



## **Response to the Consultation:**

### **Anti-Money Laundering/Counter-Terrorist Financing (AML/CTF) Supervision Reform: Duties, Powers, and Accountability**

**BY MICHELLE BUTLER**

#### **Overview**

This response reflects my personal experience and views as a compliance consultant to licensed insolvency practitioners ("IPs"), a role that involves assisting IPs to comply with all their statutory duties including the MLRs, and from my previous experience from 2005 to 2012 working in the IPA's regulation department. My current role also involves taking instructions from IPs to carry out compliance reviews usually on an annual basis, which is a regulatory requirement on IPs licensed by the ICAEW. The scope of my reviews currently includes compliance with the MLRs and, where my reports are shared with the ICAEW, I expect they assist the ICAEW, as a PBS, to risk-assess those firms and to consider whether additional interventions may be warranted or even avoided.

My response is limited to how I believe the proposals will affect only IPs and related interested parties.

I believe that a significant challenge for the FCA will be in adapting its approach appropriately to its widely diverse regulated population. Even under the current PBS regime, IPs have been generally poorly provided for: IPs have long been categorised as "accountancy service providers", largely I recall when I worked in the IPA because IPs would have sat even more uncomfortably in any of the other sectors. It took the CCAB over a decade to produce insolvency-specific guidance and even now its guidance is criticised by many for failing to recognise the true nature of the "client relationships" in IPs' MLR-regulated activities.

The MLRs define an IP's regulated activities as acting as an IP under S388 of the Insolvency Act 1986 (or the NI equivalent), for example acting as a liquidator or a trustee in bankruptcy. An IP is usually appointed by creditors or the court, not by the "client", which the PBSs have interpreted as being the insolvent entity/individual. Therefore, while an IP acting as insolvency office-holder may target their activities on the insolvent "client", there is no client relationship and the IP's primary duties are to the insolvent's creditors. In addition, in most corporate cases, the "client" is no longer trading when the IP takes office, the "client's" directors no longer have any control over the insolvent's affairs, which rest entirely with the IP, and the "client's" beneficial owners very rarely have any beneficial interest in the insolvent.

An insolvency office-holder's duties also usually involve investigating the insolvent's activities in order to report on the directors' conduct to enable the Insolvency Service to consider disqualification proceedings under the Company Directors Disqualification Act 1986 and to enable the IP to determine whether to take any recovery actions against any parties that have unfairly or illegally benefitted from the entity.

Because of these investigatory duties, which existed long before the MLRs and other ML-related statute, and because an IP has no traditional "client" relationship with the insolvent once the IP takes office, IPs have long been accustomed to taking appointments over insolvents known to have been involved in or associated with fraud or other ML activities. Consequently, while of course they risk-assess prospective

appointments, few IPs shy away from taking such an appointment. In fact, some IPs specialise in such appointments and have built strong reputations with parties such as HMRC for robustly acting in the interests of creditors who have become victims of fraud.

I hope this illustrates that IPs are not well-fitted to the description of an “accountancy service provider” to their “clients” in the way that the MLRs are usually applied. Thus, the traditional expectations of how an MLR-regulated service provider should react to and monitor their clients require substantial adaptation to address the practicalities of IPs’ work.

Because IPs will comprise a small percentage of the FCA’s MLR-regulated population – there are only c.400 firms providing IP MLR-regulated activities – I envisage the temptation would be for the FCA to devote a relatively small percentage of its resources to specialising in supervising and providing guidance to IPs. This will do nothing to assist IPs to comply with the MLRs or to strengthen the UK’s AML/CTF regime.

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## **Responses to Consultation Questions**

- 1. Do you agree with our proposal to amend the MLRs to require the FCA to maintain registers of the professional services firms (legal, accountancy and TCSPs) it supervises? Are there any practical challenges or unintended consequences we should consider?**

No.

Another register for IPs is unnecessary. The Insolvency Service already provides a register that is accessible from .gov.uk and the IP-licensing bodies maintain their own registers. It is understandable that the FCA wishes to have a record of its regulated persons, but as regards IPs, it should draw from the Insolvency Service's or the IP-licensing bodies' records.

The MLRs define an IP as "any firm or individual who acts as an insolvency practitioner within the meaning of section 388 of the Insolvency Act 1986" (or the NI equivalent). Only individuals may act as such. Quite rightly, the Insolvency Service's register lists all *individual* IPs licensed to act as such (albeit of course their details include the firms within which they work). Would the FCA similarly recognise individuals or would they look to maintain a register of the firms within which individual IPs work?

If the FCA were to decide to maintain a register of firms, then a challenge would be ensuring that it kept track of all the individual IPs who are personally carrying out the MLR-regulated activities. For example, what would happen when an IP left a firm? Would the IP carry their FCA recognition with them or would they be required to re-register with the FCA?

If it took the IP some time to re-register with the FCA, would this mean the IP would be acting in breach of the MLRs given that the IP may well remain appointed as insolvency office-holder over the cases they acquired while within the previous firm? Under the current PBS regime, this is not an issue because, e.g., if an IP is licensed by the IPA and the IPA acts as their PBS, they would remain licensed and so the IPA's AML supervision of them would continue if they were to leave a firm and continue to act as an IP as a sole trader; they would not be required to re-register. Thus, the FCA will need to consider how to continue to act as AML supervisor of the *IP*, rather than (or perhaps in addition to) their *firm*, so that insolvency appointments are not adversely affected in the event that an IP leaves their firm.

- 2. Do you agree with our proposal to grant supervisors the explicit ability to cancel a business' registration when it no longer carries out regulated activities? How might these changes affect firms of different sizes or structures?**

Yes.

I would question how the AML supervisor would satisfy itself that the business is no longer carrying out regulated activities. For example, while an IP may choose not to renew their licence to act as an IP, this does not necessarily mean that they are no longer carrying out any MLR-regulated activities; they may simply be switching to providing, e.g., a different "accountancy service".

**3. Do you support the application of regulation 58 “fit and proper” tests to legal, accountancy, and trust & company service providers? Please explain your reasoning.**

No.

This would be a wholly unnecessary burden on IPs who already undergo a robust process to obtain an insolvency licence. It would add unnecessary costs, which could act as a barrier to persons wishing to act as IPs given that the existing IP licensing regime is already fairly costly.

It would also add nothing to the strength of the AML/CTF regime. I believe that the existing PBS regime of ensuring IP licence applicants meet the required criteria (including a criminal check for the IP to be recognised as a BOOM) is sufficient. I am also not aware that OPBAS has raised any concerns or questions over the robustness of the IP-licensing PBSs’ testing of a person’s fitness when they are being asked to grant a licence. Therefore, it seems an entirely unnecessary regulatory burden to require IPs to pass a new additional “fit and proper” test.

**4. What are your views on the proposed changes to regulation 58, including the requirement for BOOMs to pass the fit and proper test before acting, mandatory disclosure of relevant convictions, and the introduction of an enforcement power similar to those under regulation 26?**

As explained in 3, I believe it would be an unnecessary burden to require any IP to pass a “fit and proper” test in addition to the existing tests to obtain an IP licence.

I believe it would also be disproportionate to require every other BOOM to pass a fit and proper test before acting. Currently, there appears to be some confusion and inconsistency between AML supervisors as to who is appointed as an “M”. The MLRs define a manager as someone who, inter alia, has responsibility for managing the business of an MLR-regulated firm. It seems to me that this description fits some who are not directly involved in applying or designing the firm’s AML/CTF policies, as the firm may employ managers for a range of areas of its business. Therefore, it seems an unnecessary regulatory burden to require all BOOMs to pass a fit and proper test and AML supervisors should be free to decide what tests are appropriate depending on the person’s proposed role within the firm.

I have no issues with the proposal for mandatory disclosure of relevant convictions, but I would ask the FCA/AML supervisors to share any such disclosures with the IP’s licensing body so that that body may take appropriate action in relation to the IP’s licence and work in the public interest.

**5. Should the FCA be granted any extra powers or responsibilities with regards to “policing the perimeter” beyond those currently in the MLRs?**

No.

In relation to IPs, I do not believe it is necessary, as the Insolvency Service already has powers and responsibilities for “policing the perimeter” of the insolvency profession and they have generally proven to be competent and effective in this area. If the FCA were to learn of any person or firm purporting to act as an IP without a licence, I trust they would immediately inform the Insolvency Service.

**6. Do you foresee any issues or risks with the extension of regulations 17 and 46 to the FCA in carrying out its extended remit, particularly in relation to how these powers will interact with the FCA’s proposed enforcement toolkit (as outlined in Chapter 6)?**

Yes.

As mentioned in the introduction, I foresee significant challenges for the FCA in developing the expertise to be an effective AML supervisor of IPs, who have extremely atypical relationships with their “clients”.

As mentioned above, I believe that even the current PBS regime has been fairly unsuccessful in this regard partly because the IP-licensing PBSs have sat within the “accountancy service providers” sector and they appear to have been slow to provide for the needs of their IPs, for example only producing insolvency-specific guidance in 2019, guidance which many criticise as being inadequate for insolvency scenarios.

It seems to me that, with its even larger and more diverse regulated population, the FCA is destined to perform worse than the current PBSs.

I really struggle to see how the FCA can possibly “ensure that employees and officers of the supervisory authority have access to relevant information on domestic and international AML/CTF risks affecting their sector” of IPs, not least as IPs have not even been mentioned once in the Consultation document. This seems to me indicative of the lack of understanding the authorities have of the extraordinary position and risks for IPs.

**7. What are your views on introducing new supervisory powers to make directions and appoint a skilled person? If this power is introduced for the FCA, should it also be available to HMRC and the Gambling Commission?**

The power to issue directions seems entirely sensible for any AML supervisor and indeed the IP-licensing PBSs have used such a tool to regulate IPs for decades. The ICAEW has also required some of its IPs to provide an independent compliance review report in relation to specific areas of concern where the IPs’ past compliance record has been unsatisfactory. Having been instructed to carry out such reviews, I believe this has proved to be an effective tool to encourage improvements.

Should the FCA use these powers, I would hope that the FCA would notify the IP’s licensing body of the steps taken and the reasons why so that that body may take appropriate action in relation to the IP’s licence and work in the public interest.

**8. Do you agree with our proposal to extend the information gathering and inspection powers in the MLRs to the new sectors within FCA supervision?**

Yes.

As with the other proposed FCA powers mentioned above, I would like to see the FCA committed to sharing information with the IP-licensing bodies so that they may continue to regulate IPs effectively.

**9. Do you believe any changes are needed to the information-gathering and inspection powers in the MLRs beyond extending them to the FCA in supervising accountancy, legal and trust and company service providers for AML/CTF matters?**

Yes.

As mentioned above, the FCA should also be granted the power to share relevant information with the IP-licensing bodies.

**10. Do you agree that responsibility for issuing AML/CTF guidance for the legal, accountancy and trust and company service provider sectors should be transferred to the FCA?**

Yes.

It would seem unfair to assign the responsibility for issuing AML/CTF guidance to anyone other than the FCA as the AML supervisor.

However, as mentioned above, even under the PBS regime, which involved the Insolvency Service and the IPA whose only real interest has been in regulating IPs, the production of insolvency-specific guidance has been slow and unsatisfactory in its content. Therefore, personally I feel that the FCA inevitably will fail to issue anything meaningful for IPs.

To reduce the risks of a serious regulatory gap or inconsistent approach by IPs developing, I strongly recommend that the FCA commit to seeking the assistance of the IP-licensing and related bodies, e.g., the Insolvency Service and R3, in developing guidance for IPs. In line with current regulatory practices, I would also expect all guidance that sets standards or expectations of compliance with the MLRs to be subject to wider consultation.

I would urge the FCA not to overlook the needs of IPs even though they will form only a fraction of the FCA's regulated population.

**11. Do you agree that the MLRs should be amended to transfer responsibility for approving AML/CTF guidance to the relevant public sector supervisor, with HM Treasury retaining a 'right of veto' but not having responsibility for approving entire guidance documents?**

Yes.

It appears unnecessary to require HM Treasury to approve entire guidance documents produced by a public sector supervisor.

**12. Do you agree to the extension of requirements under regulation 47 to the FCA in relation to accountancy, legal and trust and company service providers?**

Yes.

However, as mentioned above, the FCA should not underestimate the unique position, role and risks of IPs in comparison with traditional accountancy service providers and the FCA should draw on the sector-specific expertise resting in the IP-licensing and associated bodies.

**13. Do you see any issues with the FCA's information sharing duties and powers in regulations 46, 50 and 52 applying to the professional services firms it supervises for AML/CTF purposes?**

No.

It seems essential to the effective regulation of IPs for the FCA to share information with the IP-licensing bodies.

At present, the IP-licensing bodies have available information on their IPs' performance in relation to acting as an insolvency office-holder including their work directly related to AML/CTF measures. While they could conceivably continue to gather such information after the FCA takes on its new AML supervisor role, it would be far more efficient for the IP-licensing bodies to rely on the FCA to inform them if the FCA has any reason to believe that any of their licensed IPs are falling short on standards of compliance.

**14. Do you agree that the MLRs should be amended to require the NCA to share SARs with the FCA and other public sector supervisors, where these have been submitted by or relate to firms within their supervisory population?**

I agree, if the FCA considers this is necessary to the effective discharge of its duties.

However, I am nervous as to how the FCA would use such information. As mentioned in the introduction, some IPs specialise in insolvency appointments over "clients" that are suspected of fraud or other ML activities. While this may make such IPs high risk from an AML regulatory perspective, because of this specialism it may well be that those IPs are exceptionally skilled at managing the ML risks. The FCA should not therefore take information about SARs alone as an indicator of the level of regulatory risk presented by an IP. I also trust that the FCA will handle such sensitive information exceedingly carefully.

**15. Do you agree that these existing whistleblowing protections are sufficient and appropriate?**

Yes.

Although there seems no harm in the FCA promoting its own whistleblowing facilities, as the IP-licensing bodies operate their own, I expect that those bodies would be most IP-related whistleblowers' first port of call and it would seem impractical to expect a whistleblower to establish whether they should contact the FCA or the IP's licensing body. Consequently, it would seem valuable for the FCA to create information gateways with the IP-licensing bodies.

**16. Do you foresee any issues with our proposal for the FCA to exercise the same enforcement powers already exercised by it in relation to the financial services firms for professional services firms too?**

The only issue I foresee is that the IP-licensing bodies will need to be notified as early as possible of any intention of the FCA to exercise any of the enforcement powers.

As mentioned above, at present the IP-licensing bodies consider their IPs' performance in relation to all their work and this enables their enforcement activities to be proportionate and to ensure that stakeholders' interests are cared for. The move of AML supervision to the FCA will mean the IP-licensing bodies will lose knowledge about their IPs' performance in relation to AML/CTF measures. Where an IP is falling short on AML/CTF compliance (especially where this is to such an extent that the FCA is considering enforcement action), it is likely that they are also failing in other areas, so it would be essential to IP regulation that the IP-licensing bodies are notified.

In addition, any serious enforcement action by the FCA may impact on the IP's ability to continue to act as an IP. Where the loss of such an ability is contemplated, an IP-licensing body usually needs to be involved in the process of arranging for the transfer of the IP's insolvency appointments to another IP. As this is a time-consuming process, it would be essential for the IP's licensing body to be notified as early as possible of any threat to the IP's ability to continue to act as an IP.

**17. Are there any additional enforcement powers that you feel the FCA should be equipped with to ensure non-compliance is disincentivised effectively?**

Yes.

As mentioned above, sharing information with the IP-licensing bodies, both about sector-relevant emerging typologies and criminal trends and about any specific IP, would help disincentivise non-compliance as it would enable all "regulators" to guide IPs consistently and to focus efforts on those believed to be under-performing.



**18. Do you think any amendments to regulations 81 and 82 would help the FCA issue minor fines for more routine instances of non-compliance such as failure to register?**

No.

The MLRs appear sufficiently widely worded to allow such measures, although I appreciate it is valuable to scrutinise the wording to ensure this is the case.

However, I think a challenge for the FCA will be to appreciate the effectiveness of the range of its tools for disincentivising non-compliance across its diverse regulated population. For example, for most IPs monetary fines are far less of a concern than the threat of adverse publicity. Currently, the IP-licensing bodies' disciplinary sanctions on IPs are published on .gov.uk. These have proven to have substantial adverse effects on some IPs' businesses and on some IPs' mental health for years afterward. Consequently, all the IP-licensing bodies have methods of delivering warnings etc. that are not published but have been found to be effective in improving compliance standards.

I could envisage that some other MLR-regulated persons may not be so sensitive to the threat of a published sanction. This may require the FCA to develop different responses to non-compliances depending on the profession of the MLR-regulated person.

The IP-licensing bodies and the Insolvency Service have issued Common Sanctions Guidance, which helps the bodies to discipline IPs consistently and proportionately. This is a resource and approach that may be beneficial for the FCA to consider in relation to its future sanctioning regime.

**19. Do you have any issues with our intention that decisions made by the FCA in relation to their AML/CTF supervision of professional services firms be appealable to public tribunals, in line with the existing system?**

No.

**20. Do you have any comments regarding the FCA charging fees, under regulation 102, noting the possible proposed amendments?**

Inevitably, the move to the FCA will impose more expense on IPs, as the efficiencies currently enjoyed by the IP-licensing bodies also acting as PBSs will be lost. Inevitably also as explained above, in my view the amount and quality of IP-specific support and guidance to IPs will reduce. I also imagine that IP regulation will suffer as I doubt that any FCA/IP-licensing body gateways will act efficiently and swiftly.

It therefore seems inevitable to me that the new regime will cost more and deliver less.

Such is life.

**21. Are there any specific powers or transitional arrangements that you believe would help the FCA, current supervisors, or HM Treasury support a smooth and low-burden transition for firms already supervised under the MLRs?**

No.

I am very much in favour of the intention to allow then-current AML-regulated persons to retain that status automatically when the FCA takes on the AML supervision role. Also, as mentioned above, the FCA will need to develop in-house expertise to supervise IPs effectively and with understanding, so IPs should not be viewed as just an “accountancy service provider”.

**22. Do you agree that a requirement should be placed on the FCA and existing professional bodies and regulators to create an information-sharing regime that minimises burdens on firms?**

Yes.

However, I am sure this is a priority for all concerned, so I am not sure it needs to be enshrined in statute as a “requirement”.

**23. Are there other legislative measures that would prevent additional regulatory burdens arising?**

Yes.

As mentioned above, the FCA should rely on the IP-licensing bodies’ function in approving an applicant as fit to be granted an IP licence and this should be accepted by the FCA as sufficient for the IP also to be recognised as AML-supervised by the FCA. It should not be necessary for an IP to jump any additional hurdles to be recognised by the FCA. To require anything further would not only add unnecessary costs for the FCA and for IPs, but it could delay IPs starting business.

**24. Are there any additional powers that would support OPBAS to provide effective oversight of the PBSs during the transition? If so, please provide an overview.**

No.

As we are now in the transition period, it would seem an unnecessary expense to revisit and amend the functions and powers of OPBAS, which already appear sufficient to ensure that PBSs perform largely as intended.

***25. Are there any wider legislative changes that may be necessary to support the effective implementation of this policy, including alignment with existing statutory frameworks governing professional services?***

Probably not.

The Consultation document highlights the regulatory objectives set out in the Legal Services Act 2007. No doubt, the FCA and HM Treasury are also aware of objectives for the insolvency regulators set out in the Small Business, Enterprise and Employment Act 2015. While I doubt that any wider legislative changes are required, thought must be given to whether the FCA's AML policies etc. are compatible with and support those objectives.

***26. Should any changes be made to the economic crime objective introduced for legal regulators by the Economic Crime and Corporate Transparency Act?***

N/A

I have not concerned myself with the regulation of the legal sector.

***27. Do you have any issues with our intention to apply the FCA's existing accountability mechanisms in carrying out its additional supervisory duties?***

No.

***28. What measures do you think should be taken to ensure a proportionate overall approach to supervision, including prioritising growth?***

As explained above, recognition of the IP-licensing bodies' high bars to the granting of an IP licence is essential to a proportionate approach to supervision and to avoid adding unnecessary burdens to IPs, in relation to both expense and time, and this will also encourage growth.

Also as explained above, as the IP-licensing bodies will be losing valuable internal intelligence about their IPs' standards of compliance in AML/CTF matters and consequently they will also be losing enforcement opportunities to disincentivise non-compliance, it is essential for the FCA to compensate the IP-licensing bodies by sharing information swiftly with them.

Also as explained above, it will be important that the FCA recognises the unique position, role and risks of IPs and adapts its approach and guidance accordingly.