

TECH 49/05

MONEY LAUNDERING

**THE PROCEEDS OF CRIME ACT 2002 (POCA) AS AMENDED BY THE SERIOUS
ORGANISED CRIME AND POLICE ACT 2005 (The Act)**

Technical Release issued by the Institute of Chartered Accountants in England & Wales, in August 2005, to inform members of recent changes to the law relating to money laundering, including reporting requirements.

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Guidance Notes provided by the Home Office, circulated to UK police forces.

Background

1. The Government has amended the Proceeds of Crime Act (PoCA) to modify the money laundering reporting regime. The amendments are very welcome, as they will reduce the burden on both the regulated sector and the law enforcement authorities who have to deal with Suspicious Activity Reports (SARs). Further opportunities will arise for amendment to the Anti-Money Laundering (AML) requirements. In particular, these changes do not yet implement, or give a final policy position on, the Home Office proposals on money laundering reporting by auditors, accountants and tax advisers, issued in August 2004. The Institute continues to press for the implementation of those proposals, and for other improvements to the AML regime.
2. This guidance is addressed to those providing auditing, accounting or tax advisory services, by way of business, within the scope of the Money Laundering Regulations 2003 (the Regulations) and Section 330 of PoCA. It may also be of assistance in interpreting the legislation to accountants working in other sectors of business subject to these provisions. For the sake of brevity, all such persons are referred to as “accountants” and their services as “accountancy”.
3. No equivalent legislation has been passed amending the terrorism legislation, so these amendments will not apply in any circumstances where the laundering of terrorist finance is suspected.

Section 102: Money laundering: defence where overseas conduct is legal under local law

(This amendment had not yet been brought into force at the time of issue of this technical release)

4. PoCA defines criminal conduct as conduct which constitutes an offence in any part of the UK, or would have constituted an offence in any part of the UK if it had occurred there. This definition meant that “money laundering” included the possession of the proceeds of such behaviour as:
 - Bullfighting, or similar activities, which would be traditionally acceptable in many jurisdictions, but which are illegal in the UK, due to different cultural norms;
 - Administrative offences, such as criminal breach of the health and safety legislation in the UK, where there is no equivalent legislation in the relevant jurisdiction; and
 - Regulatory breaches, such as failure to seek regulation by the FSA, in a jurisdiction where such regulation is not required.
5. The s 102 amendments will provide that a money laundering offence is not committed under sections 327-329 of PoCA if:
 - the person in question knows or believes (on reasonable grounds) that the behaviour that would have been a criminal offence took place outside the UK; and
 - at the time it occurred it was neither illegal in that jurisdiction, nor listed in a Statutory Instrument, issued for that purpose.

They also provide a similar exemption from the failure to report offences, under sections 330 to 332 of PoCA, where it is known or believed (on reasonable grounds) that money laundering is taking place outside the UK, but in a jurisdiction where it is not illegal and nor has it been listed in the relevant Statutory Instrument.

6. These amendments did not come into force on 1 July 2005, as the Statutory Instrument describing the types of offences committed overseas that will remain subject to sections 327-329 of the Proceeds of Crime Act 2002 and the requirement in sections 330-332 of that Act to report knowledge or suspicion has not yet been drafted. The Home Office are currently considering the drafting of the Order, with the aim of ensuring that the law enforcement authorities continue to receive useful intelligence from SARs relating to any serious crime, regardless of the legislation in force in the jurisdiction where the underlying behaviour took place. The final details of which types of behaviour will or will not come within the money laundering reporting regime is, therefore, not yet known. In the meantime, all such matters should continue to be reported (and consent to undertake the relevant transactions sought, where necessary).

Section 103 of the Act: Money laundering: threshold amounts

(This amendment came into force on 1 July 2005)

7. This amendment allows banks and other deposit taking institutions to continue to operate a suspect account, by undertaking small value transactions without seeking prior consent from NCIS.
8. The amendment does not affect the requirement to report knowledge or suspicion of money laundering, but relates only to whether consent is required to carry on with transactions. It does not insert a de minimis limit on the money laundering offences or on the requirement to report – banks will still be required to report their suspicions of money laundering under Section 330 of PoCA, though they will not need to seek consent to carry out small transactions.

Section 104 of the Act: Money laundering: disclosures to identify persons and property

(This amendment came into force on 1 July 2005)

9. This amendment removes the need to make a SAR (which would usually be a “Limited Intelligence Value” report, or “LIV”) to NCIS where the identity of the culprit and the whereabouts of the property are unknown and where there is no information that would assist in identifying the person or where the property is. However the requirement to report will remain where the individual “can identify” the criminal or the whereabouts of the proceeds or believes (or it is reasonable to believe) that the information on which his suspicion is based may assist in identifying the culprit or the whereabouts of any of the laundered property. For instance, a “drive away” theft from a petrol station where the vehicle registration number is known would still require a LIV report, but a drive away theft without this or any other information that may assist in identifying the culprit or whereabouts of the property would not.
10. Accountants may be aware that their clients maintain records of (for example) suspected shoplifters, without having accessed those records or kept a note of any identifying information on the suspects. It is the Institute’s view that if such matters would have been previously the subject of a LIV, then no report need be made by the accountant. This view is based on the fact that:
 - The “information on which his suspicion is based” primarily consists of his knowledge of his clients business – it is not based on the clients’ detailed records;
 - Though it could be argued that the client’s name and contact details would assist identifying the culprit (by leading to their records of suspects) neither is this information part of the information on which the suspicion is based.

If members consider that it would be in the public interest to make a SAR, because of the seriousness of the underlying offence, or any other reason, then they are strongly encouraged to do so in any case, relying on the wide drafting of the confidentiality over-rides included in the legislation.

Section 105 of the Act: Money laundering: form and manner of disclosures

(The requirement to use the prescribed form and manner of report had not yet come into force at the time of issue of this technical release)

11. Once the necessary order has been made, it will become an offence to report in any way other than the prescribed form and manner.
12. There is a considerable efficiency gain for NCIS in receiving all reports in standard form, which should enable more effective use of resources. The Institute are making representations to try and ensure that the forms are practical, easy to complete, and accessible to all. In the meantime, we continue to recommend that the current NCIS standard form is used to make all SARs. Copies are downloadable from the NCIS website, or obtainable from them in hard copy. It can be completed either electronically or in typed form, but should not be hand written, if this can be avoided.
13. This section also clarifies that an internal disclosure to an MLRO can be effective as a report under PoCA even if it is not made in accordance with a firm's formal procedures. For example, an MLRO could not disregard a communication from a staff member that was in substance a report of money laundering suspicions on the basis that it was not made on a form or in a particular manner laid down by the firm's procedures.

Section 106 of the Act: Money laundering: miscellaneous amendments

(These amendments came into force on 1 July 2005)

14. This section makes three changes to the reporting requirements.
15. The amendment to section 330 allows professional legal advisers to discuss possible money laundering suspicions with their MLRO, even where such matters attract an exemption due to legal professional privilege, without attracting an automatic duty to report on the part of the MLRO. It is not yet of relevance to accountants, as it relates only to disclosures to which the privileged circumstances exemption would apply.
16. The amendment to section 337 represents a technical change to the drafting of PoCA, to reflect the provisions under which an MLRO can be appointed.
17. The amendment to section 338 extends the circumstances in which consent can be sought as a defence against a charge of money laundering, to expressly cover cases where knowledge or suspicion develops after a person has acted in a way that might otherwise be considered a money laundering offence, and while the person is still undertaking that activity.

Section 107 of the Act: Money laundering offences

(This amendment came into force on 1 July 2005)

18. This amendment widens the powers available to law enforcement to investigate "pre-PoCA" offences but using PoCA powers. This will increase the availability of disclosure and similar orders, in relation to offences which took place in 2002 or earlier.

Issue Date: 29/06/2005

Implementation Date: 01/07/2005

Home Office Circular 33/2005

Proceeds of Crime 2002: Amendments to Money Laundering Provisions

This Annex gives the text of a Home Office Circular addressed to Chief Officers of Police England and Wales Chief Constables, National Criminal Intelligence Service and Commissioners of HM Revenue and Customs, with contact details removed. The circular contains guidance on new provisions in the Serious Organised Crime and Police Act 2005 which have amended money laundering legislation in the Proceeds of Crime Act 2002. It also supplements Home Office Circular 17 of 2003. It is not a statement of the law, and should not be relied upon in court proceedings. This Circular supplements HOC17/2003 issued in March 2003.

Chartered Accountants who are unsure of the action they should take as a result are advised to contact their Institute's enquiry lines or seek their own legal advice, in the normal way. Further copies of the circular are available from: www.circulars.homeoffice.gov.uk.

Introduction

1. The Serious Organised Crime and Police Act 2005 (the Act) received Royal Assent on 7th April 2005. Chapter 6 of Part 2 of the Act makes a number of amendments to the Proceeds of Crime Act 2002 (POCA). This Circular contains guidance on amendments to the money laundering provisions at Part 7, and certain sections of Chapters 2 and 4 of POCA.

2. The new provisions at sections 103, 104, 105, 106 and 107 of the Act will commence on 1 July 2005. Section 102 of the Act (defence where overseas conduct is legal under local law) amendment will not commence with the others on 1st July.

3. Specifically these amendments are:

Section 102: Money Laundering: Defence where overseas conduct is legal under local law.

Section 103: Money Laundering: Threshold amounts

Section 104: Money Laundering: Disclosures to identify persons and property

Section 105: Money Laundering: Form and manner of disclosures

Section 106: Money Laundering: Miscellaneous amendments

Section 107: Money Laundering offences

4. Guidance on each amendment is attached at Annex A to this Circular.

Applicable law

5. The following pieces of legislation are directly applicable

The Serious Organised Crime and Police Act 2005 (C. 15)

The Proceeds of Crime Act 2002 (C. 29)

The Serious Organised Crime and Police Act 2005 (Commencement No. 1, Transitional and Transitory Provisions) Order 2005 [SI 2005 No. 1521 (C.66)]
The Money Laundering Regulations 2003 [SI 2003 No. 3075]
The Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2003 [SI 2003 No. 3074]
The Proceeds of Crime Act 2002 (Commencement No. 4 Transitional Provisions and Savings) Order 2003 [SI 2003 No. 120 (C.6)], as amended by Article 14 of The Proceeds of Crime Act 2002 (Commencement No. 5 Transitional Provisions, Savings and Amendment) Order 2003 [SI 2003 No. 333]
The Proceeds of Crime Act 2002 (Crown Servants) Regulations 2003 [SI 2003 No. 173]
The Proceeds of Crime Act 2002 (Failure to Disclose Money laundering: Specified Training) Order 2003 [SI 2003 No. 171]

Home Office
24 June 2005

ANNEX A

MONEY LAUNDERING PROVISIONS IN THE PROCEEDS OF CRIME ACT 2002 (POCA) AS AMENDED BY THE SERIOUS ORGANISED CRIME AND POLICE ACT 2005 (The Act)

GUIDANCE NOTES

1. These notes have been issued as an Annex to the Home Office Circular providing guidance on new provisions in the Serious Organised Crime and Police Act, which amended money laundering legislation in the Proceeds of Crime Act 2002.

Section 102: Money laundering: defence where overseas conduct is legal under local law

Background

2. The Proceeds of Crime Act 2002 (POCA) defines criminal conduct as conduct which constitutes an offence in any part of the United Kingdom, or would have constituted an offence in any part of the UK if it had occurred there. This definition has created an obligation for persons and firms to seek consent from and make disclosures to the National Criminal Intelligence Service (NCIS) when carrying out transactions involving the proceeds of activities which are not criminal in the country in which they took place. It has been argued that as a result of compliance with the law, UK firms have lost foreign business as a result of clients' concerns that a report will be made to NCIS in respect of their apparently legitimate property.

The amendments

3. Section 102 amends the three principal money laundering offences in sections 327-329 of POCA and the offences of failure to disclose money laundering in sections 330-332. The amendments to section 327-329 provide a defence to these offences where the person knows, or believes on reasonable grounds, that the relevant criminal conduct occurred in a country or territory outside the UK, and where the criminal conduct was not unlawful under the criminal law applying in that country or territory at the time it occurred. The amendments to sections 330-332 provide a defence to these offences where the person knows, or believes on reasonable grounds, that the

relevant money laundering was not unlawful under the criminal law applying in that country or territory. These new defences will not apply where the relevant conduct or money laundering is of a type described by an order made by the Secretary of State.

4. The types of offences which should be excluded from the new defence are under consideration. The defence is intended to cover only a limited range of situations. The purpose was to exclude various regulatory offences as well as offences (for which the bullfighting in Spain example is used) where the conduct would not constitute a serious offence in the UK.

5. In many cases the specific crime that generated the suspected criminal property might not be known, but the new defences are directed at circumstances where the person, who would otherwise be required to make a disclosure, knows or believes on reasonable grounds that the money laundering took place in a particular country. The conduct in question must actually be lawful in that country. To take the bullfighter example, the person must know or believe on reasonable grounds that the “criminal conduct” took place in (for example) Spain and the conduct must actually be lawful there. The reference to believing on reasonable grounds is relevant because, although the person in this case might suspect that, for example, the bullfighter’s money derives from bullfighting, he is unlikely to “know” for certain that this is the case.

Section 103: Money laundering: threshold amounts

Background

6. Under section 327(1)(d) of POCA, which relates to the transfer of criminal property, a bank or other deposit-taking body would need to make a disclosure to, and obtain consent from, NCIS before any such transfer of funds of a client who was suspected of money laundering.

7. This creates difficulties in relation to what are known as “lifestyle payments” – payment of standing orders, gas bills, mortgages, etc. Problems also arise where the client tries to get cash from, or deposit money in, his account. A delay in carrying out each such transaction while the bank sought consent to proceed with the transaction from the authorities might alert the client to what was going on.

The amendments

8. Section 103 amends the three principal money laundering offences in sections 327-329 of POCA, and inserts a new section 339A on threshold amounts. Under section 327(1)(d), a bank or other deposit-taking body would need to make a disclosure to obtain consent before proceeding with any transaction which was suspected of involving criminal property. These amendments would, in certain circumstances, allow deposit-taking bodies to continue to operate accounts without the need to seek consent in each case.

9. The amendments do not apply to the duty to make a disclosure in respect of the initial opening of an account or, as the case may be, the time when the deposit-taking body first suspects that the property is criminal property (see section 338(2A) of POCA, as inserted by section 106(5)). In such circumstances the requirement to make a disclosure continues where money laundering is known or suspected, irrespective of the amount involved. The reference to “threshold amounts” is not, therefore, the introduction of a “de minimis” level in respect of the requirement to report money laundering

10. A bank or other deposit-taking body would not commit an offence in operating an account of a person suspected of money laundering when the amount of money concerned in the transaction is below £250 or such higher threshold amount as may be specified by a constable or an officer of Revenue and Customs, or by a person authorised by the Director General of NCIS (or, in future, authorised by the Director General of the Serious Organised Crime Agency (SOCA)). Where a deposit-taking body requests a threshold amount higher than the £250 default threshold, one may be specified. The £250 default threshold can be varied by order of the Secretary of State. Where a threshold amount (above the £250 default level) has been specified for an account, the specified amount may be varied by any of the officers who could have specified it.

11. Different thresholds may be specified in relation to the operation of the same account (for example, a higher threshold could be specified for deposits than that specified for withdrawals).

12. Subsection (6) provides a definition of deposit-taking body in section 340 of POCA.

Section 104: Money laundering: disclosures to identify persons and property

Background

13. Section 329(1)(c) of POCA makes possession of “criminal property” – that is property which is a person’s benefit from criminal conduct – an offence. In addition to the persons who are rightly caught by this section, it also applies in the case of, for example, a person who steals from a supermarket or fills his car with petrol and then drives off without paying. In many cases the culprit is unknown. Nevertheless where an auditor audits the accounts of the supermarket or petrol station he is obliged to make a report of money laundering to NCIS. These reports are of no practical value to law enforcement.

The amendment

14. Section 104 amends the failure-to-disclose provisions in sections 330-332 of POCA, by inserting an additional condition that needs to be satisfied if the offences in those sections are to be committed. Under the amendment there will be no need to report to NCIS where the identity of the culprit or the whereabouts of the property are unknown and where there is no information that would assist in identifying the person or where the property is. However the requirement to report will remain where the person believes, or where it is reasonable to expect him to believe, that there is information which came to him in the course of business in the regulated sector, and which may assist in identifying the culprit or the whereabouts of any of the laundered property.

15. New section 330(3A) of POCA means that there will generally only be a disclosure if the identity of the person known/suspected of engaging in money laundering is known, or the whereabouts of the property is known. Section 330(5) requires that that information is passed on. There may be cases where neither the individual suspected of money laundering nor the whereabouts of the property are known but there is other information which may assist law enforcement. For example, in the course of an audit of a petrol station, an auditor is told that an unknown person drove off from the forecourt without paying for petrol. That is the information that leads the auditor to know etc that another person is engaged in money laundering. The information does not identify the money launderer or the whereabouts of the laundered property. So the auditor does not need to make a disclosure. However if the auditor discovered in a note in the accounts being audited that recorded the registration number of the car concerned, that information may assist law enforcement.

16. Section 104 will supersede the existing “carve out “ arrangements for cheque and credit card fraud under which HO/NCIS authorised the credit card companies to keep SARs in these cases in-house.

Section 105: Money laundering: form and manner of disclosures

Background

17. Section 339(2) of POCA enables a form which is prescribed under section 339(1) to “include a request to the discloser to provide additional information specified in the form.” No offence attaches to the failure to provide this information because it does not form part of the disclosure that a person is required to make. But the effect of section 339(3) is that this power is difficult to exercise because it may be difficult to draw a line between information which is an essential part of the disclosure and information which is a useful addition but to which criminal sanctions do not attach.

18. Separately, concerns were expressed that the penalties for failing to use the prescribed form or to submit it in the prescribed manner are excessive. The current maximum penalty is 14 years' imprisonment and a fine.

The amendments

19. There are three separate amendments here. First, subsection (2) amends sections 330(9)(b), 337(5)(b) and 338(5)(b) of POCA by omitting the requirement to follow the employer's procedures when making a disclosure to a nominated officer. This requirement could have been regarded as over-burdensome and has been removed.

20. Secondly, section 105 replaces subsections (2) and (3) of section 339 which relate to the power in subsection (1) to prescribe the form of disclosures about money laundering. Under new subsections (1A) and (1B), a person commits an offence if he makes a disclosure otherwise than in the form and manner prescribed, unless he has a reasonable excuse for not so doing. New subsection (2) confers a power to request from the person making the disclosure that the person provide information specified or described in the form if that has not been done in making the disclosure. New section 339(3) of POCA makes it clear that there is no obligation to comply with such a request.

21. Thirdly, under subsection (3) the penalty for failure to make a disclosure in the prescribed form and manner is modified to become punishable by a fine not exceeding level 5 on the standard scale. Subsection (4) makes a consequential amendment.

Section 106: Money laundering: miscellaneous amendments

Background

22. Section 106 makes three separate amendments. The one made by subsection (2) addresses the concern that section 330(9) arguably covers the circumstances when a member of staff discusses with a nominated officer the question whether a disclosure needs to be made and is not intended as a disclosure for the purposes of section 330(5)(a). But, if section 330(5)(a) applies, the provisions of section 331 apply if that officer fails to pass on the information under section 331(5). Where the informal disclosure to the nominated officer is made by a professional legal adviser, the exception in section 330(6)(b) and (10) would thereby be lost.

The amendments

23. Subsection (2) amends section 330(9) to address the concern described in the background note and to ensure that a disclosure to a nominated officer for the purposes of seeking advice is not treated as a disclosure under section 330(5)(a).

24. Subsection (3) makes a technical amendment to section 337(5)(a) to reflect the point that nominated officers may be appointed under section 330 (as to which, note the wording of section 331(1)) as well as section 337.

25. Subsection (5) (together with the consequential amendments in subsections (4) and (6)) adds an additional condition to section 338 under which a disclosure will be “authorised” and thereby provide a defence to the offences in sections 327 to 329 of POCA. The condition covers the circumstances when the discloser did not initially know or suspect that property was “criminal property” at the time when he began the “prohibited act” (as defined in section 338(6)) but made the disclosure voluntarily as soon as he did know or suspect. This condition would be relevant, for example, to a bank processing a bank account where the prohibited act is possession of criminal property (section 329(1)(c)), and the bank did not initially know or suspect that the money in the account was criminal property.

Section 107: Money laundering offences

Background

26. The current legislative provisions do not allow for the new investigation powers within POCA to be used for investigations into money laundering offences under old, pre-POCA, legislation.

27. It would be more effective for financial investigators to use these new greater investigation powers. These extended powers would be of obvious benefit to investigations into old money laundering offences.

The amendments

28. Section 107 amends sections 364 and 415 of POCA and widens the meaning of money laundering offences so that it includes the principal money laundering offences under legislation in force before POCA. This allows the investigation powers under Part 8 of POCA to be used to investigate money laundering offences committed under previous legislation. The powers will be available from the 1 July, regardless of when the offence was committed or investigation was started

Organised and Financial Crime Unit

Home Office

24 June 2005