

*Federation of Law Societies  
of Canada*



*Fédération des ordres professionnels  
de juristes du Canada*

## **MEMORANDUM**

**FROM:** No Cash Model Rule Sub-group

**TO:** Anti-money Laundering and Terrorist Financing Working Group

**DATE:** April 8, 2017

**SUBJECT:** Review of No Cash Rule

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### **INTRODUCTION**

1. The Anti-money Laundering and Terrorist Financing Working Group (“Working Group”) was established by the CEO’s Forum at the request of the Council of the Federation to review the Model No Cash and Client Identification and Verification rules and to consider issues related to their enforcement.
2. The Working Group established three sub-groups to tackle different aspects of its mandate. This is the report of the sub-group tasked with reviewing the No Cash Model Rule.

### **OVERVIEW**

3. The members of the sub-group – Deb Armour, Anthony Gonsalves, Sylvie Champagne and Frederica Wilson – met three times during March to review all aspects of the No Cash Rule. In particular, we considered whether the \$7500 threshold remains appropriate, whether any changes should be made to the exemptions in paragraph 4 of the rule, and whether any aspects of the rule require clarification. In the course of our discussions we also considered whether there should be limits placed on the purposes for which trust accounts may be used and how to manage direct deposits by clients to lawyers’ trust accounts.
4. At the start of our deliberations we agreed that the goal in examining the rule should be to assess whether as a rule intended to limit the potential for lawyers and Quebec notaries to become involved in money-laundering or terrorist financing the No Cash Rule is sufficiently robust and effective. In this regard we agreed that whether an exemption was modeled on provisions in the federal anti-money laundering regulations ought not to be determinative in deciding whether it should be included in the No Cash Rule.

5. To inform our deliberations we reached out to members of the criminal defense bar and representatives of three major banks – CIBC, TD and RBC to better understand both the use made of the existing exemptions and specific practices related to trust account management (including who can make a deposit to a trust account). We also considered the no cash rules of certain law societies, as well as the general trust accounting rules and regulations of the law societies.

6. Our review of the law society rules confirmed that all have implemented the No Cash Model Rule. The rules across the country are consistent in all essential ways. A few law societies have varied the requirement in paragraph 4(d) of the model rule for refunds of amounts of \$7500 or more paid for fees, disbursements etc. to be in cash, by setting a \$1000 threshold for the requirement. All law societies also require members to record cash transactions. The Barreau du Québec goes farther; Regulation 71 requires members to submit a copy to the Barreau within 30 days of the receipt for any cash over \$7500 together with a notation indicating the exemption under which it was received.

7. The members of the sub-group questioned the value of the exemption for cash received “from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity” (paragraph 4(b)) and the exemption for cash received “pursuant to a court order, or to pay a fine or penalty” (paragraph 4(c)). While we recognize that there is limited risk that transactions involving peace officers etc. acting in an official capacity may involve money-laundering or terrorist financing, the same is not necessarily true of transactions involving the payment of fines or penalties. In any event, neither exemption would appear to be of much practical value. Lawyers consulted suggested supported this conclusion.

8. At the outset of our deliberations, we also considered whether the exemption for legal fees was justified particularly in light of the fact that the Canadian economy is increasingly “cashless” and considered recommending that the exemption be deleted. In deciding against such a recommendation, we noted that the federal regulations also include an exemption for funds paid or received by lawyers as professional fees.

9. The sub-group members consider that the \$7500 threshold in the No Cash Rule remains appropriate, but we are concerned that there is no limit on the amount of cash that a lawyer may receive under the exemptions. We are of the view that an upper limit should be imposed, but that consultation with the profession is necessary to determine what the limit should be. We also concluded that the Model Rule should specify that the exemptions apply only when cash is received in connection with the provision of legal services by the lawyer or the lawyer’s firm.

10. We note that some law societies, but not all, have regulations or bylaws restricting the use of lawyer trust accounts to purposes related to their legal practice. The members of the sub-group are of the view that such rules make an important contribution to the fight against money-laundering and terrorist financing by preventing lawyer’s trust accounts from being used as a conduit for potentially illegitimate purposes. The Barreau’s regulation 47 is one of the clearest examples of such a restriction:

**47.** The sums of money held in trust by the advocate must be related to the performance of a lawful, clearly defined contract for services or mandate connected with the practice of his profession. The mere act of holding sums of money in a trust account does not constitute the practice of the profession.

11. The sub-group also considered whether law societies can and should restrict direct deposits by clients or others to a lawyer's trust account. We noted that such deposits can effectively lead to a lawyer accepting cash in excess of the limits in the No Cash Rule. Law societies do appear to have the jurisdiction to impose such a restriction, but ensuring compliance might pose some challenges. Bank officials consulted advised that they have limited ability to prevent cash deposits by a third party to a trust account if the depositor has the account number. A lawyer or law firm may request that a notice ("message") be put on the account indicating that no third party cash deposits may be made to the account, but if a teller misses or chooses to disregard the notice the deposit might be permitted. There may, however, still be merit in considering whether to recommend that law societies impose a restriction on third party cash deposits to trust accounts.

## RECOMMENDATIONS

12. The members of the subgroup recommend the following changes to the No Cash Model Rule:

- i. add a definition of "financial institution" that mirrors the definition of "financial entity" in the federal regulations. The definition would read

**"financial institution"** means a bank that is regulated by the Bank Act, an authorized foreign bank, as defined in section 2 of that Act, in respect of its business in Canada, a cooperative credit society, savings and credit Union or caisse populaire that is regulated by a provincial Act, an association that is regulated by the Cooperative Credit Associations Act, a financial services cooperative, the credit Union Central, a company that is regulated by the Trust and Loan Companies Act and a trust company or loan company that is regulated by a provincial Act.

- ii. Add definitions of "professional fees," "disbursements," and "expenses" either as stand-alone definitions or as guidance and commentary to the rule.
- iii. Amend paragraph four of the rule as follows:

Despite paragraph 3, paragraph 1 does not apply when the lawyer receives cash ~~in connection with the provision of legal services by the lawyer or the lawyer's firm~~

- (a) from a financial institution or public body, ~~or~~
- ~~(b) from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity,~~
- ~~(c) pursuant to a court order, or to pay a fine or penalty, or~~
- (d) in an amount ~~of greater than \$7,500 or no more than [cap to be determined]~~ for professional fees, disbursements, expenses or bail, provided that any refund out of such receipts is also made in cash.

13. We also recommend that law societies that do not currently have rules or regulations requiring that only money related to the provision of legal services by the

lawyer or the lawyer's firm may be deposited in a lawyer's trust account implement such a rule or regulation.

