CDD measures it wishes to apply to its customers, having regard to factors such as the type of customer and the nature of the business relationship or transaction. It follows therefore that enhanced CDD will be performed for high risk categories of customers (FATF, 2003b: 3). The procedures applied will be informed by the strength of the assessed risk and, in those areas of higher risk, will include enhanced transaction monitoring. Conversely, in those areas of lower risk, simplified or reduced CDD procedures will be employed (FATF, 2008a: 5). The FATF 2008 RBA Guidance for Legal Professionals attaches higher risk to, inter alia, clients who are PEPs, clients that operate cash-intensive businesses, clients whose corporate structures are such that it is difficult to identify the beneficial owner and clients who are non-profit entities and are not subject to oversight by competent authorities (Terry, 2010: 18). It is therefore essential, within a risk-based approach, for financial institutions to understand who they are dealing with, particularly the identity of the customer, the nature of the customer's business and the source of the customer's funds (Gelemerova, 2009: 50).

Recommendation 10, as an element of CDD measures, requires the financial institution to retain the CDD data and transaction records of its customers for a period of at least five years. These records should be sufficient to reconstruct the transactions and, if necessary, to serve as evidence in a prosecution (Shehu, 2010: 145; FATF, 2003b: 5). The establishment and verification of the identity of the customer should be carried out irrespective of the risk classification of the customer and, once the information required to meet the further requirements of CDD has been determined on a risk-sensitive basis, those records should be retained and will remain unaffected by any risk level (FATF, 2008b: 13). Although Recommendation 5 provides a financial institution with a discretion to apply CDD on a risk-sensitive basis, Recommendation 10 of FATF 2012 takes a firmer stance by encouraging the application of a risk-sensitive approach to CDD (FATF, 2012d: 15). The FATF provides examples of high and low risk factors to be considered in the Interpretative Notes to FATF 2012. One such example of a high risk factor is a customer who appears to make use of a particularly intricate and elaborate ownership structure in relation to the type of business in which the customer is involved (IRBA, 2013: 13).

Recommendations 5 and 10 apply to DNFBPs, and particularly to lawyers only when buying and selling real estate; managing client money, securities or other assets; managing bank, savings or securities accounts; arranging contributions for the creation, operation or management of companies; creating, operating or managing legal persons or arrangements and buying and selling business entities for their clients (FATF, 2003b: Recommendation 12(d), 5; Mugarura, 2011: 184). Accordingly, it flows from the aforesaid that unless a lawyer acts for or represents a client in relation to those specific designated transactions, there is no obligation to conduct CDD on the client (FATF, 2008b: 7).

3.3 COMPLIANCE PROGRAMMES FOR ANTI-MONEY LAUNDERING REQUIREMENTS

A further element necessary for the proper functioning of a suspicious transaction reporting system is Recommendation 15 (Chaikin, 2009: 241). This recommendation requires financial institutions to develop programmes to combat money laundering and terrorist financing. Such programmes should include the vetting of new employees, internal processes and employee training to equip staff with the necessary skills to identify unusual

transactions and the steps to be taken in meeting their reporting obligations, as well as the appointment of a compliance officer and an audit function to validate the system (Shehu, 2010: 146). Recommendation 15 is applicable to lawyers when acting for a client in a financial transaction related to those transactions specified in Recommendation 12(d) (FATF, 2003b: Recommendation 16, 6). An obligation is therefore placed on lawyers to ensure that their staff are provided with adequate AML training. This training, particularly in smaller firms, may go some way to supporting the CDD transaction monitoring obligation (FATF, 2008b: 33). The nature and extent of the processes put in place in terms of this recommendation should be dependent on the level of risk of money laundering and on the size of the firm (FATF, 2003b: Annex 5).

3.4 SUSPICIOUS TRANSACTION REPORTING AND THE ROLE OF THE LAWYER

Suspicious transaction reporting responsibilities are one of the primary obligations placed on financial institutions and DNFBPs and they play a significant role in combating money laundering (He, 2005: 252). Recommendation 13 provides that where a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of crime, it should be obliged to refer its suspicions to the FIU. There are thus two bases upon which an STR may be made: the first is the presence of an actual suspicion, being a subjective test, and the second is the presence of circumstances which would ordinarily have resulted in a reasonable person forming a suspicion, being an objective test (Chaikin, 2009: 240). Recommendation 11 provides assistance with the identification of suspicious transactions by suggesting that financial institutions focus on those transactions which are intricate, abnormally large, follow an abnormal course and offer no clear financial benefit or lawful rationale (Shehu, 2010: 145; FATF, 2003b: 5). The obligation to submit an STR thus applies to all funds and it does not matter whether these funds are held by the client or by a third party (FATF, 2013b: 27).

In terms of the Vienna and Palermo Conventions, which relate to drug trafficking and organised crime respectively, every jurisdiction is required to criminalise money laundering and to apply the crime of money laundering to the proceeds of all serious offences. These offences should include, at a minimum, the designated categories of offences, which consist of participation in organised crime and racketeering; terrorism and terrorist

financing; trafficking in humans, illicit drugs, illicit arms and stolen goods; corruption and bribery; fraud; murder and grievous bodily harm; kidnapping; robbery and theft; smuggling; extortion; forgery; counterfeiting currency; counterfeiting and piracy of products; piracy; environmental crime; smuggling and insider trading and market manipulation (FATF, 2003b: 1 & Glossary 12). The Interpretative Note to Recommendation 13 further provides that STRs should be filed regardless of whether the proceeds are believed to have originated from a breach of tax legislation, as a failure to do so may provide money launderers with a means to avoid a financial institution's reporting responsibilities (FATF, 2003b: Annex 5). It is worth noting that the offences included in the designated category of offences in FATF 2012 have since been expanded to include tax-related offences (FATF, 2012d: Glossary 112).

Recommendation 16 provides that Recommendation 13 is applicable to DNFBPs and more specifically to lawyers only when they take part in financial transactions for or on behalf of their clients in relation to those transactions designated in Recommendation 12(d) (Chaiken, 2009: 241). This obligation to report would also arise where transactions are attempted but not completed, and would not be affected by a minimum financial threshold (FATF, 2003b: Annex 5). The obligation to report is unaffected by a risk-based approach; however, it is appropriate to follow a risk-based approach and to prioritise resources in those areas of high risk to facilitate the identification of suspicious activity (FATF, 2008a: 27). STRs do not therefore form part of risk assessment, but rather represent a response to a defined set of circumstances (FATF, 2008b: 33).

It was noted earlier in this chapter that Recommendation 5 obliges a financial institution to carry out CDD when there is a suspicion of money laundering and that the application of this recommendation is extended to lawyers via Recommendation 12(d) in relation to certain designated transactions. The Interpretative Note to Recommendation 5, read with Recommendation 12(d), however, provides that if during the course of establishing or conducting a business relationship with a client or carrying out an occasional transaction for a client, a lawyer forms a suspicion that the transaction relates to money laundering, the lawyer should carry out CDD irrespective of any exemption that may be applicable and should submit an STR to the FIU in terms of Recommendation 13 (FATF, 2003b: 5, Annex 1–2).

It is the implementation of these Recommendations, along with Recommendation 5, that crafts an environment in which lawyers are required to monitor the transactions of their clients, to measure these against the profiles created of their clients and to report those transactions that create a suspicion that the funds might be related to the proceeds of crime (Gordon, 2011: 516).

3.5 SUSPICIOUS TRANSACTIONS

Suspicion is a pliable term and is influenced by one's state of mind, subjective reasoning and insight at the time (Gelemerova, 2009: 41). A suspicion-based reporting framework involves forming a subjective judgement. This is informed by factors such as the client's personality and behaviour, the nature and terms of the transaction and whether the transaction is a usual transaction for the client. The effectiveness of such a framework relies on the skill and experience of the relevant entity or person whose function it is to consider these factors. Conversely, however, the system will not be effective if the employees of the entity or the person lack the necessary skill or experience or have had insufficient training in this regard (He, 2005: 254).

To have a suspicion is to "surmise without proof". A suspicion is more than simply a feeling and can form a basis for believing that a certain set of facts exist, even though proof of this cannot be provided (Sweet & Maxwell, 2009: 5, 664). It is more than mere speculation and is founded on some basis, even though such basis is less than that which would be regarded as substantiation on the strength of concrete evidence (Gelemerova, 2009: 41).

Suspicious activity comprises conduct that has no commercial or perceived legal purpose or is outside the realm of activity in which the client would ordinarily transact and, having considered all the available facts, there is no feasible explanation for the client participating in the transaction (Fredrickson & Bennett, 2003: 25–26). A conventional AML system operates from the proposition that a usual transaction is legal and that an unusual transaction is suspicious and may well be illegal. Therefore, in the AML context, the terms "unusual" and "suspicious" are seen as synonymous (Gao & Ye, 2007: 172–173).

Examples of factors within the legal realm that may give rise to a suspicion are clients who are unnecessarily secretive, clients who provide unusual retainers, clients who appoint a lawyer some distance from their locations with no logical reason for doing so, clients who change their instructions for no good reason, such as instructing the lawyer to refund funds received into the lawyer's trust account to the payee of the funds, to the client or to a third party and an unusual arrangement of transactions that does not appear to hold any commercial value (Terry, 2010: 13).

3.6 PROTECTION AND DISCLOSURE

Recommendation 14(a) protects a financial institution from legal action in circumstances where it filed an STR in good faith, irrespective of whether it was mistaken in its suspicions. Thus, such a financial institution would be protected from civil action for breach of a duty of confidentiality and from criminal action for breach of any bank secrecy laws. Recommendation 14(b) further prohibits the financial institution from disclosing that an STR has been filed with the FIU and Recommendation 16 provides that the provisions of Recommendation 14 are applicable to lawyers when engaging in financial transactions on behalf of a client concerning those transactions specified in Recommendation 12(d) (Chaikin, 2009: 241). However, the Interpretative Note to Recommendation 14 provides that where a lawyer seeks to dissuade a client from following a particular course of illegal conduct, this would not be considered as tipping the client off (FATF, 2003b: Annex 5). The Interpretative Note to Recommendation 5, however, raises a concern that the carrying out of CDD in circumstances where there is a suspicion of money laundering may, unwittingly, alert the client to the fact that an STR may be filed and this, in turn, may compromise any future investigation. As a result, the note permits a lawyer to factor this possibility in when conducting CDD and, in circumstances in which he reasonably believes that to carry out CDD would tip the client off, to abandon the CDD process and to simply file an STR (FATF, 2003b: Annex 2).

3.7 LEGAL PROFESSIONAL PRIVILEGE

Recommendation 16 provides that where a lawyer obtains information in circumstances where legal professional privilege prevails, the lawyer will not be required to report his or

her suspicions (Terry, 2010: 12). Therefore, where the information upon which the suspicion is premised was obtained in circumstances where the lawyer is subject to legal professional privilege, no reporting duty will arise (Ali, 2006: 276). Legal professional privilege is recognised in the Interpretative Note to Recommendation 16 and it is left to the various jurisdictions to determine those matters that would fall under the privilege. The Interpretative Note records that legal professional privilege would ordinarily encompass information received by lawyers from their clients during the process of determining their clients' legal positions and while acting for their clients in any judicial, administrative, arbitration or mediation proceedings. It further provides the option for jurisdictions to permit lawyers to submit their STRs to their governing bodies, subject to there being suitable channels of cooperation in place between such bodies and the FIU (FATF, 2003b: Annex 5). Lawyers would therefore not be required to report their suspicions if the information on which their suspicions were based was obtained in circumstances where legal professional privilege applied (FATF, 2008b: 7).

3.8 OVERSIGHT

Jurisdictions are required to ensure that appropriate oversight systems are put in place to oversee and enforce compliance with the AML provisions (FATF, 2008b: 12). These oversight functions should include both guidance and inspection functions, and should ensure that supervisors have sufficient oversight powers to ensure that those natural and legal persons who fall within the purview of the FATF Recommendations meet the AML requirements set out in the recommendations and to deal with those instances of non-compliance, including the imposition of sanctions (Gordon, 2011: 503; FATF, 2003b: Recommendation 17, 6). Recommendation 24 provides that the oversight function may be performed by a government authority or a self-regulating organisation and may be carried out on a risk-sensitive basis (FATF, 2003b: 8).

3.9 SUMMARY

The FATF is an inter-governmental organisation which has set the criteria for the implementation of appropriate AML measures. Its Forty Recommendations form the international benchmark against which countries' implementation of AML systems is

measured (FATF, 2012d:7). A key component of an AML system is the requirement that suspicious transactions be reported to an FIU (Chaikin, 2009: 238). The identification of suspicious transactions relies on the employment of appropriate systems to identify such transactions (Shanmugam & Thanasegaran, 2008: 341). These systems include the conducting of CDD, the profiling of customers, the monitoring of transactions to ensure that they are aligned with the customer's profile and, if not, the investigation of the transaction to ascertain whether it may involve the proceeds of crime. Should the latter enquiry be answered in the affirmative, a report should be made to the FIU (Gordon, 2011: 511). Programmes to combat money laundering should also be developed (Shehu, 2010: 146) and records of both the documentation used to identify the customer and the customers' transactions should be maintained (Gordon, 2011: 508–509).

CDD is required to be carried out when forming a new business relationship, when attending to an occasional transaction, when there is a suspicion of money laundering and when there are doubts concerning the integrity of the information provided by the customer (FATF, 2003b: Recommendation 5, 2). Lawyers are required to carry out CDD measures only when attending to certain designated transactions for their clients (Mugarura, 2011: 184) and these measures may be determined on a risk-sensitive basis. For this reason, enhanced CDD will be performed on high risk categories of customers (FATF, 2003b: 3) and in those areas of lower risk, simplified or reduced CDD procedures will be employed (FATF, 2008a: 5).

Suspicious transaction reporting responsibilities are one of the primary obligations placed on financial institutions and DNFBPs, and they play a significant role in combating money laundering (He, 2005: 252). DNFBPs include lawyers and the FATF Recommendations require lawyers to report their suspicions that funds are the proceeds of crime should such suspicions arise when engaging in financial transactions for or on behalf of a client in relation to certain designated transactions (Chaikin, 2009: 240–241). The obligation to submit an STR thus applies to all funds whether or not these funds are held by the client or by a third party (FATF, 2013b: 27). However, where the information on which the suspicion is premised was obtained in circumstances where the lawyer is subject to legal professional privilege, no such duty would arise (Ali, 2006: 276).

The effective exemption from suspicious transaction reporting duties for lawyers in relation to those transactions not covered by Recommendation 12(d) would, however, fall away where a lawyer, while entering into or during the course of a client relationship, formed a suspicion that the transaction related to money laundering. In such circumstances a lawyer would be obliged to carry out CDD and, if appropriate, to make an STR to the FIU (FATF, 2003b: Annex 1-2).

Finally, jurisdictions are required to ensure that appropriate oversight systems are put in place to oversee and enforce compliance with the AML provisions (FATF, 2008b: 12).

CHAPTER 4: SUSPICIOUS TRANSACTION REPORTING RESPONSIBILITIES OF LAWYERS UNDER THE EUROPEAN UNION AND THE UNITED KINGDOM ANTI-MONEY LAUNDERING FRAMEWORKS

4.1 THE EUROPEAN UNION

The European Union has its origins in the formation of the European Coal and Steel Community in April 1951. Membership of the European Coal and Steel Community was made up of Germany, France, Italy, the Netherlands, Belgium and Luxembourg. It subsequently expanded cooperation to other economic sectors and, in March 1957, formed the European Economic Community (EEC). Denmark, Ireland and the United Kingdom joined the EEC in January 1973, Greece in January 1981 and Spain and Portugal in January 1986. In February 1992, the Treaty on European Union was signed and the name “European Union” was officially adopted. In January 1995, Austria, Finland and Sweden joined the European Union. Since then further countries have joined the EU and its membership currently stands at 27 (EU, 2013).

The EU committed itself to improving and extending existing frameworks to counter money laundering activities. The first anti-money laundering legislation was promulgated in the EU in 1991 and was targeted at the narcotics trade (Shaughnessy, 2002: 25). The EU acknowledged that money laundering regularly occurred in an international environment (Ganguli, 2010: 2) and it considered financial crimes, such as money laundering, as posing a serious threat to the financial system as a whole (Turksen, Ufuk, Yukselturk & Yukselturk, 2011: 286). As such, the EU has adopted various measures aimed at protecting the financial system against money laundering, one of which was the adoption of European Community Council (ECC) Directive 91/308/EEC (the first Directive) of 10 June 1991, which was designed to prevent the financial system from being used for money laundering purposes (Turksen et al., 2011: 286). The Directive required the EU member states to outlaw money laundering and to put in place measures requiring financial institutions and professions to identify their customers, to maintain suitable

records and to institute internal procedures for staff training in money laundering detection and reporting to the appropriate authorities (Turksen et al., 2011: 286).

The EU AML framework has been formulated to ensure that it is consistent with other international benchmarks, particularly with the FATF Recommendations, as it is acknowledged that for AML efforts to be successful they should be carried out in an international context (Turksen et al., 2011: 286). The EU AML framework is focused on protecting the integrity of the financial system by the imposition of record keeping, CDD, reporting and training obligations (Turksen et al., 2011: 289). Accordingly, the EU has established a dynamic and hardy AML regime (Ganguli, 2010: 1).

AML legislation was originally enacted in the EU by way of the first Directive and this Directive was subsequently amended by EU Directive 2001/97/EC (the second Directive) (Shaughnessy, 2002: 25 & 27). The Directives were issued to give effect to the various versions of the FATF Recommendations (Tyre, 2010: 69-70). EU Directive 2005/60/EC (the third Directive) consolidates the first and second Directives, extends the scope of the predicate offences and provides guidance on CDD, which is to be carried out on a risk-sensitive basis (Mugarura, 2011: 181). The first Directive was based on FATF 1990 and the second and third Directives on the 1996 and 2003 revised versions respectively of the Forty Recommendations (Leong, 2007: 146–147; Tyre, 2010: 70). The third Directive was approved by the European Parliament and Council on 26 October 2005 (Tyre, 2010:71), came into effect on 15 December 2005 and required that each member state incorporate its terms into its domestic law by 15 December 2007 (Ganguli, 2010:2). Each member state was, however, given a certain latitude in the application of the Directive domestically and was permitted to make provision for areas not covered by the Directive or to implement measures more onerous than those provided for in the Directive (Ganguli, 2010: 2). The primary objective of the third Directive is therefore to align with the FATF Recommendations (Katz, 2007: 207).

The third Directive concentrates on the implementation of measures to prevent the abuse of the EU financial system by money launderers and aims at tackling money laundering on an EU and global stage (Salas, 2005: 2). It extended the predicate offences to include all serious crime and included lawyers within its ambit (Ganguli, 2010: 2–3), although lawyers

only fall within the purview of the Directive when acting for or assisting clients in relation to certain specified transactions (Tyre, 2010: 74). Article 3(5) of the third Directive extends the ambit of the predicate offences by defining serious crime as including all those offences in respect of which a maximum jail sentence of more than a year is imposed or, in those jurisdictions where a minimum threshold is applied, those offences in respect of which a minimum jail sentence of more than six months is imposed. Serious crime further includes narcotics offences, activities of criminal organisations, fraud and corruption (Salas, 2005: 4).

Lawyers are brought within the purview of the third Directive via Article 2. This provides that the Directive is applicable to lawyers when, for or on behalf of a client they take part in any financial or real property transaction, or when they assist in the preparation, or carrying out of transactions for their client relating to the buying and selling of real property or business entities; the managing of the client's funds, securities or other assets; the opening or managing of bank, savings or securities accounts; the arrangement of contributions required for the formation, operation or management of companies and the formation, operation or management of trusts, companies or similar entities (Salas, 2005: 4-5). Any other professional services or transactions attended to by lawyers for or on behalf of their clients would therefore not fall within the ambit of the Directive (Tyre, 2010: 75).

4.1.1 Customer Due Diligence and Maintaining Records

The third Directive requires that CDD be carried out where a business relationship is formed, where there is a suspicion of money laundering and where there are doubts about the accuracy or completeness of previously acquired customer identification information (Katz, 2007: 209). These requirements are set out in Article 7, read with Article 3(9), and further provide that CDD should also be carried out when attending to occasional transactions with a threshold of above 15 000 euro (whether consisting of one transaction or a number of smaller linked transactions). The requirement that CDD be carried out where there is a suspicion of money laundering applies irrespective of any derogation, exemption or threshold that may be applicable (O'Reilly, 2006: 61).

While the Directive requires those persons and institutions subject to its terms to carry out CDD, it permits them to ascertain the extent of such measures on a risk-sensitive basis. These measures should be consistent with the risks of money laundering (Turksen et al., 2011: 287). The Directive therefore assumes a risk-based approach to CDD and permits the carrying out of simplified CDD for low risk clients, where it is not necessary to carry out money laundering checks, and enhanced CDD in an environment where the risk of money laundering activity is high, such as where transactions are conducted remotely and in the absence of physical contact with the client and where transactions are conducted with non-resident PEPs (Tyre, 2010: 71). The Directive thus permits both enhanced and simplified CDD, the applicability of which is determined by the assessment of various risks related to the client (Brown, 2007: 8). The Directive further provides that it is not permissible to enter into a business relationship or to carry out transactions prior to the completion of CDD, save for those instances of low risk and where it is necessary to transact to avoid the interruption of the ordinary course of business (Katz, 2007: 209). The Directive has also extended those instances in which simplified CDD procedures may be carried out (Katz, 2007: 209).

CDD includes identifying and verifying the identity of the client, identifying the beneficial owner where applicable, gathering information on the purpose and intended nature of the business relationship, and conducting ongoing CDD to ensure that the transactions carried out are in line with the person's or entity's understanding of the business and risk profile of the client and, where necessary, ascertaining the source of funds (Salas, 2005: 7; EUR-Lex, 2005: Article 8). The Directive therefore requires the constant supervision and scrutiny of the transactions carried out during the continuance of the business relationship to ensure that these transactions are consistent with the overall understanding of the client and its business (O'Reilly, 2006: 60). This would entail the regular updating of the client profile and ensuring that this information is circulated to those persons who engage with the client, thereby enabling such persons to distinguish between legitimate and illegitimate transactions (O'Reilly, 2006: 60). The systems implemented to monitor these transactions should be designed according to risk-based principles (O'Reilly, 2006: 60). The monitoring of client transactions is an essential mechanism for the detection of money laundering; however, its success is dependent on the initial CDD procedures being properly carried out (Brown, 2007: 8).

Where those persons covered by the Directive are unable to identify and verify the identity of a customer, unable to identify the beneficial owner or unable to ascertain the purpose or intended nature of the business relationship, they should ordinarily not form a business relationship with the customer, should not carry out the transaction or should terminate the transaction. However, Article 9(5) permits a lawyer to depart from this requirement where he or she is in the process of determining the legal position of his or her client or is representing his or her client in any judicial proceedings, which includes the provision of advice on commencing or avoiding such proceedings (Salas, 2005: 9).

Article 30(a) of the Directive places an obligation on those persons and institutions subject to the Directive to maintain the records and information obtained during the course of carrying out CDD, to maintain the records and information obtained during the course of forming business relationships with their clients and to maintain records and information relating to the transactions of their clients for five years (Turksen et al., 2011: 287–288).

4.1.2 Compliance Programmes for Anti-Money Laundering Requirements

Chapter V of the third Directive expects those persons and institutions subject to the Directive to design adequate processes and policies relating to CDD, reporting, the keeping of records, internal control, risk assessment and risk management to ensure compliance with the obligations created by the terms of the Directive. These processes and policies should include the training of staff to assist them in identifying those transactions or activities which may relate to money laundering and in how to respond to such transactions (Turksen et al., 2011: 288; EUR-Lex, 2005: Articles 34 & 35). Article 34 essentially therefore requires that a system of “compliance management” be put in place. This translates into the appointment of a compliance officer, whose function it is to ensure that there is compliance with the reporting duties placed on those persons and institutions covered by the Directive (Salas, 2005: 12).

4.1.3 Suspicious Transaction Reporting and the Role of the Lawyer

In order to assist in the identification of suspicious transactions, Article 20 of the third Directive shifts the focus to transactions which are likely to be involved in money

laundering and particularly to those which are complex and abnormally large, and those sequences of transactions which have no apparent commercial or lawful rationale (Salas, 2005: 7). The reporting of any knowledge or suspicion that money laundering is being or has been committed is provided for in Article 22(1)(a) (Turksen et al., 2011: 287). This essentially boils down to the requirement that any person (covered by the Directive) who knows, suspects or has reasonable grounds to suspect that an attempt has been made to launder money or that money laundering is taking or has taken place, is obliged to report this information (O'Reilly, 2006: 59). Article 22, read with Article 2(1)(3)(b), of the Directive provides that lawyers, when acting for clients in relation to certain designated transactions, who know, suspect or have reasonable grounds for suspecting that money laundering is taking place, has taken place or is being attempted, are required to report this information to the FIU (EUR-Lex, 2005: Article 22 & Article 2(1)(3)(b)). Article 24(1) requires that those persons subject to the Directive should refuse to carry out the transaction that gave rise to the knowledge or suspicion until such knowledge or suspicion has been reported to the relevant authority (Turksen et al., 2011: 298). The obligation to report is not affected by the value of the suspicious transaction (FEE, 2009: 27) and, as indicated, lawyers fall within the purview of this reporting obligation, save in those instances where legal professional privilege finds application (Salas, 2005: 11).

Suspicious transactions are to be reported to the FIU; however, the Directive permits the designation of a self-regulating body for lawyers to serve as the first recipient of such information and thereafter to forward this information to the FIU. The self-regulating body may further be permitted to decline to forward the information to the FIU where the information is subject to legal professional privilege (Salas, 2005: 13).

4.1.4 Suspicious Transactions

Although the obligation to report arises where there is a suspicion or reasonable grounds to suspect that money laundering is being attempted or is being or has been committed, the Directive does not define the terms "suspicion" or "reasonable grounds to suspect" and accordingly regard should be had to the FATF for guidance on this aspect (FEE, 2009: 27). The obligation to report could be triggered in both suspicious circumstances and suspicious transactions. The former would include commercial structures which do not appear to have any legitimate financial purpose and the latter the misappropriation of

funds and the purchase of goods by an organisation that seem unrelated to the business of the organisation. A reasonable ground for suspicion could be where a client transfers a property for no apparent economic benefit (FEE, 2009: 27).

4.1.5 Protection and Disclosure

The third Directive requires that appropriate measures be taken to ensure that the employees of those persons or institutions covered by the Directive, who report suspicions of money laundering, are protected from any adverse conduct as it is recognised that the protection of such employees is vital to the success of the AML system (Salas, 2005: 12). It also requires that adequate protection from liability for any disclosure made in good faith, when complying with the reporting requirements contained in the Directive, be put in place. The filing of any such report should therefore not be regarded as a breach of a prohibition against the disclosure of information contained in a contractual, administrative, regulatory or legislative provision and should not attract liability for the person, the institution or its directors or employees (Salas, 2005: 12).

Article 28(1) prohibits the disclosure to a client or a third party the fact that information has been submitted to the FIU (Salas, 2005: 14), although a lawyer seeking to persuade a client not to engage in illegal conduct would not be viewed as having made a disclosure in terms of the Directive (Itsikowitz, 2006: 84). The Directive does, however, provide for certain limited instances in which disclosure is permitted (Salas, 2005: 14).

4.1.6 Legal Professional Privilege

Where lawyers provide legal advice while ascertaining their clients' legal position or while representing their clients in legal proceedings they are exempted from the obligation of having to report their suspicions relating to money laundering. The exemption is accordingly relevant to information obtained while ascertaining a client's legal position and obtained before, during and after legal proceedings (Salas, 2005: 11). The provision of legal advice in these circumstances will therefore be subject to legal professional privilege, save for those instances where the lawyer is participating in money laundering, the advice is provided to facilitate money laundering or the lawyer is aware that the client is seeking advice to carry out such activities (Salas, 2005: 11). The third Directive thus safeguards

legal professional privilege as fundamental to the attorney and client relationship (Itsikowitz, 2006: 85). Should the information therefore originate from a client whilst determining the legal position of the client or whilst defending or representing the client in judicial proceedings, including advising the client on how to avoid the proceedings, such information will be subject to legal professional privilege and, accordingly, no duty to report the information will arise (O'Reilly, 2006: 60). O'Reilly suggests that the exemption would not extend to the provision of advice in non-judicial proceedings, which would include alternate dispute resolution proceedings, such as mediation (O'Reilly, 2006: 60). The exemption from the reporting requirement does not apply to the other duties placed on lawyers when carrying out any of the designated transactions, such as CDD, which a lawyer would be required to apply on a risk-sensitive basis (Tyre, 2010: 75).

4.1.7 Oversight

Article 37 of the third Directive places an obligation on competent authorities to oversee compliance with the provisions of the Directive and to take steps to ensure such compliance where necessary. Provision is further made for such competent authorities to be given the powers required to discharge this function (EUR-Lex, 2005: Article 37).

The third Directive creates minimum rules for the supervision and monitoring of those persons and institutions falling under it and permits self-regulatory bodies to act as supervisors. Furthermore, it makes provision for liability for infringements of the national legislation put in place under the Directive and for the imposition of penalties for such infringements (Salas, 2005: 16). Chapter V of the Directive requires that suitable penalties be put in place to deal with any infringement of the obligations created in terms of the Directive (Turksen et al., 2011: 288).

4.1.8 Summary

The third Directive came into force on 15 December 2005, gave effect to the 2003 version of the FATF Forty Recommendations and included lawyers within its ambit (Ganguli, 2010: 2–3), although lawyers only fall within the purview of the Directive when acting for or assisting clients in relation to certain specified transactions (Tyre, 2010: 74). The EU AML framework is focused on protecting the integrity of the financial system by means of the

imposition of record keeping, CDD, reporting and training obligations (Turksen et al., 2011: 289).

In terms of the Directive, lawyers are required to carry out CDD measures in the following instances: when forming a business relationship; when carrying out occasional transactions; when there is a suspicion of money laundering; or when there is uncertainty concerning the accuracy or sufficiency of previously obtained customer identification information (Katz, 2007: 209). The Directive further requires that CDD be carried out where there is a suspicion of money laundering irrespective of any exemption, indulgence or threshold that may be applicable (O'Reilly, 2006: 61). CDD should be carried out on a risk-sensitive basis (Turksen et al., 2011: 287) and the Directive permits both enhanced and simplified CDD, the applicability of which is determined by the assessment of various risks related to the client (Brown, 2007: 8).

CDD includes identifying and verifying the identity of the client, identifying the beneficial owner where applicable, gathering information on the purpose and intended nature of the business relationship, and conducting ongoing CDD to ensure that the transactions carried out are in line with the person or entity's understanding of the business and risk profile of the client and, where necessary, ascertaining the source of funds (Salas, 2005: 7; EUR-Lex, 2005: Article 8).

Article 22, read with Article 2(1)(3)(b), of the Directive provides that lawyers, when acting for clients in certain designated transactions, who know, suspect or have reasonable grounds for suspecting that money laundering is taking place, has taken place or is being attempted, are required to report this information to the FIU (EUR-Lex, 2005: Article 22 & Article 2(1)(3)(b)). However, should such information originate from a client whilst determining the legal position of the client or whilst defending or representing the client in judicial proceedings, including advising the client on how to avoid the proceedings, such information will be subject to legal professional privilege and accordingly no duty to report the information will arise (O'Reilly, 2006: 60).

Lastly, the third Directive places an obligation on competent authorities to oversee compliance with the provisions of the Directive and to take steps to ensure such compliance where necessary (EUR-Lex, 2005: Article 37).

4.2 THE UNITED KINGDOM

The Treaty of the European Union places an obligation on members of the EU to implement EU Directives nationally within certain specified time periods (Tyre, 2010: 72). The UK became a member of the erstwhile EEC (the predecessor of the EU) in January 1973 (EU, 2013). Members are, however, permitted to simply adopt the terms of the Directive via national legislation (Tyre, 2010: 72). The first Directive was implemented in the UK via the Money Laundering Regulations (MLR) of 1993, the second Directive via the MLR of 2003 and the third Directive via the MLR of 2007 (Leong, 2007: 143; Tyre, 2010: 79–80). The UK AML framework consists of the PCA, the MLR of 2007 and the guidelines issued by government and industry advisory bodies. These guidelines must be approved by the treasury (Preller, 2008: 235).

The PCA, and particularly Part 7 thereof, seeks to deny money launderers access to the commercial and banking system by requiring those involved in financial and related services, such as bankers, accountants and lawyers, to police financial transactions as it is believed that most major financial transactions require the services of these professionals (Marshall, 2003: 111). The PCA thus seeks to dissuade criminals from laundering their proceeds of crime through the financial system by creating gatekeepers at the various points of entry to it (Sproat, 2009: 137).

For the most part, the statutory criminal law relating to money laundering is contained in Part 7 of the PCA, which came into effect on 24 February 2003. The PCA extended the money laundering provisions to cover the proceeds of all crime and the offences contained in Part 7 apply to both the regulated and unregulated sectors. The offences consist of the laundering or assisting in the laundering of the proceeds of crime, failing to report knowledge of, or a suspicion of, money laundering and tipping off (Rhodes & Palastrand, 2004: 9). Schedule 9 of the PCA sets out those businesses that fall within the regulated sector and includes lawyers who engage in financial or real property transactions relating

to the purchase and sale of real property and business concerns; who manage funds, securities or other assets; who open or manage bank, savings or securities accounts; who arrange the contributions necessary for the establishment, operation or management of companies or who establish, operate or manage trusts, companies or similar structures for or on behalf of their clients, and includes both the planning or the carrying out of the transaction (UK, 2007a: 2–3).

The MLR augment the PCA by creating further AML administrative requirements which are placed on institutions attending to certain regulated activities. The aim of these requirements is to assist in the prevention, detection and prosecution of financial crime (Rhodes & Palastrand, 2004: 9, 13). The MLR apply to a variety of financial and advisory services, including lawyers involved in financial or real property transactions (Rhodes & Palastrand, 2004: 13). More specifically, both the PCA and the MLR apply to lawyers involved in financial or real property transactions when assisting in the preparation, or carrying out, of transactions for their clients relating to the buying and selling of real property or business entities; the managing of the clients' funds, securities or other assets; the opening or managing of bank, savings or securities accounts; the arrangement of contributions required for the formation, operation or management of companies and the formation, operation or management of trusts, companies or similar entities (Law Society of England & Wales, 2012: 11; UK, 2007a: 2–3; UK, 2007b: 8).

The MLR will therefore only apply to those lawyers who practise in areas such as conveyancing, tax advice, the management of client funds and the operation of trusts, which are linked to financial or real property transactions. Whereas those lawyers who practise in the areas of litigation, the provision of legal advice, the preparation of wills and those involved in financial transactions insofar as these relate to the receipt of funds on account of the lawyer's professional fees, would not be subject to the MLR (Rhodes & Palastrand, 2004: 14). According to Ryder, the most frequent methods used to launder funds in the UK include are the purchasing of property, investment in front companies, noticeably excessive levels of expenditure and relocating sizeable amounts of cash to foreign jurisdictions (Ryder, 2008: 637).

4.2.1 Customer Due Diligence and Maintaining Records

A lawyer is required to carry out CDD when forming a new business relationship, when carrying out an occasional transaction, when there is a suspicion that money laundering is taking place and when the accuracy or completeness of documents, data or other information gathered during the process of identifying and verifying the identity of a client is called into question (Haynes, 2008: 310).

Article 5 of the MLR of 2007 provides that CDD includes the identification of the client and the verification of such identity, the identification of the beneficial owner where applicable on a risk-sensitive basis, forming an understanding of the ownership and management structure of any legal person, trust or analogous legal arrangements involved and ascertaining the purpose and proposed nature of the business relationship (UK, 2007b: 10). CDD further requires that the transactions carried out during the course of the relationship be monitored and, where necessary, the source of the funds involved be ascertained to ensure that the transactions are in line with the understanding formed of the client, his business and risk profile (UK, 2007b: 12).

CDD should be carried out on a risk-sensitive basis and, in those areas of higher risk, such as those instances where a client was not present during the identification process, enhanced CDD should be carried out (Haynes, 2008: 312). In 2006, updated in 2007, the UK Joint Money Laundering Steering Group (JMLSG) published a guidance manual that included examples of high risk clients (Gelemerova, 2009: 40). The JMLSG is made up of a number of UK trade associations in the financial services industry and provides practical support and guidance in interpreting the MLR via the issue of guidance notes for the financial sector (Leong, 2007: 144). These high risk clients included commercial clients with unusually complex business ownership arrangements, PEPs, clients operating from or transacting in high risk jurisdictions, clients who operate cash-intensive businesses, clients who make use of foreign companies where the client's financial requirements do not appear to warrant such use and abnormal investment arrangements which are devoid of any clear profit motive (Gelemerova, 2009: 40).

In order for a lawyer to identify a suspicious transaction, it is important that he or she understands the nature of the client's business activities. Suspicions will arise where a

transaction is inconsistent with the lawyer's knowledge of the client and understanding of the client's business. It is therefore important that a lawyer continuously monitors the business relationship with the client. This would include scrutinising the transactions carried out during the course of the relationship and, where relevant, ascertaining the origin of the funds involved to ensure that the transactions accord with the lawyer's understanding of the client, the client's business and the client's risk profile. It is further important that the lawyer retains the documents, data and information gathered during this ongoing CDD process (Haynes, 2008: 313–314). These records are to be retained for a period of five years (Haynes, 2008: 315).

It is worth noting that the JMLSG guidance manual refers interchangeably to the knowledge or suspicion that a transaction may entail money laundering and to the knowledge or suspicion that a customer may be engaging in money laundering. These two phrases suggest two very different scenarios. It is therefore not clear whether the risk of money laundering refers to a specific transaction, or in the main to a customer and his or her activities (Gelemerova, 2009: 41).

4.2.2 Compliance Programmes for Anti-Money Laundering Requirements

It is important that employees are trained to ensure that they have the skills required to identify suspicious transactions and that they understand the applicable law in that regard (Haynes, 2008: 314). The JLMSG guidance manual encourages employers to train their staff to focus on risk, and in doing so to hone in on common sense, intelligence and motivation (Gelemerova, 2009: 41). Regulation 20 of the MLR of 2007 requires a firm to introduce acceptable and apposite policies and procedures concerning internal control systems, risk assessment, risk management, CDD measures and ongoing scrutinising of the business relationship, record keeping, the reporting of knowledge and suspicions and the monitoring and management of compliance with these policies and procedures. These policies and processes are required to be communicated internally, which would by implication include the duty to ensure that proper employee awareness and training takes place (JLMSG, 2009: 23). Regulation 21 requires that employees are made aware of the law concerning money laundering and are provided with regular training to ensure that they are able to identify and respond appropriately to transactions and other activities that may be connected to money laundering (UK, 2007b: 21).

4.2.3 Suspicious Transaction Reporting and the Role of the Lawyer

The PCA places an obligation on those persons in business in the regulated sector to report a suspicion that another person may be involved in money laundering (Marshall, 2003: 112) and criminalises the failure of businesses to do so (Preller, 2008: 235). As indicated earlier in this chapter, businesses in the regulated sector include lawyers (Preller, 2008: 246) (when attending to certain designated transactions). The PCA criminalises such failure even where the person did not form a suspicion, but should, in the circumstances, have formed a suspicion (Marshall, 2003: 112). The effect of this is therefore that the failure to report a suspicion, being a subjective test, and the failure to report a suspicion that a reasonable person would have formed, being an objective test, is criminalised (Sproat, 2009: 134). Sections 330 to 339 contain the provisions which deal with the reporting of suspicious transactions (Rhodes & Palastrand, 2004: 11). Section 330 places an obligation on a person to make a disclosure to the firm's nominated officer or to a person authorised by the Director General of the Serious Organised Crimes Agency (SOCA) to receive a disclosure. A disclosure should be made when any knowledge or suspicion or reasonable grounds for knowing or suspecting that another person is involved in money laundering materialises, provided that the information or material from which the knowledge, suspicion or reasonable grounds for knowing or suspecting arose came to the person's attention in the course of a business in the regulated sector. Any such disclosure must be made as soon as possible after the person becomes aware of the information or material. Failure to do so constitutes an offence in terms of this section (Haynes, 2008: 305). Section 331 further provides that the failure by a nominated officer to report a disclosure to SOCA also constitutes an offence (Haynes, 2008: 306).

4.2.4 Suspicious Transactions

The UK government has experienced difficulty defining the term "suspicious transaction" because forming a suspicion is largely a subjective exercise and, as such, those facts which might cause an experienced police officer to be suspicious might not have the same effect on a professional banker (Bosworth-Davies, 2007: 196). While it is acknowledged that the duty to report suspicious transactions is one of the most important weapons against money laundering, the term "suspicious transaction" is not defined in international

documents (He, 2005: 254). The PCA provides that an STR must be made when a person knows or suspects that another is involved in money laundering; however, the Act does not define either of these terms (Haynes, 2008: 314). A suspicion-based reporting system relies on the subjective judgement of that which persons and entities consider to be suspicious and would usually include factors such as the personality of the client, the client's behaviour, the nature of the transaction and its terms and whether the transaction could, in the circumstances, be considered to be a normal transaction (He, 2005: 254).

The Australian suspicious transaction reporting agency, AUSTRAC, takes the view that a suspicion should arise when, having regard to the abnormal nature or circumstances of a transaction or the person or faction of persons being dealt with, an element of uneasiness or scepticism surfaces (Haynes, 2008: 314). In *Natwest v H M Customs with the SOCA an intervening party (2006)*, it was held, with regard to the term "suspicion", that the person must "think there is a possibility, which is more than fanciful, that the relevant facts exist" (Haynes, 2008: 314). The JMLSG guidance manual concedes that suspicion is subjective and that it is something less than proof based on actual evidence. The manual records that the UK courts have described a suspicion as being more than mere speculation and which is premised on some form of foundation. The courts refer to "[a] degree of satisfaction and not necessarily amounting to a belief but at least extending beyond speculation as to whether an event occurred or not" and "[a]lthough the creation of a suspicion requires a lesser factual basis than the creation of a belief, it must nonetheless be built on some foundation" (Gelemerova, 2009: 41).

4.2.5 Protection and Disclosure

Section 337 of the PCA provides that where a disclosure is made based on information acquired in the course of his or her trade, profession, business or employment by the person making the disclosure and where such information causes the person to know or suspect, or forms reasonable grounds for knowing or suspecting, that another person is involved in money laundering, and where the disclosure is made to the SOCA or other appropriate person, such a disclosure will not contravene any restriction on the disclosure of information (Haynes, 2008: 307).

Section 333A further provides that a person commits an offence of tipping off if he or she discloses information relating to a suspicious transaction report where such disclosure is likely to prejudice any investigation that may follow the report, provided that the information so disclosed came to his or her knowledge in the course of a business in the regulated sector (Haynes, 2008: 306). However, where the person did not know or suspect that the disclosure was likely to be prejudicial, no offence will have been committed (Rhodes & Palastrand, 2004: 12).

4.2.6 Legal Professional Privilege

Legal professional privilege is a cornerstone of the English legal system and places a professional and legal obligation on lawyers to maintain the confidentiality of their client's affairs. It consists of both the "advice privilege" and "litigation privilege" (Rhodes & Palastrand, 2004: 16). Legal professional privilege therefore does not extend to all communications that a lawyer is required to keep confidential, but only to those communications falling within either the "advice privilege" or the "litigation privilege" (Law Society of England & Wales, 2012: 85). Section 330(10) of the PCA therefore exempts a lawyer from the obligation to report where the information was acquired from a client while providing legal advice, if it was acquired from a person seeking legal advice (advice privilege) or if it was acquired from a person concerning existing or contemplated legal proceedings (litigation privilege) (Tyre, 2010: 81). The PCA accordingly absolves a lawyer from having to report knowledge or a suspicion that another person is engaged in money laundering if the information upon which such knowledge or suspicion is based is privileged, save for those instances where the information was conveyed to the lawyer with the purpose of perpetuating criminal conduct (Itsikowitz, 2006: 82).

4.2.7 Oversight

The professional bodies listed in Schedule 3 of the MLR of 2007 are established as the supervisory authorities for the persons whom they regulate. In the case of lawyers, the various law societies and bar councils are appointed as supervisory authorities and it is their function to monitor the functions of those persons over whom they exercise authority and to take the necessary steps to ensure that those persons comply with the MLR of 2007 (UK, 2007b: 22).

4.2.8 Summary

The UK AML framework consists of the PCA, the MLR of 2007 and the guidelines issued by government and industry advisory bodies (Preller, 2008: 235). The statutory criminal law relating to money laundering is contained in Part 7 of the PCA (Rhodes & Palastrand, 2004: 9).

The MLR supplement the PCA (Rhodes & Palastrand, 2004: 9, 13) and both the PCA and MLR apply to lawyers involved in certain specified transactions (Law Society of England & Wales, 2012: 11; UK, 2007a: 2–3; UK, 2007b: 8).

Lawyers are required to carry out CDD when forming a new business relationship, when carrying out an occasional transaction, when there is a suspicion that money laundering is taking place and when the accuracy or completeness of documents, data or other information gathered during the process of identifying and verifying the identity of a client is called into question (Haynes, 2008: 310). CDD includes the identification of the client and the verification of such identity, the identification of the beneficial owner where applicable, forming an understanding of the ownership and management structure of any legal person, trust or analogous legal arrangement involved and ascertaining the purpose and proposed nature of the business relationship (UK, 2007b: 10). CDD further requires that the transactions carried out during the course of the relationship be monitored to ensure that they are in line with the understanding formed of the client, his business and risk profile and, where necessary, that the source of the funds involved be ascertained, (UK, 2007b: 12). CDD should be carried out on a risk-sensitive basis and in those areas of higher risk, enhanced CDD should be carried out (Haynes, 2008: 312). It is further important that the lawyer retains the documents, data and information gathered during this ongoing CDD process (Haynes, 2008: 313–314).

CDD enables a lawyer to understand the nature of the client's business activities and, flowing from this, to identify those transactions which are inconsistent with the client's normal business practice and thus give rise to a suspicion (Haynes, 2008: 313–314). Employees should be trained to identify these suspicious transactions (Haynes, 2008: 314)

and policies and procedures should be put in place to ensure that proper employee awareness and training takes place (JLMSG, 2009: 23).

A lawyer is obliged, in terms of section 330 of the PCA, to file a report where he or she knows or suspects or has reasonable grounds for knowing or suspecting that another person is involved in money laundering, provided that the information or material from which the knowledge, suspicion or reasonable grounds for knowing or suspecting arose came to the lawyer's attention during the course of a business in the regulated sector (Haynes, 2008: 305). Businesses that fall within the regulated sector include lawyers (Preller, 2008: 246). However, a lawyer would be absolved from having to report where the information on which the knowledge or suspicion is based is subject to legal professional privilege (Itsikowitz, 2006: 82).

Finally, the various law societies and bar councils are appointed as supervisory authorities and it is their function to monitor the functions of those persons over whom they exercise authority and to take the necessary steps to ensure that those persons comply with the MLR of 2007 (UK, 2007b: 22).

CHAPTER 5: SOUTH AFRICAN ANTI-MONEY LAUNDERING LEGISLATIVE FRAMEWORK AND THE SUSPICIOUS TRANSACTION REPORTING RESPONSIBILITIES OF ATTORNEYS

5.1 THE ANTI-MONEY LAUNDERING REGULATORY FRAMEWORK IN SOUTH AFRICA

POCA and FICA were promulgated in South Africa to assist law enforcement in their efforts to combat crime (including tax evasion) and to ensure that South Africa complied with international frameworks and responsibilities. POCA contains the substantive money laundering offences and FICA prescribes the administrative money laundering control responsibilities placed on businesses generally and also on accountable institutions (Agulhas & De Koker, 2003: 2). FICA essentially seeks to establish controls over institutions and persons that may be used to assist in money laundering transactions and contains both preventative and reactive measures (Kruger, 2008: 36).

POCA came into effect on 21 January 1999. Section 4 criminalises money laundering; section 5 criminalises the assisting of another to benefit from the proceeds of crime and section 6 criminalises the acquisition, possession and use of the proceeds of crime. Section 6 is generally applied to family members and close associates of criminals and section 5 may be more relevant to the attorney and client relationship. The focus of sections 5 and 6 is therefore primarily on third parties, rather than on the criminal offender (Burdette, 2010: 11, 13, 14).

The South African government demonstrated its commitment to tackling money laundering with the promulgation of FICA (Van der Westhuizen, 2003a: 1), which came into effect on 1 February 2002 (Burdette, 2010: 15). Certain sections of FICA became operational on 1 February 2002 and the Act empowered the Minister of Finance to issue regulations and exemptions. These regulations and exemptions were published on 20 December 2002 and by and large were enforceable from 30 June 2003. Further sections of FICA came into operation on 3 February 2003 and 30 June 2003. These sections include section 29 (Van

der Westhuizen, 2003a: 2). Section 4(c) of FICA requires the FIC to provide guidance to accountable institutions, supervisory bodies and other persons. This guidance is provided in the form of guidance notes and PCCs (FIC, 2012b: 10–11; FIC, 2008: 3; 2011: 1). The Act must be read in conjunction with the regulations and exemptions and with the guidelines issued by the FIC (Burdette, 2010: 15).

The statutory control measures contained in FICA are designed to assist in the detection and investigation of money laundering activities and are premised on intermediaries in the financial system being aware of their clients' identities, the safeguarding of the audit trail of transactions through the financial system and the bringing of suspected money laundering transactions to the attention of the FIC (De Klerk, 2007: 380). FICA's AML control measures are accordingly founded on three basic elements; that is, client identification, the reporting of suspicious transactions and the preservation of the audit trail through the financial system (Van Jaarsveld, 2011: 479). The FIC is at the forefront of the battle against money laundering and one of its principle objectives is the detection of the proceeds of crime and the prevention of money laundering activities (Saksenburg, Spitz & Meyer, 2008: 24).

FICA designates certain persons and entities as accountable institutions and requires these persons and entities to establish internal administrative processes to ensure that clients are identified and that certain records relating to their clients are maintained, that particular transactions are reported (these include suspicious transactions), that internal rules are employed, that a compliance officer is appointed and that their staff are trained to identify and respond to suspected money laundering (Van der Westhuizen, 2003a: 3). Although the reporting obligations were previously accommodated in POCA, these obligations have since been replaced by section 29 of FICA. Both sets of legislation make provision for the contravention of the relevant sections on the basis of the presence of both intention and negligence (Burdette, 2010: 16).

Chapter 3 of FICA places rigorous compliance responsibilities on accountable institutions. Accountable institutions are listed in Schedule 1 of FICA and included on the list is a practising attorney, as defined in the Attorneys Act 53 of 1979 (Itsikowitz, 2006: 76; FIC, 2012b: 66). Schedule 1 initially referred to admitted attorneys and thus included not only

practising attorneys, but also non-practising attorneys, such as legal advisers and academics. However, with the coming into effect of the FIC Amendment Act 11 of 2008 (FICA, 2008) on 1 December 2010, Schedule 1 was amended and, inter alia, listed only practising attorneys as accountable institutions (De Koker, 2012: Com 6-8–Com 6-10; FIC 2012b: 1, 66). An attorney is therefore subject to the obligations imposed on accountable institutions by FICA and, as such, is not permitted to enter into a business relationship or to conclude a single transaction with a client unless the identity of the client has been ascertained and verified (Dendy, 2006: 3). FICA not only requires attorneys to identify and verify the identity of their clients, but also to keep records of business relationships with their clients and transactions concluded for and on behalf of their clients for a period of five years, to compile and employ internal rules, to provide training for their staff and to oversee compliance (Itsikowitz, 2006: 77). Attorneys are furthermore required to report suspicious transactions to the FIC (Itsikowitz, 2006: 77).

5.2 CUSTOMER DUE DILIGENCE AND MAINTAINING RECORDS

A properly structured CDD programme comprises four principal elements, that is, the know your customer (KYC) component, which forms the foundation for the identification and reporting of suspicious activities, the reporting component, the retention of records component and the awareness and staff training component, which includes the implementation of internal processes and policies (Van Jaarsveld, 2004: 689).

Regulation 21 of the Money Laundering and Terrorist Financing Control Regulations requires an accountable institution to, where necessary, obtain further information concerning a transaction which it regards as constituting a high risk of facilitating money laundering or where this is required to identify the proceeds of crime or money laundering activity. The information so obtained should be sufficient to enable the accountable institution to determine whether the relevant transaction is consistent with the accountable institution's understanding of the client and the business of the client and should include the source of the client's income and the source of the funding for the relevant transaction (De Koker, 2012: Com 8-53–Com 8-54). In order to identify a suspicious transaction, it is therefore imperative that the accountable institution has a sufficient understanding of the client's business to enable it to differentiate between normal transactions and those that

appear unusual. From an accountable institution's perspective, a suspicious transaction would be any financial transaction in which the accountable institution is involved and which causes the institution to have knowledge, or which ought to have caused it to have knowledge or a suspicion, that the transaction involves the facilitation of the transfer of the proceeds of crime (Tomlinson, 2003: 21). For instance, transactions which appear unusual from a commercial perspective or which seem not to have a lawful purpose, may give rise to a suspicion (FIC, 2008: 14).

Section 21 of FICA places a duty on an accountable institution to identify and verify the identity of its clients and prevents it from entering into a business relationship or concluding a single transaction with a client until the required steps have been taken to establish and verify the client's identity (Van der Westhuizen, 2003a: 3). Section 21 applies only to accountable institutions; therefore no one other than an accountable institution is required to identify its clients (Saksenburg et al., 2008: 67). It is important that a client is properly identified as this information, which will include forming an understanding of the client's background, credentials and earning capacity, will assist the accountable institution to identify suspicious transactions (Van Jaarsveld, 2011: 480). There is, however, no explicit prerequisite in FICA or its regulations requiring an accountable institution to ascertain the particulars of the beneficial owner and to verify those particulars, to form an understanding of the ownership and management structure of the client, to determine the purpose of the business relationship or to conduct ongoing CDD (FATF, 2009: 8). Furthermore, should doubts arise concerning the veracity or sufficiency of the information so obtained from a client, there is no explicit obligation to consider filing an STR (FATF, 2009: 103).

A "business relationship" is an understanding between an accountable institution and a client which serves as a foundation for entering into transactions on a recurring basis. In this case, a "transaction" is a transaction entered into between an accountable institution and a client which conforms with the nature of business ordinarily carried out by that institution (Van der Westhuizen, 2003a: 3–4). A single transaction is a transaction other than a transaction entered into during the course of a business relationship (FIC, 2012b: 8). Such transactions are not restricted to monetary transactions (Van der Westhuizen, 2003a: 3–4)

Attorneys are exempted from compliance with Parts 1 and 2 of Chapter 3 of FICA, that is, the duty to identify clients and the duty to keep records thereof, in respect of every business relationship and single transaction, save for those transactions where a client is assisted in the planning or effecting of the buying or selling of immovable property; the buying or selling of any business undertaking; the opening or management of a bank, investment or securities account; the organisation of contributions necessary for the creation, operation or management of a company, close corporation or a similar structure outside the Republic; the creation, operation or management of a company, close corporation or a similar structure outside the Republic or the creation, operation or management of a trust or similar structure outside the Republic, save for a trust formed via a testamentary writing or court order. The exemption would further not be applicable where the attorney assisted a client in disposing of, transferring, receiving, retaining, maintaining control of or in any way managing any property; assisting the client in the management of any investment; representing the client in any financial or real estate transaction; or where a client deposits R100 000 or more over a period of twelve months with the attorney for attorney's fees which may be incurred during the course of litigation (De Koker, 2012: Com 10-14).

The exemption does not meet the requirements of Recommendation 12 of FATF 2003, as Recommendation 12 requires that lawyers carry out CDD in respect of transactions concerning the arrangement of contributions for any legal person or arrangement, and also when forming, running or overseeing such functionaries. This exemption essentially exempts lawyers from having to carry out CDD when providing such services to legal persons and arrangements within South Africa (FATF, 2009: 162). A further difficulty with the exemption is that in real estate transactions, the attorney usually receives instructions from and acts for the seller of the property; however, the purchaser is liable for and pays the purchase price. As such, the money laundering risk rests with the purchaser, although because the seller is the client, the lawyer carries out CDD on the seller. There is thus no obligation on the lawyer to conduct CDD on the purchaser (FATF, 2009: 162).

Furthermore, there is no specific obligation on an attorney, as an accountable institution, to carry out CDD where there is a suspicion of money laundering (FATF, 2009: 93).

Section 22 of FICA requires accountable institutions to keep records of their clients and the transactions entered into by their clients when a business relationship is established with a client or a transaction is concluded with a client, whether a single transaction or one concluded during the course of a business relationship with a client. A record should be kept of, inter alia, the identity of the client and the document used to verify the identity, details of the business relationship or transaction and, in the case of a transaction, the amount and parties involved, (Van der Westhuizen, 2003b:1) and the particulars of the person who accumulated all the information (Saksenburg et al., 2008: 86), for a period of five years (FIC, 2012b: 23).

FICA and the Money Laundering and Terrorist Financing Control Regulations follow an essentially rule-based approach to CDD and, accordingly, do not make provision for a proper risk-based approach to CDD as no general provision is made for simplified due diligence in cases of low risk or for enhanced due diligence in high risk cases, save for that set out in Regulation 21, which, it has been suggested, may well be *ultra vires* the Act (De Koker, 2012: Com 8-55–Com 8-56).

Accountable institutions are therefore required to identify their clients, to verify the identities of their clients, to maintain a record of their clients' transactions and to formulate and implement internal rules that traverse these duties (Van Jaarsveld, 2004: 700).

5.3 COMPLIANCE PROGRAMMES FOR ANTI-MONEY LAUNDERING REQUIREMENTS

Section 42 provides that an attorney, along with other accountable institutions, is required to establish and put in place a set of internal rules concerning those persons whom the attorney is required to identify and to verify such identity, the information to be retained in terms of FICA, the manner in which and place at which the records are to be maintained and the procedure to be followed in identifying a reportable transaction. Furthermore, each employee is to be given access to the internal rules and to receive training on compliance with both the internal rules and the requirements of FICA (Dendy, 2006: 4). Essentially, section 42 seeks to ensure that accountable institutions establish standard procedures for

their staff to follow to identify those instances that initiate the FICA obligations staff members are required to comply with (Saksenburg et al., 2008: 117).

These internal rules should indicate the information relating to the client's business that is to be obtained, the circumstances that may prompt a reporting duty and the steps to be taken to identify an STR. The internal rules should be made available to all employees of an accountable institution who may be exposed to money laundering transactions and should clearly set out the steps to be taken in ensuring compliance with the requirements of FICA (Van der Westhuizen, 2003a: 6–7). Accountable institutions are required to train their employees to ensure that they are able to meet the requirements of the internal rules and of FICA. Such institutions are also required to appoint compliance officers to oversee compliance with the requirements of the internal rules and the requirements of FICA by the employees and to oversee the institution's compliance with its obligations in terms of FICA (Kruger, 2008: 47).

5.4 SUSPICIOUS TRANSACTION REPORTING AND THE ROLE OF THE ATTORNEY

Section 29(1) of FICA provides that any person who carries on a business, is in charge of a business, manages a business or is employed by a business (which includes an attorney [Dendy, 2006: 3]) and who knows or ought reasonably to have known or suspected that the business has received or is on the verge of receiving the proceeds of unlawful activities; or that a transaction or a series of transactions to which the business is a party facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities, has no apparent business or lawful purpose, is conducted to avoid giving rise to a reporting duty under FICA, may be relevant to the investigation of any evasion or attempted evasion of any dues imposed by legislation administered by the Commissioner for the South African Revenue Service; or the business has been used or is about to be used in any way for money laundering purposes, is obliged to file an STR (Itsikowitz, 2006: 77–78; FIC, 2012b: 26). South Africa's reporting system is therefore not restricted to accountable institutions, but includes all financial institutions and businesses (FATF, 2009: 9).

Section 1 of FICA incorporates the definition of the “proceeds of unlawful activities” and “property” as contained in POCA (FIC, 2012b: 7–8). The proceeds of unlawful activities

includes any property or any service, advantage, benefit or reward, and property, in turn, includes money or any other movable, immovable, corporeal or incorporeal thing (Kruger, 2008: 39). Property is therefore not restricted to money (Kruger, 2008: 39). It is further noted that although transactions with no apparent business or lawful purpose are to be reported, accountable institutions are not required to pay specific attention to the complexity, size or patterns of transactions (FATF, 2009: 9).

In summary, therefore, a person is required to report to the FIC any suspicions that a specific transaction may relate to money laundering (Saksenburg et al., 2008: 95). Although section 29 does not refer specifically to an accountable institution or to an attorney, attorneys fall within the purview of a person who carries on a business, is in charge of a business, manages a business or is employed by a business, and would therefore be subject to the duties created by this section (Dendy, 2006: 3). The duty to report suspicious transactions is therefore not limited to accountable institutions, but to any person who carries on a business, is in charge of a business, manages a business or is employed by a business (Kruger, 2008: 45).

Section 29 requires such a person who knows or ought reasonably to have known or suspected that the business has received or is on the verge of receiving the proceeds of crime, that a transaction to which the business is a party is associated with money laundering or that the business has been used to facilitate money laundering, to report the basis of his or her knowledge or suspicions and the details of the relevant transactions to the FIC (Kruger, 2008: 46). The duty to file an STR will extend to those circumstances where an enquiry has been made concerning a transaction which, if carried out, would have any of the aforementioned consequences (Van Jaarsveld, 2011: 492).

The term “unlawful activities” includes all conduct deemed to be unlawful, whether it occurred within South Africa or elsewhere, and therefore a duty to report will arise equally in respect of the proceeds of murder as it would to the proceeds of tax evasion (Saksenburg et al., 2008: 96). The duty to file an STR is not a duty of a general nature applicable to any matter which is considered to be suspicious, based on any rationale however it arises (De Koker, 2012: Com 7-12). Before a duty to report a suspicious transaction occurs, the transaction would have to fall within the scope of the activities

prescribed in section 29. Furthermore, a connection is necessary between the business of the person on whom the reporting obligation rests and the transaction. So, for instance, where the proceeds of unlawful activity are received by another business, no reporting duty will arise (Van der Westhuizen, 2004a: 2).

A duty to file a report in terms of section 29 will only arise when the business with which the person on whom the obligation rests is associated with receives, or is about to receive, the proceeds of crime; the business is party to a transaction which is associated with money laundering or tax evasion or the business has been used or is about to be used for money laundering purposes.

An article by Agulhas and De Koker (2003) refers to circumstances in which such a duty may arise in relation to an auditor, where the auditor is party to a tainted transaction or is used in some manner to facilitate money laundering. Examples given are of the receipt of illicit funds from a client for services rendered, which originate from the client's unlawful conduct, and where the auditor suspects that the client is engaged in money laundering activities and that his reputation is being used by the client to legitimise the client's illicit activities (Agulhas & De Koker, 2003: 5). It is submitted that an attorney can be similarly abused. For instance, the involvement of a lawyer as a service provider in a fraudulent scheme can lend an appearance of legitimacy to the scheme, which may cause the scheme to appear more attractive to investors (Bell, 2002: 20). However, in the absence of a suspicious transaction falling within the provisions of section 29, no reporting obligation will arise (Agulhas & De Koker, 2003: 5).

The term "business" is not defined in FICA; however, Guidance Note 4 on Suspicious Transaction Reporting assigns the ordinary meaning of the word to the term, that is, a commercial activity, as opposed to a charitable organisation or a public sector entity (FIC, 2008: 9). The effect of this seems to be that any of those persons cited in section 29 who are associated with either a charitable organisation or a public sector entity would not attract any reporting obligations under that section (Van der Westhuizen, 2008: 1).

Furthermore, it should be noted that the various exemptions issued under FICA, be it either the general exemptions or the industry specific exemptions, do not absolve a person from the reporting obligations arising from section 29 (Van der Westhuizen, 2003a: 5).

5.5 SUSPICIOUS TRANSACTIONS

Section 29 provides that the business must be a party to the transaction about which enquiries were made, which was attempted or which took place, or an attempt must be made to use the business or it must be used for money laundering purposes, in order for a reporting duty to arise (Burdette, 2010: 18). The term “transaction” is defined in section 1(1) of FICA as referring to a transaction entered into between a client and an accountable institution that is consistent with the nature of business ordinarily carried on by that institution. Therefore, there is room for the argument that where the transaction does not involve an accountable institution or, where it does, the transaction is not of the type ordinarily concluded by the accountable institution, no obligation to file an STR would arise. It has thus been suggested that the definition assigned to “transaction” in the Act should not apply to section 29 and that the ordinary grammatical meaning should be assigned to the term. Should this not be the position, the application of section 29 would be severely restricted (Itsikowitz, 2006: 78).

Insofar as attorneys are concerned, a transaction with an attorney would entail his or her acceptance of a mandate to provide legal advice to the client, to represent the client in litigation or to attend to other non-litigious matters. The underlying transaction to which the client is a party would not fall within the confines of the transaction concluded with the attorney (Itsikowitz, 2006: 79).

Although the word “suspected” suggests an actual suspicion in the mind of the person involved, the reading of the section in the context of the Act seems to indicate that it is sufficient if the suspicion would have manifested in the mind of a reasonable person in the same circumstances (Itsikowitz, 2006: 80). “Suspicion” is not defined in FICA, and should therefore be given its ordinary meaning, which has been held by the South African courts to be “a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’”. It has been argued that section 29 does not suggest that an unjustified suspicion

or a suspicion which enjoys no factual basis should lead to an STR. This, it is argued, is supported by the requirement in section 29 that a person making an STR must indicate “the grounds for the knowledge or suspicion”. A “reasonable suspicion” therefore does not call for *prima facie* proof of a fact. It is suggested that section 29 imposes an obligation to report a “reasonable” suspicion (Van der Westhuizen, 2004b: 1). As FICA requires an accountable institution to set out the basis for the knowledge or suspicion in the report submitted to the FIC, it is safe to accept that there would need to be valid grounds or reasons to support the forming of a suspicion, in the absence of which no obligation to report would arise (Van Jaarsveld, 2011: 493).

As far as knowledge is concerned, a person would have knowledge of a fact if he or she were actually aware of the fact or if he or she formed the view that there was a reasonable possibility that the fact existed and, despite this, failed to take the necessary steps to interrogate this possibility (Itsikowitz, 2006: 80). In the latter circumstances, knowledge will be attributed to the person (Burdette, 2010: 18). Therefore, not only actual knowledge, but also wilful blindness would give rise to a reporting obligation (De Koker, 2012: Com 7-15).

Section 29 refers to a person as having reasonably ought to have known or suspected the existence of a certain set of facts. A person ought reasonably to have known or suspected the existence of a fact if the deduction which the person should have made is the deduction that would have been made by a reasonably attentive and alert person with the general knowledge, expertise, training and experience that might reasonably be expected of a person in that position and the general knowledge, expertise, training and experience that the person actually had (Van der Westhuizen, 2004a: 2–3). It would therefore seem that if reasonable grounds exist for suspecting that money laundering is occurring, deemed actual knowledge is imputed unless it can be shown that no such activities occurred (Saksenburg et al., 2008: 44). This knowledge places a duty on the person involved (i.e. an accountable institution or otherwise) to make the necessary enquiries to ascertain whether there is cause for suspicion; alternatively to satisfy the enquirer that no such illicit conduct is taking place (Saksenburg et al., 2008: 44).

Guidance Note 4 on suspicious transaction reporting issued by the FIC provides examples of circumstances that may be of assistance in identifying suspicious transactions. These

include the depositing of funds accompanied by a request to immediately transfer the funds elsewhere, the payment of commissions or fees which seem disproportionate to those ordinarily paid, transactions which appear unnecessarily intricate, a client making enquiries of a nature which would seem to indicate an attempt to avoid the reporting obligations, a client providing unreliable or unclear identification paperwork and a client providing information relating to a transaction that seems vague, deficient or suspicious (FIC, 2008: 15–17). Further examples are abnormal or inexplicable transactional patterns, the charging for goods or services at a rate way above or below the going market rate and the nature of the transaction being inconsistent with the understanding of the reasons provided for entering into the transaction (Saksenburg et al., 2008: 46–47).

5.6 PROTECTION AND DISCLOSURE

Section 38 provides protection to those persons who comply in good faith with the reporting requirements of FICA from criminal and civil proceedings instituted by those clients whose confidentiality has been breached by a report filed with the FIC. Section 38 further prevents such reporters from having to give evidence in any criminal proceedings arising from their reports by providing that such persons cannot be compelled to give evidence in any such proceedings and, furthermore, provides that the identity of the reporter is not admissible in any such proceedings unless he or she testifies at those proceedings (FIC, 2012b: 32).

Section 37(1) of FICA provides that any duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by statute, the common law or by agreement, will not affect compliance with the reporting duty imposed on accountable institutions (Itsikowitz, 2006: 80). Thus, a client can have no expectation of confidentiality when a report is required to be made to the FIC in terms of FICA (Saksenburg et al., 2008: 102). However, in order to enjoy the protection of sections 37 and 38 where a report is filed in terms of section 29, it is important that the report meets the prerequisites of section 29 and that it is founded on one of the grounds contained in that section. Should such a report fall outside of the purview of section 29, sections 37 and 38 will not afford the reporter any protection and the filing of such a report may give rise to a breach of the client's right to confidentiality (De Koker, 2012: Com 7-20).

Whistle-blowing provisions ordinarily prevent the provider of information on suspicious activities from disclosing this to anybody else in order to avoid the information filtering back to the money launderer and thereby alerting him to and thwarting a possible pending investigation (Saksenburg et al., 2008: 97). It follows therefore that suspicious transaction reporting obligations would be rendered useless if the money launderer were advised that he was under investigation (Van Jaarsveld, 2011: 497). A person who has filed or is considering filing an STR is therefore prohibited, in terms of section 29, from tipping off anyone, including the client, that a report has been filed or may be filed (Agulhas & De Koker, 2003: 5). This prohibition on disclosure in fact extends to any person who knows or suspects that a report has been or may be made (Tomlinson, 2003: 21). Thus, attorneys are not permitted to advise their clients that an STR has been made as to do so would amount to tipping the client off, which is an offence in terms of FICA. However, where an attorney consults with a client concerning a particular course of action, the attorney will not be prevented from advising the client that the course of action is unlawful and should not be pursued (Itsikowitz, 2006: 81).

5.7 LEGAL PROFESSIONAL PRIVILEGE

Although section 37 provides that any duty of secrecy or confidentiality is overridden by the reporting duties of FICA, the common law right to legal professional privilege as between an attorney and his client is safeguarded (Itsikowitz, 2006: 81). The common law legal professional privilege is a general rule which protects the communications between an attorney and a client from disclosure provided that the attorney was acting in a professional capacity, that the attorney was consulted in confidence and that the advice does not advance the commission of crime. This protection is extended to the litigation privilege, which attaches to material acquired with a view to litigation and protects communications between the attorney, client and third parties (Avery, 2005: 36).

Section 37(2) of FICA preserves legal professional privilege by providing that the reporting obligations created by section 29 are not applicable to communications between an attorney and his or her client where such communications were made for the purposes of providing the client with legal advice in general or advice with regard to litigation which was

contemplated, pending or which had commenced (Itsikowitz, 2006: 81). Section 37(2) further provides that communications between a third party and an attorney with regard to litigation which was contemplated, pending or which had commenced would also be subject to the privilege (Van der Westhuizen, 2004c: 1). However, communications between a third party and the attorney made for the purposes of providing legal advice to the client would not be covered by the privilege and thus would not be exempt from the reporting requirements (Saksenburg et al., 2008: 103). For such communications to be exempt, they would need to be made in confidence by third parties once litigation has commenced or is contemplated (Burdette, 2010: 27–28). For communications between the attorney and third parties to qualify for the protection of the privilege, the communications must take place in an environment where the prospect of litigation is at least foreseen as highly likely (Kruger, 2008: 43).

Any other communications which take place between an attorney and a client would therefore be subject to the reporting requirements of FICA. For instance, where a client communicates information to an attorney which is not directly related to legal advice or litigation, such communications would fall within the reporting obligations net. Where an attorney forms a suspicion that the client is engaged in money laundering from information unrelated to the communications with the client concerning legal advice or litigation, the exemption from adhering to the reporting obligations would similarly not come into play (Saksenburg et al., 2008: 102). It should be noted, therefore, that information which is unrelated and incidental to the matter that forms the subject of legal professional privilege will not be covered by the privilege. It should further be borne in mind that an obligation to report only arises once the provisions of section 29 have been met. That is to say that a reporting duty would only arise where the actual or considered transaction, or the enquiries made in this regard, involves the attorney's practice. Thus, dinner table talk or scandal would not create a reporting obligation (Van der Westhuizen, 2004d: 2).

5.8 OVERSIGHT

Section 45 of FICA places the responsibility for supervising accountable institutions' compliance with the requirements of FICA on the supervisory bodies. The supervisory bodies are the regulating institutions of the various industries in South Africa. Accordingly,

those regulatory bodies that are already charged with supervising a particular business or profession would attract the additional responsibility of ensuring that their charges meet the requirements imposed on them by FICA (Saksenburg et al., 2008: 25). Section 45 incorporates this duty into the legislative mandate of the supervisory body and includes it as one of its core functions. It further entitles the supervisory body to, inter alia, raise any fees or charges to defray the costs of discharging its duties in terms of FICA, to take any steps it considers essential or appropriate to ensure compliance by those persons it oversees and to issue or amend any licence, registration, approval or authorisation to accommodate, as a stipulation, conformity with FICA (De Koker, 2012: Com 5-15–Com 5-16). FICA further requires the FIC and the supervisory bodies to manage their approach to the carrying out of their powers and complying with their responsibilities in terms of FICA and to enter into a memorandum of understanding concerning supervision and enforcement (De Koker, 2012: Com 5-16). The FIC and supervisory bodies may impose administrative sanctions for, inter alia, the failure to comply with the provisions of FICA (FIC, 2012b: 44).

The list of supervisory bodies is contained in Schedule 2 to FICA (FIC, 2012b: 68). Sections 44 and 45 of FICA further place an obligation on a supervisory body to investigate those matters referred to it by the FIC in which it is suspected that an accountable institution has failed to comply with, or has breached, the provisions of FICA (FIC, 2012b: 37–39).

Section 36 imposes an additional obligation on a supervisory body in that should such a body know or suspect that an accountable institution, either knowingly or unknowingly, has received or is about to receive the proceeds of unlawful activities or has been used or may be used for money laundering purposes, or to facilitate a transaction referred to in section 29(1)(b), it has a duty to report this knowledge or suspicion to the FIC (FIC, 2012b: 30).

Since 1 December 2010, the date on which FICA 2008 came into effect, the supervisory bodies for attorneys have been the statutory provincial law societies (De Koker, 2012: Com 5-13).

5.9 SUMMARY

POCA contains the substantive money laundering offences and FICA prescribes the administrative money laundering control responsibilities placed on businesses generally and also on accountable institutions (Agulhas & De Koker, 2003: 2). FICA's AML control measures are founded on client identification, the reporting of suspicious transactions and the preservation of the audit trail through the financial system (Van Jaarsveld, 2011: 479). Moreover, the identification and verification of the client forms the foundation for the reporting of suspicious activities (Van Jaarsveld, 2004: 689). FICA also requires attorneys to keep a record of the identity of the client and the document used to verify the identity (Van der Westhuizen, 2003b:1), to keep a record of the business relationships with their clients and transactions concluded for and on behalf of their clients, to compile and employ internal rules, to provide training for their staff and to oversee compliance (Itsikowitz, 2006: 77).

The proper identification of the client includes forming an understanding of the client's background, credentials and earning capacity (Van Jaarsveld, 2011: 480). However, there is no specific requirement to ascertain and verify the particulars of the beneficial owner, to form an understanding of the ownership and management structure of the client, to determine the purpose of the business relationship or to conduct ongoing CDD (FATF, 2009: 8). Furthermore, should doubts arise concerning the veracity or sufficiency of the information so obtained from a client, there is no explicit obligation to consider filing an STR (FATF, 2009: 103).

Although Chapter 3 of FICA places rigorous compliance responsibilities on accountable institutions, which include practising attorneys (Itsikowitz, 2006: 76; FIC, 2012b: 66), attorneys are exempted from compliance with the duty to identify clients and the duty to keep records thereof in respect of every business relationship and single transaction, save for those where a client is assisted in the planning or effecting of certain specified transactions (DeKoker, 2012: Com 10-14). An attorney is not permitted to enter into a business relationship or to conclude a single transaction with a client unless client identification and verification has been carried out (Dendy, 2006: 3) in relation to those transactions in respect of which the exemption does not apply. There is, however, no

specific obligation on an attorney, as an accountable institution, to carry out CDD where there is a suspicion of money laundering (FATF, 2009: 93).

FICA and the Money Laundering and Terrorist Financing Control Regulations follow an essentially rule-based approach to CDD and, accordingly, do not make provision for a proper risk-based approach to CDD because no general provision is made for simplified due diligence in cases of low risk or for enhanced due diligence in high risk cases, save for that set out in Regulation 21, which, it has been suggested, may well be *ultra vires* the Act (De Koker, 2012: Com 8-55–Com 8-56).

Section 29 requires a person who carries on a business, is in charge of a business, manages a business or is employed by a business and who knows or ought reasonably to have known or suspected that the business has received or is on the verge of receiving the proceeds of crime, that a transaction to which the business is a party is associated with money laundering or that the business has been used to facilitate money laundering, to report the basis of his or her knowledge or suspicion and the details of the relevant transactions to the FIC (Kruger, 2008: 45–46).

Although section 29 does not refer specifically to an accountable institution or to an attorney, attorneys fall within the purview of a person who carries on a business, is in charge of a business, manages a business or is employed by a business, and would therefore be subject to the duties created by this section (Dendy, 2006: 3). South Africa's reporting system is therefore not restricted to accountable institutions, but includes all financial institutions and businesses (FATF, 2009: 9).

Before a duty to report a suspicious or unusual transaction occurs, the transaction would have to fall within the scope of the activities prescribed in section 29. Furthermore, a connection between the business of the person on whom the reporting obligation rests and the transaction is necessary (Van der Westhuizen, 2004a: 2). Thus, a duty to file a report in terms of section 29 will only arise when the business with which the person upon whom the obligation rests is associated with receives, or is about to receive, the proceeds of crime, the business is party to a transaction which is associated with money laundering or tax evasion or the business has been used or is about to be used for money laundering

purposes (Aguilhas & De Koker, 2003: 5). Therefore, where the proceeds of unlawful activity are received by another business, no reporting duty will arise (Van der Westhuizen, 2004a: 2).

Section 29 imposes an obligation to report a “reasonable” suspicion (Van der Westhuizen, 2004b: 1). As FICA requires an accountable institution to set out the basis for the knowledge or suspicion in the report submitted to the FIC, it is safe to accept that there would need to be valid grounds or reasons to support the forming of a suspicion, in the absence of which no obligation to report would arise (Van Jaarsveld, 2011: 493).

The reporting obligations created by section 29 would not be applicable to communications between an attorney and his or her client where such communications were made for the purposes of providing the client with legal advice in general or advice with regard to litigation which was contemplated, pending or which had commenced (Itsikowitz, 2006: 81) or to communications between a third party and an attorney with regard to litigation which was contemplated, pending or which had commenced (Van der Westhuizen, 2004c: 1).

Finally, FICA places the responsibility for supervising accountable institutions’ compliance with the requirements of FICA on the supervisory bodies (Saksenburg et al., 2008: 25). It is left to the FIC and the supervisory bodies to manage their approach to the wielding of their powers and complying with their responsibilities in terms of FICA (De Koker, 2012: Com 5-16). The FIC and supervisory bodies may impose administrative sanctions for the failure to comply with the provisions of FICA (FIC, 2012b: 44).

Since 1 December 2010, the date on which FICA 2008 came into effect, the supervisory bodies for attorneys have been the statutory provincial law societies (De Koker, 2012: Com 5-13).

CHAPTER 6: A COMPARATIVE ANALYSIS OF THE FINANCIAL ACTION TASK FORCE, EUROPEAN UNION, UNITED KINGDOM AND SOUTH AFRICAN SUSPICIOUS TRANSACTION REPORTING RESPONSIBILITIES OF LAWYERS

6.1 INTRODUCTION

FATF

Over the preceding four decades there has been a consistent and escalating worldwide focus on curbing the prevalence of money laundering (Gordon, 2011: 503–505; Reddington, 2011: 1). This effort led to the establishment of the FATF in 1989, whose membership includes the European Commission, the UK and South Africa (FATF, 2012c: 1). Subsequently, the FATF published its Forty Recommendations, which served as a framework for anti-money laundering measures (FATF, 2012a: 14) and formed the international benchmark against which countries' implementation of AML/CFT systems is measured (FATF, 2012d: 7).

European Union

The EU, whose membership includes the UK (EU, 2013), committed itself to improving and extending existing frameworks to counter money laundering activities (Shaughnessy, 2002: 25). Its AML framework has been formulated to ensure that it is consistent with other international benchmarks, particularly with the FATF Recommendations (Turksen et al., 2011: 286). AML legislation was enacted in the EU by way of directives (Shaughnessy, 2002: 25, 27), the third Directive being based on FATF 2003 (Leong, 2007: 147), with its primary objective being to align with the FATF Recommendations (Katz, 2007: 207).

Lawyers are brought within the purview of the third Directive when, for or on behalf of a client, they take part in any financial or real property transaction, or when they assist in the preparation, or carrying out of transactions for their client relating to the buying and selling of real property or business entities; the managing of the client's funds, securities or other assets; the opening or managing of bank, savings or securities accounts; the arrangement

of contributions required for the formation, the operation or management of companies and the formation, operation or management of trusts, companies or similar entities (Salas, 2005: 4–5). Any other professional services or transactions attended to by lawyers for or on behalf of their clients would not fall within the ambit of the Directive (Tyre, 2010: 75).

United Kingdom

The Treaty of the European Union places an obligation on members of the EU to implement EU Directives nationally (Tyre, 2010: 72) and, as such, the third Directive was implemented in the UK via the MLR of 2007 (Tyre, 2010: 79–80). The UK AML framework consists of the PCA, the MLR of 2007 and the guidelines issued by government and industry advisory bodies (Preller, 2008: 235).

Both the PCA and the MLR apply to lawyers involved in financial or real property transactions when assisting in the preparation or carrying out of transactions for their clients relating to the buying and selling of real property or business entities; the managing of the clients' funds, securities or other assets; the opening or managing of bank, savings or securities accounts; the arrangement of contributions required for the formation, operation or management of companies and the formation, operation or management of trusts, companies or similar entities (Law Society of England & Wales, 2012: 11; UK, 2007a: 2–3; UK, 2007b: 8).

South Africa

POCA and FICA were promulgated in South Africa to ensure that the country complied with international frameworks and responsibilities. POCA contains the substantive money laundering offences (Agulhas & De Koker, 2003: 2) and FICA establishes controls over the institutions and persons that may be used to assist in money laundering transactions (Kruger, 2008: 36). FICA must be read in conjunction with the regulations and exemptions and with the guidelines issued by the FIC (Burdette, 2010: 15).

FICA designates certain persons and entities as accountable institutions (Van der Westhuizen, 2003a: 3). These include practising attorneys (FIC, 2012b: 66), and compliance responsibilities are placed on these accountable institutions (Itsikowitz, 2006: 76; FIC, 2012b: 66).

6.2 CUSTOMER DUE DILIGENCE AND MAINTAINING RECORDS

FATF

CDD (in Recommendation 5 of FATF 2003) entails the identification and verification of the clients' identities, where appropriate the determining of the beneficial owner of the client, obtaining the necessary information to understand the nature and purpose of the business relationship with the client and conducting ongoing CDD (FATF, 2008b: 13). Financial institutions are required to carry out CDD when forming a new business relationship, when attending to an occasional transaction, when there is a suspicion of money laundering and when the financial institution doubts the integrity of the information provided by the customer (FATF, 2003b: Recommendation 5, 2). CDD measures can be determined on a risk-sensitive basis; thus enhanced CDD will be performed for high risk categories of customers (FATF, 2003b: 3) and simplified or reduced CDD procedures in those areas of lower risk (FATF, 2008a: 5).

Recommendation 10 requires that CDD data and the transaction records of customers be retained for a period of at least five years (Shehu, 2010: 145).

Recommendations 5 and 10 apply to lawyers when buying and selling real estate; managing client money, securities or other assets; managing bank, savings or securities accounts; arranging contributions for the creation, operation or management of companies; creating, operating or managing legal persons or arrangements and buying and selling business entities for their clients (FATF, 2003b: Recommendation 12(d), 5; Mugarura, 2011: 184). Consequently, unless a lawyer acts for or represents a client in relation to those specific transactions (designated in Recommendation 12(d)), there is no obligation to conduct CDD on the client (FATF, 2008b: 7).

European Union

The third Directive requires that CDD be carried out where a business relationship is formed, where there is a suspicion of money laundering, where there are doubts about the accuracy or completeness of previously acquired customer identification information (Katz, 2007: 209) and when attending to occasional transactions with a threshold of above

15 000 euro. The requirement that CDD be carried out where there is a suspicion of money laundering applies irrespective of any derogation, exemption or threshold that may be applicable (O'Reilly, 2006: 61).

The Directive permits those persons and institutions subject to its terms to ascertain the extent of the CDD measures required on a risk-sensitive basis (Turksen et al., 2011: 287). Thus, it permits the carrying out of simplified CDD for low risk clients and enhanced CDD where the risk of money laundering is high (Tyre, 2010: 71).

CDD includes identifying and verifying the identity of the client, identifying the beneficial owner where applicable, gathering information on the purpose and intended nature of the business relationship, and conducting ongoing CDD to ensure that the transactions carried out are in line with the person or entity's understanding of the business and risk profile of the client and, where necessary, ascertaining the source of funds (Salas, 2005: 7; EUR-Lex, 2005: Article 8).

Article 30(a) of the Directive places an obligation on those persons and institutions subject to the Directive to maintain the records and information obtained during the course of carrying out CDD, to maintain the records and information obtained during the course of forming business relationships with their clients and to maintain records and information relating to the transactions of their clients for five years (Turksen et al., 2011: 287–288).

United Kingdom

Article 5 of the MLR of 2007 provides that CDD includes the identification of the client and the verification of such identity, the identification of the beneficial owner on a risk-sensitive basis where applicable, forming an understanding of the ownership and management structure of any legal person, trust or analogous legal arrangement involved and ascertaining the purpose and proposed nature of the business relationship (UK, 2007b: 10). CDD further requires that the transactions carried out during the course of the relationship be monitored and, where necessary, the source of the funds involved be ascertained to ensure that the transactions are in line with the understanding formed of the client, and its business and risk profile (UK, 2007b: 12).

A lawyer is required to carry out CDD when forming a new business relationship, when carrying out an occasional transaction, when there is a suspicion that money laundering is taking place and when the accuracy or completeness of documents, data or other information gathered during the process of identifying and verifying the identity of a client is called into question (Haynes, 2008: 310). CDD should be carried out on a risk-sensitive basis and, in areas of higher risk enhanced CDD should be carried out (Haynes, 2008: 312).

All documents, data and information gathered during CDD (Haynes, 2008: 313–314) are to be retained for a period of five years (Haynes, 2008: 315).

South Africa

Section 21 of FICA places a duty on an accountable institution to identify and verify the identity of its clients and prevents it from entering into a business relationship or concluding a single transaction with a client until the required steps have been taken to establish and verify the client's identity (Van der Westhuizen, 2003a:3). Section 21 applies only to accountable institutions; therefore, no one other than an accountable institution is required to identify its clients (Saksenburg et al., 2008: 67). There is, however, no explicit prerequisite in FICA or its regulations for an accountable institution to ascertain the particulars of the beneficial owner and to verify those particulars, to form an understanding of the ownership and management structure of the client, to determine the purpose of the business relationship or to conduct ongoing CDD (FATF, 2009: 8). Furthermore, should doubts arise concerning the veracity or sufficiency of the information so obtained from a client, there is no explicit obligation to consider filing an STR (FATF, 2009: 103).

Attorneys are exempted from compliance with Parts 1 and 2 of Chapter 3 of FICA, that is, the duty to identify clients and the duty to keep records thereof, in respect of every business relationship and single transaction, save for those where a client is assisted in the planning or effecting of the buying or selling of immovable property; the buying or selling of any business undertaking; the opening or management of a bank, investment or securities account; the organisation of contributions necessary for the creation, operation or management of a company, close corporation or a similar structure outside the Republic; the creation, operation or management of a company, close corporation or a

similar structure outside the Republic or the creation, operation or management of a trust or similar structure outside the Republic, save for a trust formed via a testamentary writing or court order. The exemption would further not be applicable where the attorney assisted a client in disposing of, transferring, receiving, retaining, maintaining control of or in any way managing any property; assisting the client in the management of any investment; representing the client in any financial or real estate transaction or where a client deposits R100 000 or more over a period of twelve months with the attorney for attorney's fees which may be incurred during the course of litigation (De Koker, 2012: Com 10-14).

This exemption does not meet the requirements of Recommendation 12 of FATF 2003 as Recommendation 12 requires that lawyers carry out CDD in respect of transactions concerning the arrangement of contributions for any legal person or arrangement and also when forming, running or overseeing such functionaries. The exemption essentially exempts lawyers from having to carry out CDD when providing such services to legal persons and arrangements within South Africa (FATF, 2009: 162). A further difficulty with the exemption is that in real estate transactions, the attorney generally receives instructions from and acts on behalf of the seller of the property, but the purchaser is liable for and pays the purchase price. As such, the money laundering risk rests with the purchaser; however, as the seller is the client, the lawyer carries out CDD on the seller. There is thus no obligation on the lawyer to conduct CDD on the purchaser (FATF, 2009: 162).

There is furthermore no specific obligation on an attorney, as an accountable institution, to carry out CDD where there is a suspicion of money laundering (FATF, 2009: 93).

Section 22 of FICA requires accountable institutions to keep records of their clients and the transactions entered into by their clients. Records should be kept of, inter alia, the identity of the client and the document used to verify the identity, details of the business relationship or transaction and, in the case of a transaction, the amount and parties involved (Van der Westhuizen, 2003b:1), and the particulars of the person who accumulated all the information (Saksenburg et al., 2008: 86) for a period of five years (FIC, 2012b: 23).

FICA and the Money Laundering and Terrorist Financing Control Regulations follow an essentially rule-based approach to CDD and, accordingly, do not make provision for a proper risk-based approach to CDD because no general provision is made for simplified due diligence in cases of low risk or for enhanced due diligence in cases of high risk, save for that set out in Regulation 21, which, it has been suggested, may well be *ultra vires* the Act (De Koker, 2012: Com 8-55–Com 8-56).

6.3 COMPLIANCE PROGRAMMES FOR ANTI-MONEY LAUNDERING REQUIREMENTS

FATF

Recommendation 15 requires financial institutions to develop programmes to combat money laundering. These programmes should include the vetting of new employees, internal processes and employee training to equip staff with the necessary skills to identify unusual transactions and the steps to be taken in meeting their reporting obligations, the appointment of a compliance officer and an audit function to validate the system (Shehu, 2010: 146). Recommendation 15 is applicable to lawyers when acting for a client in a financial transaction related to those transactions specified in Recommendation 12(d) (FATF, 2003b: Recommendation 16, 6).

European Union

Chapter V of the third Directive expects of those persons and institutions subject to the Directive to design adequate processes and policies covering CDD, reporting, the keeping of records, internal control, risk assessment and risk management to ensure that there is compliance with the obligations created by the terms of the Directive. These processes and policies should include the training of staff to assist them in identifying those transactions or activities that may relate to money laundering and on how to respond to such transactions (Turksen et al., 2011: 288; EUR-Lex, 2005: Articles 34 & 35).

United Kingdom

Regulation 20 of the MLR of 2007 requires a firm to introduce acceptable and apposite policies and procedures for internal control systems, risk assessment, risk management, CDD measures and ongoing scrutinising of the business relationship, record keeping, the

reporting of knowledge and suspicions and the monitoring and management of compliance with these policies and procedures. Regulation 21 requires that employees are made aware of the law concerning money laundering and are provided with regular training to ensure that they are able to identify and respond appropriately to transactions and other activities that may be connected to money laundering (UK, 2007b: 21).

South Africa

Section 42 provides that an attorney is required to establish and put in place a set of internal rules concerning those persons whom the attorney is required to identify and to verify such identity, the information to be retained in terms of FICA, the manner in which and place at which the records are to be maintained and the procedure to be followed in identifying a reportable transaction. Furthermore, each employee is to be given access to the internal rules and to receive training on compliance with both the internal rules and the requirements of FICA (Dendy, 2006: 4).

6.4 SUSPICIOUS TRANSACTION REPORTING AND THE ROLE OF THE LAWYER

FATF

Recommendation 13 provides that where a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of crime, the financial institution should be obliged to refer its suspicions to the FIU. Recommendation 11 provides assistance with the identification of suspicious transactions by suggesting that financial institutions focus on those transactions that are intricate or abnormally large, those which follow an abnormal course and those which offer no clear financial benefit or lawful rationale (Shehu, 2010: 145; FATF, 2003b: 5). The obligation to submit an STR thus applies to all funds and it does not matter whether these funds are held by the client or by a third party (FATF, 2013b: 27).

Recommendation 16 provides that Recommendation 13 is applicable to DNFBPs and, more specifically, to lawyers only when they take part in financial transactions for or on behalf of their clients in relation to those transactions designated in Recommendation 12(d) (Chaiken, 2009: 241). This obligation to report would also arise where transactions

are attempted but not completed and would not be affected by a minimum financial threshold (FATF, 2003b: Annex 5).

The Interpretative Note to Recommendation 5, read with Recommendation 12(d), however, provides that if during the course of establishing or conducting a business relationship with a client or carrying out an occasional transaction for a client, a lawyer forms a suspicion that the transaction relates to money laundering, he or she should carry out CDD irrespective of any exemption that may be applicable and should submit an STR to the FIU in terms of Recommendation 13 (FATF, 2003b: 5 & Annex 1–2).

European Union

The reporting of any knowledge or suspicion that money laundering is being or has been committed is provided for in Article 22(1)(a) (Turksen et al., 2011: 287) and essentially boils down to fact that any person (covered by the Directive) who knows, suspects or has reasonable grounds to suspect that an attempt has been made to launder money or that money laundering is taking or has taken place is obliged to report this information (O'Reilly, 2006: 59). Article 22, read with Article 2(1)(3)(b), of the Directive provides that lawyers, when acting for clients in relation to certain designated transactions, who know, suspect or have reasonable grounds for suspecting that money laundering is taking place, has taken place or is being attempted, are required to report this information to the FIU (EUR-Lex, 2005: Article 22 & Article 2(1)(3)(b)). The obligation to report is not affected by the value of the suspicious transaction (FEE, 2009: 27).

United Kingdom

The PCA places an obligation on those persons in business in the regulated sector to report a suspicion that another person may be involved in money laundering (Marshall, 2003: 112). Businesses in the regulated sector include lawyers (Preller, 2008: 246) (when attending to certain designated transactions). A disclosure should be made when any knowledge or suspicion or reasonable grounds for knowing or suspecting that another person is involved in money laundering materialises, provided that the information or material from which the knowledge, suspicion or reasonable grounds for knowing or suspecting arose came to the person's attention in the course of a business in the regulated sector (Haynes, 2008: 305).

South Africa

Section 29(1) of FICA provides that any person who carries on a business, is in charge of a business, manages a business or is employed by a business (which includes an attorney [Dendy, 2006: 3]) and who knows or ought reasonably to have known or suspected that the business has received or is on the verge of receiving the proceeds of unlawful activities; or that a transaction or a series of transactions to which the business is a party facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities, has no apparent business or lawful purpose, is conducted to avoid giving rise to a reporting duty under FICA, may be relevant to the investigation of any evasion or attempted evasion of any dues imposed by legislation administered by the Commissioner for the South African Revenue Service; or the business has been used or is about to be used in any way for money laundering purposes, is be obliged to file an STR (Itsikowitz, 2006: 77–78; FIC, 2012: 26). South Africa’s reporting system is therefore not restricted to accountable institutions, but includes all financial institutions and businesses (FATF, 2009: 9).

Section 1 of FICA incorporates the definition of the “proceeds of unlawful activities” and “property” as contained in POCA (FIC, 2012b: 7–8). The proceeds of unlawful activities include any property (Kruger, 2008: 39). Property, therefore, is not restricted to money (Kruger, 2008: 39). It is further noted that although transactions with no apparent business or lawful purpose are to be reported, accountable institutions are not required to pay specific attention to the complexity, size or patterns of transactions (FATF, 2009: 9).

Section 29 provides that the business must be a party to the transaction about which enquiries were made, which was attempted or which took place, or an attempt must be made to use the business or it must be used for money laundering purposes, in order for a reporting duty to arise (Burdette, 2010: 18).

Although section 29 does not refer specifically to an accountable institution or to an attorney, attorneys fall within the purview of a person who carries on a business, is in charge of a business, manages a business or is employed by a business, and would therefore be subject to the duties created by this section (Dendy, 2006: 3).

The duty to file an STR will extend to those circumstances where an enquiry has been made concerning a transaction which, if carried out, would have any of the aforementioned consequences (Van Jaarsveld, 2011: 492).

Before a duty to report a suspicious transaction occurs, the transaction would have to fall within the scope of the activities prescribed in section 29. Furthermore, a connection between the business of the person on whom the reporting obligation rests and the transaction is necessary. So, for instance, where the proceeds of unlawful activity are received by another business, no reporting duty will arise (Van der Westhuizen, 2004a: 2).

The use of the term “business” seems to suggest that any of those persons cited in section 29 who are associated with either a charitable organisation or a public sector entity would not attract any reporting obligations under that section (Van der Westhuizen, 2008: 1)

It should also be noted that the various exemptions issued under FICA do not absolve a person from the reporting obligations arising from section 29 (Van der Westhuizen, 2003a: 5).

6.5 SUSPICIOUS TRANSACTIONS

FATF

Suspicion is a pliable term and is influenced by one’s state of mind, subjective reasoning and insight at the time (Gelemerova, 2009: 41). To have a suspicion is to “surmise without proof”. A suspicion is more than simply a feeling and can form a basis for believing that a certain set of facts exist, even though proof thereof cannot be provided (Sweet & Maxwell, 2009: 5,664). It is more than mere speculation and is founded on some basis, even though such basis is less than that which would be regarded as substantiation on the strength of concrete evidence (Gelemerova, 2009: 41).

A conventional AML system operates from the proposition that a usual transaction is legal and that an unusual transaction is suspicious and may well be illegal. Therefore, in the

AML context, the terms “unusual” and “suspicious” are seen as synonymous (Gao & Ye, (2007): 172–173).

European Union

The third Directive does not define the term “suspicion” and, accordingly, the FATF should be consulted for guidance on this aspect (FEE, 2009: 27).

United Kingdom

Forming a suspicion is largely a subjective exercise (Bosworth-Davies, 2007: 196). In *Natwest v H M Customs with the SOCA an intervening party (2006)*, it was held, with regard to the term “suspicion”, that the person must “think there is a possibility, which is more than fanciful, that the relevant facts exist” (Haynes, 2008: 314). The JMLSG guidance manual concedes that suspicion is subjective and that it is something less than proof based on actual evidence. The manual states that the UK courts have described a suspicion as being more than mere speculation and which is premised on some form of foundation (Gelemerova, 2009: 41).

South Africa

Although the word “suspected” suggests an actual suspicion in the mind of the person involved, reading the section in the context of the Act seems to indicate that it is sufficient if the suspicion would have manifested in the mind of a reasonable person in the same circumstances (Itsikowitz, 2006: 80). “Suspicion” is not defined in FICA, and should therefore be given its ordinary meaning, which has been held by the South African courts to be “a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’”. It has been argued that section 29 does not suggest that an unjustified suspicion or a suspicion which enjoys no factual basis should lead to an STR. This is supported by the requirement in section 29 that a person making an STR must indicate “the grounds for the knowledge or suspicion”. A “reasonable suspicion” therefore does not call for *prima facie* proof of a fact and it is suggested that section 29 imposes an obligation to report a “reasonable” suspicion (Van der Westhuizen, 2004b: 1).

6.6 PROTECTION AND DISCLOSURE

FATF

Recommendation 14(a) protects a financial institution from legal action in circumstances where it filed an STR in good faith. Recommendation 14(b) further prohibits the financial institution from disclosing that an STR has been filed with the FIU and Recommendation 16 provides that the provisions of Recommendation 14 are applicable to lawyers when engaging in financial transactions on behalf of a client concerning those transactions specified in Recommendation 12(d) (Chaikin, 2009: 241).

European Union

The third Directive requires that appropriate measures be taken to ensure that the employees of those persons or institutions covered by the Directive who report suspicions of money laundering are protected from any adverse conduct (Salas, 2005: 12). It also requires that adequate protection from liability for any disclosure made in good faith when complying with the reporting requirements contained in the Directive be put in place. (Salas, 2005: 12).

Article 28(1) prohibits the disclosure to a client or a third party that information has been submitted to the FIU (Salas, 2005: 14).

United Kingdom

Section 337 of the PCA provides that where a disclosure is made based on information acquired in the course of his or her trade, profession, business or employment by the person making the disclosure and where such information causes the person to know or suspect or forms reasonable grounds for knowing or suspecting that another person is involved in money laundering, and where the disclosure is made, such a disclosure will not contravene any restriction on the disclosure of information (Haynes, 2008: 307).

Section 333A further provides that a person commits an offence of tipping off if he or she discloses information relating to a suspicious transaction report where such disclosure is likely to prejudice any investigation that may follow the report, provided that the information so disclosed came to his or her knowledge in the course of a business in the regulated sector (Haynes, 2008: 306).

South Africa

Section 38 provides protection to those persons who comply in good faith with the reporting requirements of FICA from criminal and civil proceedings instituted by those clients whose confidentiality has been breached by a report filed with the FIC. (Saksenburg et al., 2008: 103). However, it is important that such a report meets the prerequisites of section 29 and that the report is founded upon one of the grounds contained in that section in order to benefit from the protection afforded by section 38 (De Koker, 2012: Com 7-20).

A person who has filed or is considering filing an STR is furthermore prohibited, in terms of section 29, from tipping off anyone, including the client, that a report has been filed or may be filed (Agulhas & De Koker, 2003: 5). This prohibition on disclosure in fact extends to any person who knows or suspects that a report has been or may be made (Tomlinson, 2003: 21). Thus, attorneys are not permitted to advise their clients that an STR has been made (Itsikowitz, 2006: 81).

6.7 LEGAL PROFESSIONAL PRIVILEGE

FATF

Recommendation 16 provides that where a lawyer obtains information in circumstances where the lawyer is subject to legal professional privilege, the lawyer will not be required to report his or her suspicions (Terry, 2010: 12). The Interpretative Note in this regard records that legal professional privilege would ordinarily encompass information received by lawyers from their clients during the process of determining their clients' legal positions and while acting for their clients in any judicial, administrative, arbitration or mediation proceedings (FATF, 2003b: Annex 5).

European Union

Where lawyers provide legal advice while ascertaining their clients' legal position, or while representing their clients in legal proceedings, they are exempted from the obligation of having to report their suspicions relating to money laundering. This exemption is accordingly relevant to information obtained while ascertaining a client's legal position and

obtained before, during and after legal proceedings (Salas, 2005: 11). The third Directive thus safeguards legal professional privilege (Itsikowitz, 2006: 85).

United Kingdom

Section 330(10) of the PCA exempts a lawyer from the obligation to report where the information was acquired from a client while providing legal advice or if it was acquired from a person concerning existing or contemplated legal proceedings (Tyre, 2010: 81). The PCA accordingly absolves a lawyer from having to report knowledge or a suspicion that another person is engaged in money laundering if the information upon which such knowledge or suspicion is based is subject to legal professional privilege (Itsikowitz, 2006: 82).

South Africa

Section 37(2) of FICA preserves legal professional privilege by providing that the reporting obligations created by section 29 are not applicable to communications between an attorney and his or her client where such communications were made for the purposes of providing the client with legal advice in general, or advice with regard to litigation which was contemplated, pending or which had commenced (Itsikowitz, 2006: 81). Section 37(2) further provides that communications between a third party and an attorney with regard to litigation which was contemplated or pending or which had commenced would also be subject to the privilege (Van der Westhuizen, 2004c: 1).

6.8 OVERSIGHT

FATF

Jurisdictions are required to ensure that appropriate oversight systems are put in place to oversee and enforce compliance with AML provisions (FATF, 2008b: 12). These oversight functions should include both guidance and inspection functions, and should ensure that supervisors have sufficient oversight powers to ensure that those natural and legal persons who fall within the purview of the FATF Recommendations meet the AML requirements set out in the recommendations and to deal with those instances of non-compliance, including the imposition of sanctions (Gordon, 2011: 503; FATF, 2003b: Recommendation 17, 6). Recommendation 24 provides that the oversight function can be

performed by a government authority or a self-regulating organisation and can be carried out on a risk-sensitive basis (FATF, 2003b: 8).

European Union

Article 37 of the third Directive places an obligation on competent authorities to oversee compliance with the provisions of the Directive and to take steps to ensure such compliance where necessary (EUR-Lex, 2005: Article 37).

The Directive permits self-regulatory bodies to act as supervisors. Furthermore, the Directive makes provision for liability for infringements of the national legislation put in place under the Directive and for the imposition of penalties for such infringements (Salas, 2005: 16).

United Kingdom

The professional bodies listed in Schedule 3 of the MLR of 2007 are established as the supervisory authority for the persons whom they regulate. In the case of lawyers, the various law societies and bar councils are appointed as supervisory authorities and it is their function to monitor the functions of those persons over whom they exercise authority and to take the necessary steps to ensure that those persons comply with the MLR of 2007 (UK, 2007b: 22).

South Africa

Section 45 of FICA places the responsibility for supervising accountable institutions' compliance with the requirements of FICA on the supervisory bodies. The supervisory bodies are the regulating institutions of the various industries in South Africa. Accordingly, those regulatory bodies which are already charged with supervising a particular business or profession would attract the additional responsibility of ensuring that their charges meet the requirements imposed on them by FICA (Saksenburg et al., 2008: 25). It further entitles the supervisory body to take any steps it considers essential or appropriate to ensure compliance by those persons it oversees (De Koker, 2012: Com 5-15–Com 5-16). FICA further requires the FIC and the supervisory bodies to manage their approach to the carrying out of their powers and complying with their responsibilities in terms of FICA and to enter into a memorandum of understanding concerning supervision and enforcement

(De Koker, 2012: Com 5-16). Both the FIC and the supervisory bodies may impose administrative sanctions for, inter alia, failure to comply with the provisions of FICA (FIC, 2012b: 44).

The list of supervisory bodies is contained in Schedule 2 to FICA (FIC, 2012b: 68) and since 1 December 2010, the date upon which FICA 2008 came into effect, the supervisory bodies for attorneys have been the statutory provincial law societies (De Koker, 2012: Com 5-13).

6.9 SUMMARY

6.9.1 Customer Due Diligence

Section 21 of FICA places a duty on an accountable institution to identify and verify the identity of its clients (Van der Westhuizen, 2003a: 3). There is, however, no explicit prerequisite in FICA or its regulations requiring an accountable institution to ascertain the particulars of the beneficial owner and to verify those particulars, to form an understanding of the ownership and management structure of the client, to determine the purpose of the business relationship or to conduct ongoing CDD (FATF, 2009: 8). Furthermore, should doubts arise concerning the veracity or sufficiency of the information so obtained from a client, there is no explicit obligation to consider filing an STR (FATF, 2009: 103).

Attorneys are exempted from compliance with the duty to identify clients and the duty to keep records thereof, in respect of every business relationship and single transaction, save for those specified in the exemption (Exemption 10) (De Koker, 2012: Com 10-14). The exemption does not, however, meet the requirements of Recommendation 12 of FATF 2003, as Recommendation 12 requires that lawyers carry out CDD in respect of transactions concerning the arrangement of contributions for any legal person or arrangement and also when forming, running or overseeing such functionaries. The exemption in terms of FICA essentially exempts lawyers from having to carry out CDD when providing such services to legal persons and arrangements within South Africa (FATF, 2009: 162).

A further difficulty with the exemption is that, in real estate transactions, the attorney in most instances receives instructions from and acts for the seller of the property, while the purchaser is liable for and pays the purchase price. As such, the money laundering risk rests with the purchaser. Nevertheless, because the seller is the client, the lawyer carries out CDD on the seller. There is thus no obligation on the lawyer to conduct CDD on the purchaser (FATF, 2009: 162). Added to this, there is no specific obligation on an attorney, as an accountable institution, to carry out CDD where there is a suspicion of money laundering (FATF, 2009: 93); however, the exemption would not absolve a person from the reporting obligations arising from section 29 (Van der Westhuizen, 2003a:5).

FICA and the Money Laundering and Terrorist Financing Control Regulations follow an essentially rule-based approach to CDD and, accordingly, do not make provision for a proper risk-based approach to CDD as there is no general provision made for simplified due diligence in cases of low risk or for enhanced due diligence in the high risk cases (De Koker, 2012: Com 8-55).

6.9.2 Suspicious Transaction Reporting

Section 29(1) of FICA, in dealing with suspicious transaction reporting obligations, refers to any person who carries on a business, is in charge of a business, manages a business or is employed by a business (which includes an attorney [Dendy, 2006: 3]) and to the proceeds of unlawful activities (Itsikowitz, 2006: 77–78; FIC, 2012b: 26). South Africa's reporting system is therefore not restricted to accountable institutions, but includes all financial institutions and businesses (FATF, 2009: 9). Furthermore, as the definition of the proceeds of unlawful activities in section 1 of FICA (FIC, 2012b: 7–8) includes any property (Kruger, 2008: 39), property is not restricted to money (Kruger, 2008: 39). It is further noted that although transactions with no apparent business or lawful purpose are to be reported, accountable institutions are not required to pay specific attention to the complexity, size or patterns of transactions (FATF, 2009: 9).

Section 29 provides that the business must be a party to the transaction about which enquiries were made, which was attempted or which took place, or an attempt must have been made to use the business, or it must have been used, for money laundering purposes in order for a reporting duty to arise (Burdette, 2010: 18). It is therefore

necessary for there to be a connection between the business of the person on whom the reporting obligation rests and the suspected transaction. So, for instance, where the proceeds of unlawful activity are received by another business, no reporting duty will arise (Van der Westhuizen, 2004a: 2).

The use of the term “business” seems to suggest that any of those persons cited in section 29, who are associated with either a charitable organisation or a public sector entity, would not attract any reporting obligations under that section (Van der Westhuizen, 2008: 1).

CHAPTER 7: CONCLUSION

7.1 OBJECTIVE OF RESEARCH

This research sought to ascertain whether the South African AML legislation places obligations on attorneys concerning suspicious transaction reporting that are in line with and meet international directives, conventions and best practice frameworks. For the purpose of this research, the assumption was made that the FATF Forty Recommendations represent the international AML framework and best practice and that the EU and the UK are at the forefront in the implementation of AML measures. Accordingly, the suspicious transaction reporting regimes introduced by the FATF, the European Union (EU), the United Kingdom (UK) and South Africa were considered.

The research involved forming an understanding of the suspicious transaction reporting provisions of the AML frameworks of the FATF, the EU, the UK and South Africa in relation to the suspicious transaction reporting obligations of lawyers. It also entailed forming an understanding of the areas in which lawyers are vulnerable to money laundering.

The approach to this research further entailed forming an understanding of the concept of money laundering, the money laundering process and the role that attorneys play in the process.

In addition, the research entailed an analysis of the suspicious transaction reporting obligations of the UK and the EU and a comparison of these with the FATF framework.

7.2 MAIN FINDINGS

The identification of suspicious transactions relies on the exercising of judgement by those institutions upon which reporting duties rest. The efficient exercise of this judgement is, in turn, dependent on the employment of appropriate systems to identify suspicious

transactions, which include effective CDD measures and forming a profile of the customer (Shanmugam & Thanasegaran, 2008: 341).

7.2.1 Customer Due Diligence

In terms of FATF 2003, the third Directive and the MLR of 2007, CDD entails the identification and verification of the identities of clients, where appropriate the determining of the beneficial owner of the client, obtaining the information needed to understand the nature and purpose of the business relationship with the client and conducting ongoing CDD (FATF, 2008b: 13; Salas, 2005: 7; EUR-Lex, 2005: Article 8; UK, 2007b: 10 & 12). However, the third Directive and the MLR of 2007 take CDD a step further by providing that, where necessary, the source of the funds involved be ascertained (EUR-Lex, 2005: Article 8; UK, 2007b: 12). In contrast, FICA merely places a duty on an accountable institution to identify and verify the identity of its clients (Van der Westhuizen, 2003a: 3). Moreover, there is no explicit prerequisite in FICA or its regulations requiring an accountable institution to ascertain the particulars of the beneficial owner and to verify those particulars, to form an understanding of the ownership and management structure of the client, to determine the purpose of the business relationship or to conduct ongoing CDD (FATF, 2009: 8).

FATF 2003, the third Directive and the MLR of 2007 require that CDD be carried out on a risk-sensitive basis (FATF, 2003b: 3; Turksen et al., 2011: 287; Haynes, 2008: 312), whereas FICA and the Money Laundering and Terrorist Financing Control Regulations do not make provision for a risk-based approach, but rather follow a rule-based approach (De Koker, 2012: Com 8-55).

Lawyers are required to carry out CDD on their clients in terms of FATF 2003, the third Directive, the PCA and the MLR of 2007 and FICA when acting for those clients in certain designated transactions (FATF, 2003b: Recommendation 12(d), 5; Salas, 2005: 4–5; UK, 2007a: 2–3; UK, 2007b: 8; De Koker, 2012: Com 10-14). These designated transactions are comparatively similar, save that FICA does not require that lawyers carry out CDD when arranging contributions for any legal person or arrangement or when forming, running or overseeing such functionaries within South Africa and, to this extent, FICA does not meet the requirements of Recommendation 12 of FATF 2003 (FATF, 2009: 162).

Moreover, there is an anomaly in South African real estate transactions in that the attorney in most instances receives instructions from and acts for the seller of the property, while the purchaser is liable for and pays the purchase price. The money laundering risk therefore rests with the purchaser, in respect of whom there is no obligation on the lawyer to conduct CDD (FATF, 2009: 162).

In addition to the designated transactions, FATF 2003, the third Directive and the MLR of 2007 require lawyers to carry out CDD when a suspicion that a transaction relates to money laundering arises (FATF, 2003b: 5 & Annex 1-2; Katz, 2007: 209; Haynes, 2008: 315). There is no equivalent obligation placed on an attorney in FICA (FATF, 2009: 93).

FATF 2003, the third Directive and the MLR of 2007 further require that CDD be carried out when there is doubt concerning the integrity of the information provided by the client during the client identification process (FATF, 2003b: Recommendation 5, 2; Katz, 2007: 209; Haynes, 2008: 310). FICA, on the other hand, has no equivalent provision and therefore, should doubts arise concerning the veracity or sufficiency of the information so obtained from a client, there is no explicit obligation to consider filing an STR (FATF, 2009: 103).

The research therefore demonstrates that the CDD requirements for attorneys in terms of FICA are not in line with international frameworks and best practice.

7.2.2 Suspicious Transaction Reporting

In terms of FATF 2003, where a lawyer, when attending to certain designated transactions for or on behalf of his clients, suspects or has reasonable grounds to suspect that funds are the proceeds of crime, he or she should be obliged to refer these suspicions to the FIU (Shehu, 2010: 145; FATF, 2003b: 5; Chaiken, 2009: 241).

The third Directive provides that lawyers, when acting for clients in certain designated transactions, who know, suspect or have reasonable grounds for suspecting that money laundering is taking place, has taken place or is being attempted, are required to report this information to the FIU (EUR-Lex, 2005: Article 22 & Article 2(1)(3)(b)).

The PCA places an obligation on lawyers (when attending to certain designated transactions on behalf of their clients) to report a suspicion that another person may be involved in money laundering (Marshall, 2003: 112; Preller, 2008: 246). Such a disclosure should be made when any knowledge or suspicion or reasonable grounds for knowing or suspecting that another person is involved in money laundering materialises (Haynes, 2008: 305).

Section 29(1) of FICA, however, places an obligation on certain designated persons (which include attorneys [Dendy, 2006: 3]), who know or ought reasonably to have known or suspected that the business has received or is on the verge of receiving the proceeds of unlawful activities; or that a transaction or a series of transactions to which the business is a party facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities, has no apparent business or lawful purpose, is conducted to avoid giving rise to a reporting duty under FICA, may be relevant to the investigation of any evasion or attempted evasion of any dues imposed by legislation administered by the Commissioner for the South African Revenue Service; or the business has been used or is about to be used in any way for money laundering purposes, is obliged to file a STR (Itsikowitz, 2006: 77–78; FIC, 2012b: 26). FICA further refers to the proceeds of unlawful activities (Itsikowitz, 2006: 77–78; FIC, 2012b: 26) and as the definition of the proceeds of unlawful activities in FICA (FIC, 2012b: 7–8) includes any property (Kruger, 2008: 39), property is not restricted to money (Kruger, 2008: 39).

FICA provides that the business (which includes an attorney [Dendy, 2006: 3]) must be a party to the transaction about which enquiries were made, which was attempted or which took place, or an attempt must have been made to use the business or it must have been used for money laundering purposes, in order for a reporting duty to arise (Burdette, 2010: 18). It is therefore necessary for a connection between the business on whom the reporting obligation rests and the transaction to exist. So, for instance, where the proceeds of unlawful activity are received by another business, no reporting duty will arise (Van der Westhuizen, 2004a: 2).

The research therefore demonstrates that the suspicious transaction reporting obligations placed on attorneys in terms of FICA are not in line with international frameworks and best practice.

7.3 OTHER FINDINGS

7.3.1 Generally

FATF 2003, the third Directive, the PCA and/or the MLR of 2007 and FICA make provision for the following:

Keeping of Records

The retention of CDD data and client transaction records for a period of five years (Shehu, 2010: 145; Turksen et al., 2011: 287–288; Haynes, 2008: 313–315; Van der Westhuizen, 2003b: 1; FIC, 2012b: 23).

Compliance Programmes

The development of programmes to assist staff in identifying those transactions or activities which may relate to money laundering and how to respond to such transactions (Shehu, 2010: 146; Turksen et al., 2011: 288; EUR-Lex, 2005: Articles 34 & 35; UK, 2007b: 21; Dendy, 2006: 4).

Protection and Disclosure

The protection from liability of those persons who comply with the reporting requirements in good faith (Chaikin, 2009: 241; Salas, 2005: 12; Haynes, 2008: 307; Saksenburg et al., 2008: 103) and the prohibition of disclosure to the client or a third party that a report has been filed (Chaikin, 2009: 241; Salas, 2005: 14; Haynes, 2008: 306; Agulhas & De Koker, 2003: 5).

Legal Professional Privilege

The recognition of legal professional privilege and the exemption of lawyers from having to report their knowledge or suspicions concerning money laundering where the information on which the knowledge or suspicion was based was obtained in circumstances where legal professional privilege finds application (Terry, 2010: 12; Salas, 2005: 11; Tyre, 2012: 81; Itsikowitz, 2006: 81).

Oversight

Oversight functions to ensure compliance with AML provisions and to take the necessary steps in instances of non-compliance (Gordon, 2011: 503; FATF, 2003b: Recommendation 17, 6; EUR-Lex, 2005: Article 37; UK, 2007b: 22; Saksenburg et al., 2008: 25; De Koker, 2012: Com 5-15–Com 5-16).

The research therefore demonstrates that the obligations placed on the attorney profession by FICA relating to the maintaining of records, compliance programmes, protection and disclosure, legal professional privilege and oversight are in line with international frameworks and best practice.

7.3.2 Suspicious Transactions

In attempting to analyse the term “suspicion” in terms of the FATF, UK and South African AML frameworks, a common thread that can be identified from the research is that a suspicion is more than simply a feeling and can form a basis for believing that a certain set of facts exist, even though proof thereof cannot be provided (Sweet & Maxwell, 2009: 5, 664; Gelemerova, 2009: 41; Van der Westhuizen, 2004b: 1). The third Directive does not provide any assistance in defining the term “suspicion” and, accordingly, the Federation of European Accountants makes reference to the FATF for guidance in that regard (FEE, 2009: 27).

7.4 RESEARCH LIMITATIONS

Limited professional and academic articles were found to be available that relate to the AML duties of South African attorneys in terms of FICA and, more particularly, their suspicious transaction reporting duties. There was also little by way of guidance provided by the professional bodies governing attorneys. This may be a consequence of the statutory provincial law societies only having been appointed as supervisory bodies since 1 December 2010.

It was also difficult to identify reporting trends in relation to South African attorneys as the FIC Annual Report for the 2009/10 period records that of the 29 411 STRs received for that period, 9% originated from non-financial institutions and 91% from financial institutions

(FIC, 2010: 29–30). The reports originating from the non-financial institutions were not broken down any further into specific accountable institutions, nor were similar figures provided in subsequent annual reports by the FIC, so it was not possible to ascertain the number of reports originating from attorneys. The FIC Annual Report 2011/12 merely records that the number of STRs for the 2011/12 period was 53 506, which increased from 36 990 in the 2010/11 and 29 411 in the 2009/10 periods (FIC, 2012a: 19).

In addition, there was further little by way of public information available concerning any action taken by either the FIC or the statutory provincial law societies against attorneys for any failure to give effect to the suspicious transaction reporting responsibilities placed on them by section 29 of FICA.

7.5 CONCLUSION

FICA does not meet the requirements of FATF 2003 concerning CDD in that FICA does not require an accountable institution to ascertain the particulars of the beneficial owner and to verify those particulars, to form an understanding of the ownership and management structure of the client, to determine the purpose of the business relationship or to conduct ongoing CDD (FATF, 2009: 8). FICA further does not require CDD to be carried out on a risk-sensitive basis (De Koker, 2012: Com 8-55) or when arranging contributions for any legal person or arrangement or when forming, running or overseeing such functionalities within South Africa (FATF, 2009: 162). Moreover, it does not address the anomaly in South African real estate transactions that in most instances the attorney receives instructions from and acts for the seller of the property, in respect of whom CDD has to be carried out, whereas the purchaser is liable for and pays the purchase price, which is where the risk of money laundering lies and in respect of whom there is no obligation on the attorney to carry out CDD (FATF, 2009: 162).

FICA further does not meet the requirements of FATF 2003 in that it does not require lawyers to carry out CDD when a suspicion that a transaction relates to money laundering arises (FATF, 2009: 93), nor does it require that CDD be carried out when there is doubt concerning the integrity of the information provided by the client during the client identification process (FATF, 2009: 103).

In another instance, FICA does not meet the suspicious transaction reporting requirements of FATF 2003 in that the latter requires a lawyer, when attending to certain designated transactions for or on behalf of his clients, who suspects or has reasonable grounds to suspect that funds are the proceeds of crime, to refer his suspicions to the FIU (Shehu, 2010: 145; FATF, 2003b: 5; Chaiken, 2009: 241). By contrast, FICA requires that the business (which includes an attorney [Dendy, 2006: 3]) must be a party to the transaction about which enquiries were made, which was attempted or which took place, or an attempt must be made to use the business or it must be used for money laundering purposes, in order for a reporting duty to arise (Burdette, 2010: 18). A connection between the business on whom the reporting obligation rests and the transaction is therefore necessary before a reporting obligation will arise (Van der Westhuizen, 2004a: 2).

FICA does, however, meet the requirements of FATF 2003 concerning the keeping of records, the installing of compliance programmes, the protection of those persons meeting their reporting obligations, the prohibition of disclosure that a report has been made, the recognition of legal professional privilege and the monitoring and enforcement of compliance with the AML provisions.

It is therefore submitted that although FICA does meet the requirements of FATF in many of those aspects covered in this study, from a suspicious transaction reporting responsibilities perspective, the reporting responsibilities of attorneys in terms of South African AML legislation are not in line with international frameworks and best practice.

7.6 RECOMMENDATIONS

FICA should be amended to ensure that the CDD process caters for ascertaining the particulars of the beneficial owner and the verification of those particulars, the formation of an understanding of the ownership and management structure of the client, the determination of the purpose of the business relationship and the conducting of ongoing CDD. Consideration should also be given to extending the CDD measures, similar to the MLR of 2007, to cater for ascertaining the source of the funds involved (UK, 2007b: 12).

FICA should further be amended to provide for a risk-based approach to CDD, for CDD to be carried out when a suspicion that a transaction relates to money laundering arises and for CDD to be carried out when there is doubt concerning the integrity of the information provided by the client during the client identification process. An amendment should also be effected to include in the designated transactions applicable to lawyers, those transactions involving the arranging of contributions for any legal person or arrangement or the forming, running or overseeing of such functionaries within South Africa, to bring FICA in line with FATF 2003.

Insofar as the reporting of suspicious transactions is concerned, FICA should be amended to widen the reporting requirements to a suspicion or reasonable grounds to suspect that funds are the proceeds of crime and not restrict the obligation to the requirement that the business must be a party to the transaction about which enquiries were made, which was attempted or which took place, or that an attempt must have been made to use the business or it must have been used for money laundering purposes.

7.7 FURTHER RESEARCH

The 2009 FATF Mutual Evaluation Report for South Africa notes some uncertainty relating to the interpretation of legal professional privilege in the context of the suspicious transaction reporting obligations of attorneys (FATF, 2009: 167). To the extent that there seems to be uncertainty pertaining to the boundaries of legal professional privilege, this may present an area for further research.

The research has further identified an anomaly in the South African real estate context; that is, in real estate transactions the attorney generally receives instructions from and acts for the seller of the property, while the purchaser is liable for and pays the purchase price. Therefore the money laundering risk rests with the purchaser, even though the lawyer only carries out CDD on the seller as the client and is not obliged to conduct CDD on the purchaser (FATF, 2009: 162). The effect that this anomaly may have on the efficacy of the reporting responsibilities placed on attorneys in terms of FICA and the steps that should be taken to redress this anomaly may present a further area for research.

For the purposes of this research, the assumption was made that attorneys are more vulnerable to money laundering than terrorist financing. Furthermore, it was noted that in the FATF report covering the money laundering and terrorist financing vulnerabilities of lawyers, the majority of case studies involved money laundering (FATF, 2013b: 4). A further area of research may be whether this is a correct assumption and the extent to which lawyers' services are vulnerable to misuse for the purposes of the financing of terrorism.

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