



Powers of Attorney – Good practice for ID&V, due diligence & fraud

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About TISA

TISA's ambition is to improve the financial wellbeing of UK consumers by bringing the financial services savings industry together to promote collective engagement, to deliver solutions and to champion innovation for the benefit of people, our industry and the nation.

We do this by focusing on good consumer outcomes and harnessing the power of our broad industry membership base to deliver practical solutions, new digital infrastructure and by devising innovative, evidence-based strategic proposals for government, policy makers and regulators. This holistic approach to address the major consumer issues uniquely positions TISA to deliver independent insight, promote innovation and facilitate good practice.

TISA's rapidly growing membership is representative of all sectors of the financial services industry. We have over 200-member firms involved in the supply and distribution of savings, investment products and associated services, including the UK's major investment managers, retail banks, online platforms, insurance companies, pension providers, distributors, building societies, wealth managers, third party administrators, Fintech businesses, financial consultants, financial advisers, industry infrastructure providers and stockbrokers.

TISA will unveil **Vision 2025** – our strategic policy roadmap towards delivering a material impact in enhancing consumers' financial wellbeing at our Annual Conference in December 2019. Our current strategic policy focus includes making financial guidance more widely available; financial education for young people; retirement savings and addressing consumer engagement, particularly for the vulnerable. Complementing our development of consumer policy and thought leadership, TISA has become a major industry delivery organisation for consumer focused, digital industry infrastructure initiatives (TeX/STAR, Digital ID, MiFID II and Open Savings & Investment). This reflects TISA's commitment to open standards and independent governance.

TISA is also recognised for the support it provides to members on a range of operational and technical issues targeted at improving infrastructure and processes, establishing standards of good practice and the interpretation and implementation of new rules and regulations. This work currently includes MiFID II, CASS, SM&CR and addressing cybercrime.



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Introduction

This guide notes have been written to assist firms in conducting due diligence for new client relationships to be effected under Powers of Attorney ('PoA'), and for managing financial crime risks during the lifecycle of PoA accounts.

We have taken into account:

- relevant provisions of the Joint Money Laundering Steering Group (JMLSG) guidance notes, as revised in December 2017 and granted Ministerial approval in March 2018;
- relevant provisions of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ('MLR');
- guidance issued and maintained by the Office of the Public Guardian for England and Wales;
- provisions of the Mental Capacity Act 2005 ('MCA') and precedent legislation, for context, and including the MCA Code of Practice.

This guide should be read alongside TISA's "[Powers of Attorney England & Wales – a guide for administration in financial services](#)" reference document. Where there is overlap in content, it should only be for the purpose of demonstrating administrative points which have a potential impact on financial crime risks.

Scope

This guide intends to cover good practice for:

- identifying and verifying the parties involved in PoA cases of various types;
- establishing the validity of authority and registration status of a PoA;
- what to do if one suspects an attorney is acting unlawfully, or if some other form of fraud is being attempted with regard to a PoA case

The focus here is on PoAs effected under English law (the MCA et al) and this guide does not cover elements specific to the PoA regimes in Scotland or Northern Ireland. We may revise this guide in future to cover these provisions, although the general standards herein are still likely to hold true.

In addition, this guide does not (yet) cover situations where an individual loses mental capacity without a PoA in place, and therefore a representative (deputy) is appointed by the Court of Protection. Again, the principles and associated financial crime risks will be broadly the same, but with some consideration given to the due diligence undertaken by the Court itself.

Identification and verification in PoA cases

Basic principles

The spirit of the MLR is such that firms are expected to identify both controlling party and beneficial owner of an account when entering into a customer relationship, and to verify them according to the risk they represent. This is relevant to PoA business.

Attorneys are invariably individuals (and must be at least 18 years of age for their appointment to be valid), with the relevant sections of JMLSG guidance being:

Pt.1 5.3.69-5.3.94 – ID&V for private individuals

Pt.1 5.3.99-101 – Attorneys

Pt.1 5.3.139-141 – Other firms that are subject to MLR (or equivalent)

Some considerations when conducting ID&V on PoA cases:

- Firms should look to ensure that they know the identity of both the person giving authority (the donor) and the attorney(s) adopting that authority under the PoA, and to verify their identity in line with the firm's established ID&V standards.
- Where a PoA gives authority to more than one attorney (up to four), firms should look to establish the basis (jointly, or jointly and severally) on which those attorneys can give instructions, to inform their verification. This is typically done through review of the PoA document (see section 4 for more detail).
 - Joint attorneys should all be verified at outset, as they will all be party to the application and further instructions.
 - **Attorneys acting jointly and severally may not all be 'active'**; indeed, it is common that one attorney will act as the lead with the other(s) in reserve when needed. In these situations, information about all attorneys should be captured (e.g. via review of the PoA document) and those who have signed the application form in hand or who wish to provide other instructions should be verified. Firms should attempt to verify all attorneys at the outset to preclude the need to conduct further verification going forward, but would find it useful to have processes to defer the verification for inactive attorneys.
 - Whether or not all attorneys are verified at outset, they and the donor should all be screened for PEP/sanction exposure as appropriate.
- Firms should consider the risks posed by the donor and attorney(s) on an individual and collective basis in accordance with the firm's established processes for any customer, in order to determine the level of due diligence required on each party.
- The donor may appoint someone **acting in a professional capacity**, e.g. their family solicitor, to act as an attorney for them. In these cases, firms may wish to consider whether or not they can leverage information on professional registers (e.g. The Law Society Register) in lieu of verifying the attorney as a private individual. It is important to note that, in these situations, being an attorney is something which **stays with the individual rather than the firm** they work for. So, if a solicitor appointed as an attorney retires or moves firms, they will continue as attorney unless there is specific provision in the PoA to the

contrary, or representation is made to the Court of Protection to replace or retire them, although the CDD held may need to be refreshed in the event of such a change.

PoA validity and registration with the Office of the Public Guardian

Firms should ensure that, as part of their client due diligence, the attorney(s) they are dealing with are those named on an appropriately registered version of the PoA.

Lasting Powers of Attorney (LPAs)

LPAs have been available for use since the MCA took effect on 1st October 2007, and, must be registered with the Office of the Public Guardian (OPG) before they are valid for use, whether or not the donor has lost mental capacity. The OPG maintains examples of registered LPAs on the GOV.UK website:

<https://www.gov.uk/government/publications/lasting-power-of-attorney-valid-examples>

Enduring Powers of Attorney (EPAs)

EPAs enacted under the Power of Attorney Act 1971 prior to the MCA taking effect remain valid (EPAs dated before 1st October 2017). A key difference between EPAs and LPAs is when they can be used – EPAs can be used without being registered until the donor loses mental capacity, and from then on can *only* be used once registered.

The OPG maintains a corresponding page of examples for EPAs:

<https://www.gov.uk/government/publications/enduring-power-of-attorney-valid-example>

Ordinary/General Powers of Attorney (including Trustee PoAs)

These types of PoA exist mainly for convenience, rather than to protect the donor in the event of loss of mental capacity, and therefore are valid for use without needing to register them with the OPG. In the same breath, such PoAs cease to be valid once the donor has lost mental capacity. Per the Trustee Delegation Act, delegation of trusteeship can only last for a maximum of twelve months.

Checking attorney appointments and PoA registration with the OPG

The OPG maintains a register of all LPAs and EPAs registered with it, and provides the facility for interested parties to request for information about specific PoAs – names and DoB of donor, names of attorney(s), dates made/registered/revoked as applicable, nature of appointment (jointly or joint and several) and history of replacement attorneys.

This may offer firms additional comfort when taking on PoA relationships or noting PoAs against existing accounts. More details about the OPG's process for requesting a check can be found at:

<https://www.gov.uk/government/publications/search-public-guardian-registers>

Certification of PoAs

It is a requirement of English law that any PoA document consisting of more than one page must be certified by a solicitor, stockbroker (for EPAs) or authorised notary *on every page* in order to provide valid authority. Certification by the donor is permitted provided they still have capacity.

While this is largely a legal/operational consideration, firms may wish to consider the associated financial crime risks if certification is incomplete on a certified copy (for example, the added potential for fraud if the sections outlining the attorney's details are filled out but not certified) as part of noting the PoA on the account.

Fraud and misuse risks in PoA cases

It is an unfortunate truth that the majority of cases where a PoA is misused, for purposes of fraud or undue personal gain, are committed by family members acting as attorney. While it may be relatively straightforward to establish the authority of family members from the PoA document, and to verify their identities, it is not always as obvious what sort of behaviour should prompt concern about the possibility an attorney is attempting to commit fraud against the donor.

A list of points to consider, by no means exhaustive:

- If money is being withdrawn, where it is being paid to - an account in the donor's name, the attorney's own personal account or a third party;
- If to the attorney, whether the payment is demonstrably (e.g. through sight of an invoice) for reasonable expenses incurred in the course of attorney duties;
- If not for expenses incurred, then whether the payment is a reasonable gift in light of the donor's previous financial behaviour (as much as that might be known to a firm);
- If to a third party (e.g. a charity, a close friend), whether the gift is reasonable, whether the payment is permissible under a firm's policy on paying third parties and whether the third party has itself been properly verified;
- Concurrent changes to bank account details alongside withdrawal instructions (a specific example of a wider fraud indicator);
- Unexplained gaps in the chain of evidence, particularly where solicitors or other professionals are not party to the account.

To mitigate the potential risk of fraud and/or misuse, firms should give due consideration to some or all of the following:

- Requiring payment to be made to an account confirmed to be in the name of the donor (for which the attorney has control) to centralise all financial transactions for the purpose of simplifying the ongoing monitoring;

- Having robust processes in place to ensure that instructions received from the attorney(s) are within the scope of authority given to them by the donor in the PoA document;
- Performing enhanced monitoring of PoA accounts to identify potentially inappropriate behaviour (either as each activity happens, or by performing periodic reviews more frequently than otherwise occur);
- In the event of multiple attorneys acting jointly and severally, sending copies of all transaction confirmations / periodic statements to all attorneys to ensure they are kept informed of activity on the donor's account;
- Reviewing all other correspondence received in respect of the operation of the account for information or transactions that appear out of place for the situation (e.g. bank statement received to evidence ownership of an account shows transactions that would be obviously inconsistent with an elderly person in a care home.)
- Providing additional training to all staff involved with the administration and operation of PoA arrangements to ensure they are familiar with different characteristics of each type, and are vigilant for the additional risks associated with such accounts.
- Operating enhanced controls where the client is known to be more vulnerable (e.g. very elderly and/or known to be of deteriorating health) in order to seek confirmation whether the donor still has mental capacity.
- Requiring instructions to make a large / complete redemption (or any other material action) to be validated by ALL attorneys, where the instruction has not originated from them all (e.g. by an attorney appointed on a 'jointly and severally' basis).

A more fundamental consideration is whether the PoA being put in place was in itself a coercive act, with the PoA therefore being an explicit instrument in attempted fraud against the donor. The Mental Capacity Act brought in a more robust control framework, requiring interaction between the donor and independent professional parties to ensure that the donor has capacity and is entering into a Lasting Power of Attorney from a properly informed position, and evidence of these steps form part of the set-up and registration processes.

These controls were not part of the EPA regime, with the opportunity for scrutiny by family or friends only happening once they were registered. Given that EPAs could potentially be used for some time before that point, out of sight, firms may wish to assess the nature of the relationship between donor and attorney in EPA cases, as a sense-check against the legitimacy of instructions being given.

Per TISA's Guide for Administration of Powers of Attorney, should you have any concerns over the use of a PoA by an attorney, you should make your legal function aware in the first instance, and consider whether or not it is appropriate to notify the Office of the Public Guardian via their Safeguarding Unit:

<https://www.gov.uk/report-concern-about-attorney-deputy>

From a client relationship management perspective, it is worth noting that the OPG may contact the attorney or donor directly as a result of any concerns raised to the Safeguarding Unit. This has the potential for difficult conversations if suspicion proves to be unfounded, so firms should be confident of the evidential basis for reporting in this way.