

TECH 20/04

ANTI-MONEY LAUNDERING

GUIDANCE FOR INSOLVENCY PRACTITIONERS

Guidance on compliance with the anti-money laundering legislation, which is specific to issues likely to arise in relation to insolvency practice, has been developed by the Association of Business Recovery Professionals [R3] and is available to their members, on their web site. This technical release has been issued by the Institute, to clarify that the Guidance is also of relevance to all insolvency practitioners, including those who are not members of R3, and to ensure that it is available to them. It duplicates the R3 Guidance and should be applied in conjunction with the current main Institute Guidance, on anti-money laundering for members and member firms (and which was simultaneously issued by the other CCAB bodies, and is referred to in the R3 Guidance) which is available from the Institute web site on www.icaew.co.uk/moneylaundering.

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Introduction

1. UK anti-money laundering law is based on the [EU Second Directive on money laundering](#).
There are three key pieces of legislation:
 - [The Money Laundering Regulations 2003](#)
 - [The Proceeds of Crime Act 2002](#) (as amended by [the Proceeds of Crime Act 2002 \(Business in the Regulated Sector and Supervisory Authorities\) Order 2003](#))
 - [The Terrorism Act 2000](#) (as amended by the [Anti-Terrorism Crime and Security Act 2001](#) and [the Terrorism Act 2000 \(Business in the Regulated Sector and Supervisory Authorities\) Order 2003](#))
2. The Regulations set out the systems and procedures that relevant businesses (see Appendix) must have and follow. One of these is to have a system for recording and reporting knowledge or suspicion of money laundering. The reporting obligations are further elaborated in the Proceeds of Crime Act (see below). Failure to comply with the requirements of either the Regulations or the Proceeds of Crime Act can carry criminal sanctions.
3. Regulators, such as the Financial Services Authority (FSA), may impose additional systems and controls requirements on persons and businesses regulated by them. A person or business regulated by the FSA needs to have regard to its Money Laundering Sourcebook as well as the Regulations.
4. The Proceeds of Crime Act sets out in Part 7 for the regulated sector (see Appendix) details of what constitutes money laundering and money laundering offences, the offences of tipping off and the offence of failing to disclose knowledge or suspicion of money laundering. It also lays down detailed responsibilities as regards disclosing (reporting) knowledge or suspicion to the criminal authorities and gaining consent to certain acts where needed. Section 342 in Part 8 describes a further offence of prejudicing an investigation.
5. The anti-terrorism legislation provides that financing terrorism or handling terrorist proceeds is laundering money and applies responsibilities similar to those in the Proceeds of Crime Act. In addition to this legislation, supervisory bodies (e.g. the Consultative Committee of Accountancy Bodies ([CCAB](#) and [The Law Society](#))) issue guidance for their members to follow, and the [Joint Money Laundering Steering Group](#) (JMLSG) also issues guidance to the financial community.
6. The CCAB and Law Society guidance gives detailed information about the new Money Laundering legislation and associated offences, and provides comprehensive guidance on compliance with the various requirements imposed by the legislation. R3 recommends that insolvency practitioners have regard, in addition to the guidance attached, to the CCAB or Law Society guidance in accordance with their professional status. They should also refer to the JMLSG guidance with particular reference to matters of identification.
7. The guidance which follows is concerned principally with matters particularly affecting those acting as insolvency office holders. These relate to identification, reporting

suspicious, and obtaining consent to transactions involving potentially criminal property. It should be borne in mind that because of the complexities and ambiguities of the legislation the legal position in many areas may not be clear and may need to be clarified by the courts.

Identification

8. The provisions relating to identification procedures set out in the Regulations apply in situations where the person subject to the regulations and his counterparty form, or agree to form, a 'business relationship'. The Regulations require that identification takes place as soon as is reasonably practicable after contact is first made in connection with the proposed business relationship. In the context of insolvency, there is taken to be a 'business relationship' between the insolvency practitioner and the entity or individual over which he is appointed. Practitioners should commence identification procedures at their initial contact with the debtor or company. This would include, for example, accepting instructions from directors to take steps to place a company into liquidation, to act as nominee in a company voluntary arrangement not preceded by another insolvency procedure, to accept an appointment as administrator under paragraph 22 of Schedule B1 to the Insolvency Act 1986, or to agree to act as nominee in an individual voluntary arrangement. Although it is not strictly necessary to have completed the identification procedure before taking office, it would be advisable to do so in order to avoid possible later complications.
9. Where a practitioner is appointed by court order or by a creditors' meeting convened by the official receiver without any prior involvement with the insolvent, reliance on the order of appointment or the initial bankruptcy or winding-up order is considered to be sufficient evidence of identity. This would apply to the following cases:
 - Appointment as provisional liquidator by order of the court
 - Appointment as liquidator in a winding up by the court (whether by court order following an administration, at a creditors' meeting convened by the official receiver or directly by the Secretary of State)
 - Appointment as administrator by order of the court
 - Appointment as trustee in bankruptcy (whether at a creditors' meeting convened by the official receiver or directly by the Secretary of State)
10. In cases such as appointments made at a creditors' meeting in a voluntary liquidation, the practitioner should commence his identification procedures on appointment and complete them as soon as is reasonably practicable (within 5 working days is considered a reasonable period). Much of the necessary information may be obtainable from the practitioner who assisted with convening the meeting, for example, by providing certified copies of the necessary documentation. Where a practitioner is appointed receiver or administrator by a bank or other institution which is itself subject to the money laundering regulations, the practitioner may well be able to receive certified copies of the bank's own evidence of identity. Again, this process should be completed as soon as is reasonably practicable. Practitioners must note that it is for them to be satisfied that they have sufficient evidence of identity and so must conduct such further enquiries as they see fit if convening accountants or appointing lenders are unable to provide sufficient information.

11. The appointment of an insolvency practitioner to a company which is not itself subject to the Money Laundering legislation will not bring the company within the ambit of the legislation so as to require identification of trading partners in respect of transactions conducted by the company during the course of the insolvency. The same would apply in the case of appointment as supervisor of a voluntary arrangement of an individual or partnership which is not subject to the legislation.
12. Where practitioners are providing services outside of formal insolvency proceedings, they should identify those parties entering into a contractual relationship with them. For example, where work is to be carried out for one party (e.g. a creditor or investor) in respect of a debtor, or investee entity, and both parties sign the letter of instruction, both parties should be identified. Where instructions letters are received from groups of creditors or investors, it will normally be sufficient to identify those parties who act on behalf of the group and enter into a contract with the practitioner (i.e. sign the letter of instruction), such as the agent or trustee.

Reporting suspicions of Money Laundering

13. There is guidance on suspicion and reporting in the CCAB Guidance. Note that the requirement to report relates to suspicion of **any** criminal activity resulting in proceeds regardless of who may have committed the offence, and where it was committed if the conduct would have been criminal if undertaken in the UK. In addition, the relevant date is when the practitioner becomes suspicious, not when the conduct occurred.
14. Consent may be obtained from NCIS to enter into a transaction which involves suspected criminal property and which would otherwise constitute a Money Laundering offence. NCIS has seven working days (starting the day after submission of a report) in which to grant or refuse consent. If nothing is heard from NCIS during that time consent is deemed to have been given. Consent is also deemed to have been given if within seven days NCIS gives notice of refusal but then a further 31 days ('the moratorium period') passes without any restraint order being granted.
15. Practitioners should bear in mind that, where they suspect the assets of a company or individual to which they have been appointed may be tainted by criminality, selling those assets without consent may itself constitute an offence under section 327 of the Proceeds of Crime Act.
16. If a practitioner has reported suspicion to NCIS, he should obtain a consent to the act of selling the business and assets. If a practitioner is suspicious that the funds offered to purchase a business or assets are of criminal origin, again he should obtain a consent from NCIS.
17. Where an insolvency practitioner contemplates entering into, or causing a company to enter into, a transaction which may involve criminal property, whether the property is that of the company or a counterparty, he will need to submit a report to NCIS and seek approval of the transaction. NCIS has indicated that most requests for consent should be dealt with in 24 hours, but if the matter is particularly urgent this fact will need to be

highlighted on the disclosure form. To facilitate a rapid response from NCIS, it is important to:

- make a report and seek consent as soon as it is apparent that the consent may be needed;
 - make the report and consent request in writing;
 - fax it to the NCIS duty desk and mark it 'urgent'; and
 - follow up the fax with a call to the NCIS duty desk to explain any special urgency or potential deadlines.
18. There is clearly scope for conflict between a practitioner's duty to achieve the best results for creditors and his duty under the Money Laundering legislation. However, in view of the criminal sanctions attached to committing a Money Laundering offence or failing to report it is probable that the latter will prevail. Practitioners may, in suitable circumstances, wish to seek the directions of the court.
19. In addition to the offences under the Proceeds of Crime Act, insolvency practitioners must report suspicions of proceeds from or finance intended for terrorism, regardless of how and when the suspicion arises. This is required by the Terrorism Act 2000 (as amended by the Anti-Terrorism Crime and Security Act 2001). Suspicions of terrorism are to be reported using the same methods as for suspicions of Money Laundering.

Tipping off

20. Tipping off is an offence under the Proceeds of Crime Act and care must be taken not to tip off a suspected money launderer. The offence arises when there is knowledge or suspicion that a report has been made, or, for terrorism related offences, that a report will be made. This includes internal reports. The practitioner also needs to know or suspect that his actions will prejudice an investigation in order to commit an offence. Practitioner should be careful to ensure that reports to creditors do not contain anything that might constitute tipping off. Note that there is no provision for obtaining consent to tipping off.

Where the Insolvent is subject to the Money Laundering legislation

21. Where an insolvency practitioner is appointed to a company, partnership or individual which is itself subject to the Money Laundering legislation, he will need to ensure that the insolvent's own internal systems comply with the legislation and continue to function during the course of the insolvency. However, the practitioner himself will also have to report suspicions coming to him in the course of his duties through his own money laundering reporting officer.

Reporting Requirements under other Legislation

22. Insolvency practitioners are subject to a number of reporting duties. For example they are required to submit reports on directors under the disqualification legislation, and under section 218 of the Insolvency Act 1986 a liquidator must report to the prosecuting authority if it appears to him that any past or present officer or member of a company has

been guilty of an offence for which he is criminally liable. Under these various duties the matters to be reported and the nature and extent of the supporting evidence may differ from that required under the Money Laundering legislation. For example section 218 covers a wider range of criminal activity than the Money Laundering legislation, and requires more than just suspicion on the part of the practitioner. When submitting reports practitioners should confine themselves to the matters required under the relevant legislation and any associated guidance. In cases where a report has been made to NCIS under the Money Laundering legislation this fact should not be mentioned in reports made under any other provisions.

FJB
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APPENDIX

Persons covered by the Legislation

23. The legislation applies to persons who carry on business in ‘the regulated sector’ (in the language of the Proceeds of Crime Act and the Terrorism Act) or who carry on ‘relevant business’ (in the language of the Regulations). The definition of ‘the regulated sector’ is set out in Schedule 9 to the Act, and the definition of ‘relevant business’ is set out in regulation 2 (2) of the Regulations. Despite the different terminology the activities in both cases are the same and, broadly, are:

- Regulated activity under the Financial Services and Markets Act 2000
- The activities of the National Savings Bank
- Any activity carried on for raising money under the National Loans Act 1986
- Operating a bureau de change, transmitting money or cashing cheques payable to customers
- The activities in points 1 to 12 of Annex 1 to the Banking Consolidation Directive
- Estate agency work
- Operating a casino by way of business
- The activities of a person appointed to act as an insolvency practitioner within the meaning of section 388 of the Insolvency Act 1986 or article 3 of the Insolvency(Northern Ireland) Order 1989
- The provision of tax advice
- The provision of accountancy services
- The provision of audit services
- The provision of legal services which involve participation in a financial or real property transaction
- The provision by way of business services in relation to the formation, operation or management of a company or trust
- Dealing in high value goods of any description (involving cash payments of 15,000 euros or more)