

# technical factsheet 85

## Anti-money laundering (proceeds of crime and terrorism)

Interim guidance for accountants published in May 2003

### CONTENTS

	Page
1 Executive Summary	3
2 Background and Purpose	3
3 The Legislation	5
4 Money Laundering	6
5 Offences	6
6 Knowledge and Suspicion	7
7 Absence of de-minimis Concessions	7
8 Client Confidentiality	7
9 Tipping Off	8
10 Tax Related Offences	8
11 Penalties	8
12 Legal Privilege	8
13 Geographical Coverage & Extra-territoriality	9
14 What Firms Need To Do	9
15 The MLRO	9
16 Training	10
17 Internal Procedures	10
18 Identification Procedures	10
19 Banking and Client Money	11
20 Reporting Suspicions to NCIS	12
21 Constructive Trusts	12
22 Risk-based Approach	13
23 What Firms Are Not Required To Do	13
24 Transitional Arrangements	14
25 Money Laundering Legislation Outside the UK	14
26 Members in Business	15
27 Guidance	15
28 Definitions and Abbreviations	17

Appendix I: NCIS Disclosure Form and Guidance Notes

Appendix II: Criminal Offences Under the Anti-money Laundering Legislation

Appendix III: Tipping Off

Appendix IV: Reporting Guidance

This statement was issued by the Consultative Committee of Accountancy Bodies in May 2003. This Statement is published by ACCA on behalf of the Consultative Committee of Accountancy Bodies.

The *ACCA Rulebook* has not been updated to incorporate the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003. The *Rulebook* contains useful guidance and should be read in conjunction with ACCA supplementary guidance and this factsheet.

**The Serious Organised Crime Agency**

The Serious Organised Crime Agency (SOCA) was launched on 1 April 2006. SOCA was established by the Serious Organised Crime and Police Act 2005 (SOCAP) and brought together the National Crime Squad, the National Criminal Intelligence Service, the part of HM Revenue and Customs that dealt with drug trafficking and associated criminal finance, and the part of the U.K immigration service that dealt with organised immigration crime.

The following website link provides details in respect of making disclosure reports which will now need to be made through SOCA and not NCIS.

<http://www.soca.gov.uk/financialIntel/disclosure.html>

Therefore, please note references in this factsheet to NCIS have not been changed to SOCA.

## 1 EXECUTIVE SUMMARY

I Accountants are covered by two pieces of legislation being brought into force in 2003, the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003, along with the existing Terrorism Act 2000 (as amended by the Anti-terrorism Crime and Security Act 2001). These introduce major changes to accountants' responsibilities and potential criminal liability, particularly for accountants working in practising firms.

II Money Laundering now includes possessing, or in any way dealing with, or concealing, the proceeds of any crime. This is a very wide definition and details are contained in the Proceeds of Crime Act. For the purposes of this guidance, it also involves similar activities relating to, terrorist funds, which include funds that are likely to be used for terrorism, as well as the proceeds of terrorism.

III The key change introduced is the requirement that accountants in practice must report knowledge or suspicions of Money Laundering (whether involving a client or other third parties) to the National Criminal Intelligence Service (NCIS) or face the prospect of criminal liability. This includes circumstances where such accountants should have been suspicious (i.e., where they have reasonable grounds for suspicion) as well as where they are suspicious. Reports can be faxed to NCIS on 0207 238 8286.

IV Accountancy firms will have to:

- appoint a money laundering reporting officer (MLRO) to receive money laundering reports from colleagues and to make reports to NCIS
- train relevant principals and employees on the requirements of the legislation, including how to recognise and deal with potential Money Laundering, how to report to the MLRO, and how to identify clients
- verify the identity of new clients and keep records of the evidence obtained
- establish appropriate internal procedures to forestall and prevent Money Laundering.

These obligations will apply equally to sole practitioners with any employees. Sole practitioners without employees will have slightly different legal requirements, because they do not have to appoint an MLRO, but in other respects are recommended to follow this guidance.

V Firms, principals and employees face significant criminal penalties where they breach the requirements of the new legislation.

VI The Proceeds of Crime Act is now in force. However, the new reporting offence, as well as the requirements outlined in paragraph IV, will impact accountants in practice from a date three months after the date on which the Money Laundering Regulations 2003 are tabled in Parliament. At the date of publication of this guidance this had not occurred, and as a result the actual implementation date is unknown. However, for accountants undertaking investment business, and any other accountants who were subject to the Money Laundering Regulations 1993, the reporting offences in the Proceeds of Crime Act applied from 24 February 2003.

## 2 BACKGROUND AND PURPOSE

2.1 The CCAB is in discussions with a view to becoming a member of the Joint Money Laundering Steering Group (JMLSG). The JMLSG's Guidance Notes are widely regarded as the leading source of guidance on anti *Money Laundering* practice in the United Kingdom. The most recent version (December 2001) of the JMLSG's Guidance Notes has received approval from the Treasury for the purposes of *the Act* and therefore must be taken into account by the Courts when considering whether *firms* within its scope have committed the failure to *report* offence. It is expected that the Guidance Notes will also in due course be approved by the Treasury for the purposes of *the 2003 Regulations*. In the event that the CCAB becomes a member of the JMLSG, guidance for accountants will be incorporated into the JMLSG Guidance Notes. Until then, members of CCAB bodies are not bound to follow the JMLSG Guidance Notes. However, certain sections are recommended best practice and are referred to in this guidance.

2.2 As an interim measure this guidance has been prepared for the members of the following CCAB bodies:

- the Association of Chartered Certified Accountants
- the Institute of Chartered Accountants in England and Wales
- the Institute of Chartered Accountants in Ireland
- the Institute of Chartered Accountants of Scotland
- the Chartered Institute of Management Accountants
- the Chartered Institute of Public Finance and Accountancy.

The guidance may also be of assistance for any other persons who are performing *relevant business*, which includes performing *accountancy services*, such as members of the Chartered Institute of Taxation. *Accountancy services* is not defined in either the Proceeds of Crime Act 2002 (*the Act*) or the Money Laundering Regulations 2003 (*the 2003 Regulations*). A suggested definition has been included in section 28 below, but this does not have the force of law.

- 2.3 The primary legislation covered by this guidance is *the Act*, sections 327-340 and Schedule 9. Reference is also made to the Terrorism Act 2000 (as amended by the Anti-terrorism Crime and Security Act 2001) (*the TA 2000*) and associated regulations. The guidance also covers relevant sections of *the 2003 Regulations*, which are Treasury Regulations to implementing the Second EC Money Laundering Directive (2001/97/EC). At the time of writing *the 2003 Regulations* had not been laid before Parliament. As a result this guidance is based on the latest public version which is contained in the Treasury consultation document issued on 15 November 2002. The draft regulations can be accessed on the Treasury's web-site, under the full index of consultation documents ([www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk)). This guidance also assumes that Schedule 9 of *the Act* will be amended to correspond with the definition of *relevant business* as contained in *the 2003 Regulations* (Regulation 2(2)). At the time of writing an Order had not been tabled in Parliament to enact the amendment.
- 2.4 This guidance does not deal with the requirements of the Financial Services Authority's (FSA) Money Laundering Sourcebook (to which members with an FSA authorisation must have regard).
- 2.5 This guidance is intended to assist *firms* to understand and comply with the requirements of *the Act*, *the TA 2000* and *the 2003 Regulations*. These have not yet been applied by the Courts and it is not possible to be certain how they will apply in all circumstances. This guidance does not constitute legal advice and *firms* should be aware that alternative interpretations of the law may be possible. If *firms* wish to adopt alternative interpretations they are encouraged to take legal advice first. Similarly, for situations and issues not covered by this guidance, it may be appropriate for *firms* to obtain legal advice.
- 2.6 This guidance has not been approved by the Treasury. However, it is intended that approval will be sought for all or part of this guidance. If approved by the Treasury, the Courts will be required to take into account the guidance when considering whether a *firm* or an *individual* has complied with *the 2003 Regulations* or committed the failure to *report* offence.
- 2.7 *The Act* and *the 2003 Regulations* impose obligations on both organisations and *individuals*. The term *firms* is used throughout this document to refer to organisations regulated by CCAB bodies, including sole practitioners, unless specified otherwise in this guidance. The term *individuals* refers to both principals and employees. The obligations on *individuals* are generally dealt with separately from the obligations on *firms*. However, *individuals* should familiarise themselves with the obligations imposed on *firms*.

- 2.8 *The Act* and *the 2003 Regulations* impose different obligations depending on the nature of the *firm's* or *individual's* business or role. The principal distinctions are that *the 2003 Regulations* only apply to those conducting *relevant business* and *the Act* and *the TA 2000* impose extended reporting offences on those in the regulated sector. When reading this guidance, *firms* and *individuals* who do not carry out *relevant business* and who are not in the regulated sector need to take account of their differing obligations. This guidance assumes that most *firms* will find it easier, and possibly more effective, to apply the requirements to all of their services and has therefore been drawn up on that basis. That is, however, a decision for each *firm* to take.
- 2.9 Definitions and abbreviations are provided in section 28 below.

### **3 THE LEGISLATION**

#### **3.1 Introduction**

Two significant pieces of anti *Money Laundering* legislation will take effect in 2003. These are *the Act* and *the 2003 Regulations*. The interaction of the two and the existing *TA 2000* brings dramatic changes for *firms* and *individuals*.

#### **3.2 The Act**

*The Act* re-defines *Money Laundering* and the money laundering offences, creates new mechanisms for investigating and recovering the proceeds of crime, and revises and consolidates the requirement on *firms* and *individuals* to report knowledge, suspicion or reasonable grounds to suspect *Money Laundering*.

#### **3.3 The 2003 Regulations**

3.3.1 Whilst *the 2003 Regulations* replace and significantly expand the scope and coverage of the Money Laundering Regulations 1993 (*the 1993 Regulations*), please note that the failure to report offences introduced by *the Act* have applied to *firms* and *individuals* conducting business within the scope of the 1993 Regulations, since 24 February 2003.

3.3.2 *The 2003 Regulations* will apply to *relevant business*, which extends the previous definition of *relevant financial business* to include, inter alia:

- “the provision of *accountancy services*”;
- “a person who acts as an insolvency practitioner”;
- “a person appointed to give advice about the tax affairs of another person”; and
- “the provision .... of services in relation to the formation of a company, or the formation, operation and management of a trust”.

3.3.3 The key requirements imposed on *firms* by *the 2003 Regulations* include the requirement to establish procedures to confirm the identity of new *clients*, to appoint a Money Laundering Reporting Officer (*MLRO*) to whom principals and employees must make *Money Laundering reports*, to establish systems and procedures to forestall and prevent *Money Laundering*, and to provide relevant *individuals* with training on *Money Laundering* and awareness of the *firm's* procedures in relation to *Money Laundering*. These requirements are set out more fully in section 14.2 below.

#### **3.4 The TA 2000**

3.4.1 The third key component of *Money Laundering* legislation, is the *TA 2000*, which relates to the proceeds of terrorism and terrorist financing. The relevant offences under *the TA 2000* and the Terrorism (United Nations Measures) Order 2001 are summarised in Appendix Two.

3.4.2 The interaction of *the Act*, *the TA 2000* and *the 2003 Regulations* means that, in general, *firms* and *individuals* will now be required to make a *report* where there are reasonable grounds to know, believe or suspect *Money Laundering* whenever such grounds come to the *firm* or *individual* in the course of the *firm's* business. Further detail is provided in Appendix Two.

## 4 MONEY LAUNDERING

4.1 *Money Laundering* is the term used for a number of offences involving the proceeds of crime or terrorist funds. It now includes possessing, or in any way dealing with, or concealing, the proceeds of any crime. For the purposes of this guidance, it also involves similar activities in relation to terrorist funds, which include funds which are likely to be used for terrorism, as well as the proceeds of terrorism.

4.2 Someone is engaged in *Money Laundering* under *the Act* if they:

- conceal, disguise, convert, transfer or remove (from the United Kingdom) criminal property;
- enter into or become concerned in an arrangement which they know or suspect facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person; or
- acquire, use or have possession of criminal property.

4.3 Property is Criminal Property if it:

- constitutes a person's benefit in whole or in part (including pecuniary and proprietary benefit) from criminal conduct; or
- represents such a benefit directly or indirectly, in whole or in part; and
- the alleged offender knows or suspects that it constitutes or represents such a benefit.

Criminal Property is very widely defined, and further definitions are contained in section 340 of *the Act*.

4.4 Criminal Conduct is conduct which constitutes an offence in any part of the United Kingdom or would constitute an offence in any part of the United Kingdom if it occurred there.

4.5 For the avoidance of doubt Criminal Property includes (but is by no means limited to):

- the proceeds of tax evasion
- a benefit obtained through bribery and corruption (including both the receipt of a bribe and the profits earned from a contract obtained through bribery or the promise of a bribe)
- benefits obtained through the operation of a cartel
- benefits (in the form of saved costs) arising from a failure to comply with a regulatory requirement, where that failure is a criminal offence.

4.6 Please note that there are thousands of criminal offences in the United Kingdom which, if committed, are likely to result in a person benefiting from an offence and thereby having Criminal Property.

## 5 OFFENCES

5.1 The main *Money Laundering* offences are set out in sections 327 to 329 of *the Act*. Further offences relating to the requirements to *report Money Laundering*, and tipping-off, are set out in sections 330 to 333. Additional offences are contained in sections 336 and 342 of *the Act* and in *the TA 2000* and related regulations. More detailed information on these offences is contained in Appendix Two.

5.2 The key point to note is that *the Act* introduces an 'all crime' reporting regime. That is, *Money Laundering* offences can relate to the proceeds of any criminal activity. This effectively means that *MLROs* will need to report to the National Criminal Intelligence Service (*NCIS*) when they have suspicion or reasonable grounds to know or suspect that a criminal offence, which gives rise to criminal proceeds, has been committed, regardless of whether that offence has been committed by a *client* or by a third party. The *report* must be made as soon as practicable. The breadth of the definition of *Money Laundering* is demonstrated by the fact that it includes the possession of the proceeds of an offender's own crime. Some examples include, cost savings resulting from breaches of health and safety regulations, property even of minimal value acquired by theft, cartel offences under the Enterprise Act, and tax evasion (both of direct and indirect taxes).

- 5.3 In addition to the offences under *the Act*, all persons, *individuals* and *firms* alike, already have an obligation to *report* belief or suspicion of the proceeds from, or finance likely to be used for, terrorism, or its laundering, based on information which came to them in the course of their business or employment. This is required by *the TA 2000* which is applicable throughout the United Kingdom whether or not persons are involved in regulated or *relevant business*. Where *individuals* are involved in business in the regulated sector, the reporting threshold is lowered to include an obligation to make a *report* where there are reasonable grounds for them to know or suspect that the relevant offence under *the TA 2000* has been committed. *Reports* in relation terrorism may be made using the *NCIS* disclosure report in the same way as for *reports* under *the Act*.

## 6 KNOWLEDGE AND SUSPICION

- 6.1 Generally speaking, knowledge is likely to include:

- actual knowledge
- shutting one's mind to the obvious
- deliberately refraining from making inquiries, the results of which one might not care to have
- knowledge of circumstances which would indicate the facts to an honest and reasonable person
- knowledge of circumstances which would put an honest and reasonable person on inquiry, but failing to make reasonable inquiries, which such a person would have made.

- 6.2 Suspicion is not defined in existing legislation. Case law and other sources indicate that suspicion is more than speculation but it falls short of proof or knowledge. Suspicion is personal and subjective but will generally be built on some objective foundation and so there should be some degree of consistency in how a *firm's MLRO* treats possible causes of suspicion.

- 6.3 *Firms* should also be alert to the fact that an objective or negligence test applies to the offence of failure to report in the regulated sector under section 330 of *the Act* and under *the TA 2000*. That is, *firms*, and *individuals*, would commit an offence even if they did not know or suspect that a *Money Laundering* offence was being committed, if they had reasonable grounds for knowing or suspecting that it was. In other words, if another reasonable person in the same position would have been suspicious and made a *report*, a person who does not make a *report* may have committed an offence. Incompetence or negligence is no excuse for a failure to *report*.

## 7 ABSENCE OF DE MINIMIS CONCESSIONS

*Money Laundering reports* need to be made irrespective of the quantum of the benefits derived from, or the seriousness of the offence. This is necessary because there are no de-minimis concessions contained in *the Act*, *the TA 2000* or *the 2003 Regulations*.

## 8 CLIENT CONFIDENTIALITY

The making of a *report* takes precedence over *client* confidentiality considerations. *The Act* provides protection for any breach of any duty under the laws of the constituent parts of the United Kingdom to keep confidential the information which gives rise to the knowledge, suspicion, or reasonable grounds to suspect *Money Laundering*. These provisions apply to those inside or outside the regulated financial sector, and include *reports* that are made voluntarily in addition to *reports* made in order to fulfil reporting obligations.

The *MLRO* should disclose all information that is relevant to the suspicion. There may well be many details that are not relevant that should not be disclosed.

Similar protection is provided under *the TA 2000*.

## 9 TIPPING OFF

- 9.1 Everyone needs to be careful to ensure that they do not tip-off a money launderer, as this will constitute an offence under *the Act*. There are also similar offences under *the TA 2000*. The offence can be committed when there is knowledge or suspicion that a *report* has been made, or, for terrorism related offences, also that a report will be made. This includes internal *reports*. If any disclosure is made which is likely to prejudice any investigation by the authorities, an offence may be committed. *Firms* should exercise caution when disseminating knowledge that a *Money Laundering* suspicion has arisen, and that a *report* has been made. More detailed guidance on the offence of tipping-off is contained in Appendix Three.
- 9.2 It must be noted that, whilst tipping off requires a person to have knowledge or suspicion that a *report* has been or will be made, a further offence of prejudicing certain investigations is included in Part 8 of *the Act*. Under this provision, it is an offence to make any disclosure which may prejudice an investigation of which a person has knowledge or suspicion, or to falsify, conceal, destroy, etc documents relevant to such investigations. A further offence of making a disclosure which is likely to prejudice a terrorist investigation applies under *the TA 2000* when a person knows or has reasonable cause to suspect that a terrorist investigation is being or will be conducted, regardless of whether a *report* has been made. More detailed information on these offences is given in Appendix Two.

## 10 TAX RELATED OFFENCES

- 10.1 Tax related offences are not in a special category. The proceeds or monetary advantage arising from tax offences are treated no differently from the proceeds of theft, drug trafficking or other criminal conduct. This includes tax offences committed abroad if the action would have been an offence were it to have taken place in the United Kingdom. There is no need for there to be any consequential effect on the United Kingdom's tax system.
- 10.2 Tax evasion offences will fall within the definition of *Money Laundering*. This includes both the under declaring of income and the over claiming of expenses. For direct tax, common criminal offences generally involve some criminal intent or dishonesty. However, for indirect tax section 167(3) Customs and Excise Management Act 1979 provides that a wide range of innocent/accidental errors are criminal offences and even though they are, in practice, generally dealt with under the civil penalty regime. That is not relevant for making *reports* under *the Act*.
- 10.3 The legislation impacts *firms* who are about to make, or who offer or provide services that could lead to, or are about to make, disclosures to the Inland Revenue or HM Customs and Excise, or who will be encouraging their *clients* or potential *clients* to make such disclosures. If there are reasonable grounds to know or suspect that potential disclosures to the Inland Revenue or to HM Customs & Excise relate to criminal conduct, then a *report* should be made to *NCIS* as well. *The Act* requires that *reports* to *NCIS* be made as soon as practicable.

## 11 PENALTIES

Offences may be tried in a Magistrates Court or in a Crown Court depending on severity. The range of penalties that each court may impose is as follows:

- Magistrates Court - up to the maximum fine (£5,000), up to six months imprisonment, or both
- Crown Court - a fine (no limit is set), up to fourteen years imprisonment, or both, for the main *Money Laundering* offences, and a fine (no limit is set), up to five years imprisonment, or both, for the failure to *report* offence and the tipping off offences.

## 12 LEGAL PRIVILEGE

Legal privilege can provide a defence to a charge of failing to report suspicions of *Money Laundering*. It is generally available to the legal profession when giving legal advice to a *client*. In most circumstances it will not be available to accountants. Neither is it available to the legal profession when information is given with the intention of furthering a criminal purpose.

*Firms* may consider that they are in possession of legally privileged information, for example, where they have been instructed by a lawyer in respect of legal proceedings. If a *report* under *the Act* would result in the disclosure of that information, the *firm* may wish to take legal advice when deciding whether there are any grounds preventing them from making that disclosure.

### 13 GEOGRAPHICAL COVERAGE & EXTRA-TERRITORIALITY

The legislation applies to *firms* operating in the United Kingdom, including to *firms* working from a United Kingdom office for a *client* who is based abroad. *Firms* with foreign offices, and particularly *firms* with *individuals* temporarily working abroad or on secondment, may wish to seek legal advice in relation to the need for procedures for those *individuals* to ensure that the *individuals* and the *firm* comply with the United Kingdom's legal requirements as well as the local legal requirements.

Irrespective of the strict legal position a United Kingdom *firm* may wish to consider putting in place a *firm* wide *Money Laundering* strategy to protect its global reputation and United Kingdom regulated business, particularly when the United Kingdom *firm* exercises control over the business performed outside the United Kingdom, or outsources United Kingdom business to offshore locations.

### 14 WHAT FIRMS NEED TO DO

14.1 This section should be read in conjunction with Transitional Arrangements (see section 24 below).

14.2 *Firms* need to:

- appoint an *MLRO* and implement internal reporting procedures
- train *individuals* to ensure that they are aware of the relevant legislation, know how to recognise and deal with potential *Money Laundering*, how to report suspicions to the *MLRO*, and how to identify *clients*
- establish internal procedures appropriate to forestall and prevent *Money Laundering*, and make relevant *individuals* aware of the procedures
- verify the identity of new *clients* and maintain evidence of identification
- maintain records of *client* identification, and any transactions undertaken for or with the *client*
- *report* suspicions of *Money Laundering* to *NCIS*.

### 15 THE MLRO

15.1 *The 2003 Regulations* require *firms* to appoint an *MLRO*. This should be one of the first matters to be addressed by *firms*. The person appointed as the *MLRO* should have a suitable level of seniority and experience. In many *firms* the principal, or one of the principals, would be a suitable person. There is no obligation on a sole practitioner to appoint an *MLRO*, where the sole practitioner does not employ any staff, or act in association with any other person.

15.2 *Individuals* should make internal *reports* of *Money Laundering* to the *MLRO*. The *MLRO* is then required to consider the internal *report* in the light of any relevant information which is available to the *firm*. If on consideration the *MLRO* concludes that he has knowledge or suspicion (or reasonable grounds for knowledge or suspicion) of *Money Laundering*, then the matter should be reported to *NCIS*. If in doubt, *MLROs* may wish to seek legal advice and, if a *report* is not made, they should document the reasons why not.

15.3 The *MLRO* can delegate these tasks to other *individuals*. However, *MLROs* cannot relieve themselves of their responsibility. The *MLRO* can be held to be personally liable if they receive *reports* of *Money Laundering* but fail to make a *report* to *NCIS*, where required to do so. As a result, the *MLRO* needs to ensure that they do not take a 'hands off' approach to their duties, and should seek to maintain control over the internal processes. Other offences that the *MLRO* could commit are set out in Appendix Two.

- 15.4 It will be necessary for *firms* to develop alternative procedures for situations where the *MLRO* is going to be unavailable for a period of time, since *reports* have to be made as soon as is reasonably practicable. It would generally not be acceptable to delay filing a *report* with *NCIS* in such a situation. An acceptable solution would be to nominate or appoint an appropriate deputy *MLRO* to consider the validity of internal *reports* and decide whether the matter should be reported to *NCIS*.
- 15.5 *Firms* are required to establish and maintain internal procedures and ensure that *individuals* are adequately trained. It could be appropriate for *firms* to assign the responsibility for fulfilling these requirements to the *MLRO*.

## 16 TRAINING

- 16.1 *Firms* are required to take appropriate steps to ensure that relevant *individuals* are provided with training on the provisions of *the 2003 Regulations*, the main *Money Laundering* offences, and on how to recognise and deal with situations that may involve *Money Laundering*. Training will ideally enable *firms* to establish a culture of complying with *Money Laundering* requirements. It is recommended that *firms* document the provision of training to enable them to demonstrate their compliance.
- 16.2 The level of training provided to *individuals* should be appropriate to their role and seniority within the *firm*. Apart from knowledge of the main *Money Laundering* offences, relevant *individuals* are not expected to have a detailed knowledge of what constitutes a criminal offence beyond that knowledge which could reasonably be expected of a person of their position and seniority. Instead the focus of the training should be on the basic obligations of *firms* under *the Act*, *the TA 2000* and *the 2003 Regulations*, what the *individual* is expected to do to ensure that the *firm* fulfils those obligations, and on what the *individual* is expected to do to fulfil their personal obligations. This will also entail making relevant *individuals* aware of the *firm's* procedures to forestall and prevent *Money Laundering*, including the *firm's* identification, record keeping and reporting procedures.
- 16.3 Training does not need to be performed in-house, although in many instances *firms* may prefer to conduct training by this route. Attendance by *individuals* at conferences, seminars and training courses run by external organisations, or participation in computer based training courses, may be taken to represent an effective method of fulfilling the training obligations imposed on *firms*. However, common sense judgement should be used to determine the appropriateness of any course, seminar or conference.

## 17 INTERNAL PROCEDURES

*Firms* will need to review their existing internal control procedures to ensure that they include measures appropriate to forestall and prevent *Money Laundering*. Where necessary, modifications should be made to existing procedures. It is difficult to provide guidance on particular procedures, as the services offered by various *firms* will result in differing risks and vulnerabilities. However, it is recommended that *firms* include consideration of:

- *client* acceptance procedures
- controls over *client* money, and transactions passing through the *client* account
- advice to *clients*, the nature of which could be of use to a money launderer
- the appropriateness of internal reporting lines, and
- the role of the *MLRO*.

## 18 IDENTIFICATION PROCEDURES

- 18.1 Subject to the transitional arrangements (see section 24 below), *firms* need to be able to establish that new *clients* are who they claim to be.
- 18.2 Chapter 4, Know Your Customer and Identification Evidence, of the *JMLSG* Guidance Notes, provides useful guidance. We recommend that *firms* follow this guidance where appropriate. Where circumstances fall outside the guidance, or where it is not appropriate to apply it, *firms* may wish to document the reason for departure

from it. It is not appropriate to use the Guidance Notes as a set of internal procedures without first tailoring them where appropriate to the *firm's* business, taking a risk-based approach. The guidance can be purchased from <http://www.jmlsg.org.uk> either in hard copy or on CD-ROM.

- 18.3 By way of example, basic identification procedures for individuals, private companies and trusts who have been met face-to-face are illustrated below. These may not be appropriate in all circumstances. A risk-based approach should be adopted. For example, more thorough procedures may be appropriate for offshore trusts in high-risk jurisdictions.
- 18.4 Identification procedures for an individual would typically include the *firm* seeing, and taking copies of, evidence establishing the *client's* full name and permanent address. An official document with a photograph is particularly valuable evidence of identity. This would most likely take the form of a new style driving licence or a passport, with a separate document being used to confirm the address, such as a recent utility bill.
- 18.5 For private companies, partnerships or sole traders, the *firm* needs to establish the identity of the entity itself, its business activity, and, where appropriate the identities (as illustrated above) of the owners, principal directors, partners and sole traders. Suitable evidence of identity for the entity may include a copy of the certificate of incorporation, evidence of the company's registered address, and a list of shareholders and directors.
- 18.6 For trusts the key identification requirements will generally involve ascertaining the nature and purpose of the trust, and the original source of funding as well as the identities of the trustees/controllers, principal settlors and beneficiaries.
- 18.7 In the case of insolvency work, it is possible that some lack of co-operation may be encountered in certain circumstances. Guidance for members carrying out insolvency work is currently being considered by the Association of Business Recovery Professionals (R3).
- 18.8 Chapter 4 of the *JMLSG* Guidance Notes contains more details on the identification requirements for the types of *clients* referred to above, along with details on the identification requirements for other types of *clients*. It also contains guidance on the identification requirements for *clients* operating through other forms of business structures. The *JMLSG* Guidance Notes are tailored for use by banking related organisations. However, Chapter 4 should be able to be adapted and applied to the business of accountants.
- 18.9 *Firms* might also wish to check the names of new *clients* against lists of known terrorists. Certain lists can be found at:
  - <http://www.bankofengland.co.uk/sanctions> (selecting the consolidated list)
  - <http://www.treas.gov/offices/enforcement/ofac/sdn/index.html> (selecting the SDN list)
  - <http://www.fbi.gov/mostwant/terrorists/fugitives.htm>

## 19 BANKING AND CLIENT MONEY

- 19.1 *Firms* are reminded of a related identification issue. The "Charter for the European Professional Associations in support of the fight against organised crime" was signed on 27 July 1999 on behalf of the *CCAB* bodies. The Charter requires *firms* to verify *client* identity when handling *client* money. This is of significance for *firms* that hold any *client* money in their ordinary or designated *client* money bank accounts. Those with *client* money bank accounts denominated in foreign currencies should take particular care. Please note that this is not a new requirement, and should already be followed by *firms*.
- 19.2 Special care needs to be taken when handling *clients'* money in order to avoid participating in a *transaction* involving *Money Laundering*. Handling a *client's* money may also give rise to constructive trust issues (see section 21 below).

## 20 REPORTING SUSPICIONS TO NCIS

- 20.1 *NCIS* co-ordinates the holding and dissemination of information amongst the law enforcement agencies. To assist in dealing with the volume of *reports* and inputting to their database, *NCIS* have designed a standard disclosure form. It is recommended that *MLROs* use this disclosure form when filing *reports* with *NCIS*. This should normally be sent in by post or by fax. *Firms* must state the reasonable grounds for the suspicion, and should be able to provide other required information that is relevant to the *report*, where it is already available, (or where obtaining it does not delay the *report* or raise tipping off concerns), including the subject's name, date of birth, address, bank account details, details of the relevant *transaction(s)* and names and addresses of any known associates connected with the suspicion. The form is tailored for use by financial institutions and *firms* may not have available all the information requested, such as bank account details or records of individual *transactions*. A copy of the disclosure form is attached as Appendix One. It is available online from the *NCIS* web-site (<http://www.ncis.co.uk>) along with a guide to completion. *Firms* may wish to consider applying to use Moneyweb, a secure on-line reporting system provided by *NCIS*.
- 20.2 *NCIS* will contact the *firm* if they have any queries about the disclosure.
- 20.3 No action which could assist the launderer or otherwise constitute *Money Laundering* by the *firm* or *individuals* must take place for a period of seven working days (starting the first working day after the *report* of that particular action is made to *NCIS*), unless *NCIS* gives consent for it to go ahead. This could mean that particular work for a *client* has to stop until consent is given (although see also section 23.2 below – Cessation of Work). Failure to observe this requirement places *MLROs*, *individuals* and *firms* at risk of committing offences under sections 327 to 329 and 336 of *the Act*. It is also an offence for the *MLRO* to consent to any such action after an internal *report* has been made to him and before the seven day period has expired, in the absence of consent by *NCIS*. *NCIS* interpret the consent provisions narrowly. For example, the payment of suspect funds into and out of the *firm's client* account could be considered as separate *transactions*. The lapse of seven days following a *report* of a payment into the account may not count towards the consent period for the payment out of the account, e.g., by way of repayment of the funds. If the *client* requests repayment, a further *report* may have to be made. If this could result in a delay, it may give rise to tipping off issues. Therefore, when time is particularly pressing, the *firm* should mark this on the disclosure form, fax it to *NCIS* (0207 238 8286), and follow up with a phone call to the Duty Desk (tel: 0207 238 8262/8607).
- 20.4 If no response is received from *NCIS* within the seven working days, *NCIS* are deemed to have provided consent to the *transaction* in the report, and the *firm* is entitled to proceed with that *transaction*. Consent is not required when the *firm* has made a *report* but has no involvement in the suspected *Money Laundering* and is not in any other way assisting it. For example, if the *report* concerns a matter that had been observed in a *client's* business when providing unconnected services. *Firms* are referred to Appendix Two, where the offences under Sections 327 to 329 of *the Act* are set out more fully.
- 20.5 Where *NCIS* refuses to issue its consent, and provides notice of its refusal, there is a further moratorium period of 31 calendar days starting on the day that the *firm* receives the refusal notice from *NCIS*. During the moratorium period the *MLRO* cannot consent to, and the *firm* and *individuals* cannot proceed with, the *transaction* that has been reported. At the expiry of the moratorium period *NCIS* is deemed to have consented to the *transaction* in the *report* and the *firm* is then entitled to proceed with that *transaction*.

## 21 CONSTRUCTIVE TRUSTS

- 21.1 A conflict can sometimes arise between the *Money Laundering* legislation and civil law. A *firm* may suspect that certain assets are the proceeds of crime and make a *report* about them. In such circumstances, it is possible that the victim of the original crime may be the true owner of the assets and have a civil claim to recover them. Such assets could be sums of money which have passed through the *firm's client* bank account. If the *firm* has notice that such assets are not rightfully owned by the *client* then there is a risk that the *firm* may be considered to be a constructive trustee for the true owner. If the *firm* has any indication that this may be the case, then the report to *NCIS* should make clear the possible constructive trustee position and a "tick box" is provided on the *NCIS* form for this purpose.

21.2 If the *firm* has made a *report* about funds in its client bank account and the *client* subsequently requests the funds to be moved or otherwise paid away, a further *report* should be made to *NCIS*. If *NCIS* refuse to consent to the transfer of funds, and they are therefore retained, the *firm* is unlikely to be prosecuted for “tipping off”, provided the reason given to the *client* for the refusal to complete the *transaction* is agreed with *NCIS*. However, the *firm* might incur civil liability to the *client*. Even if *NCIS* consents to the transfer of the funds and the *firm* follows *NCIS*’ advice, the *firm* may find itself liable as a constructive trustee of the true owner. However, if the *firm* fails to transfer the funds because it is concerned about the constructive trust issue it may become liable for tipping off. The position regarding constructive trusts is complex and it would be advisable to obtain legal advice where appropriate.

## 22 RISK-BASED APPROACH

22.1 In applying the requirements for *client* identification, and in relation to the level of scepticism that should be adopted, *firms* may apply a risk-based approach. Certain business activities are more likely to involve *Money Laundering* than others. However, it should be remembered that money launderers are not obvious. On the contrary, they rely on appearing plausible. They may be deceitful on occasions and tell their accountant only just enough. *Firms* should take care to subject all potential *Money Laundering* to a proper objective assessment.

22.2 *Firms* need to be aware in particular of the risks of:

- being used by a *client* or third party to launder money (e.g., through *client* accounts);
- being used to design arrangements to facilitate laundering money (e.g., trusts and complex offshore structures);
- the *client* laundering money; and
- third parties using the *client* to launder money.

## 23 WHAT FIRMS ARE NOT REQUIRED TO DO

Whilst the new legislation imposes new requirements on *firms*, it is worthwhile pointing out what *firms* do not need to do, or indeed, what they should avoid doing.

### 23.1 Investigating Suspicion

Suspicions are the result of a *firm* applying a healthy level of objectivity and professional experience to the information it comes across in the ordinary course of providing *accountancy services*. *Firms* are not required to carry out investigative work beyond what they would normally do as part of their professional relationship. Indeed, to do so might well involve committing the offence of tipping off. *MLROs* are required to consider information available to the *firm*, when deciding whether to make a *report* to *NCIS*. Further investigations into possible *Money Laundering* should be left to the law enforcement agencies.

### 23.2 Cessation of Work

There is no automatic need to cease working for a particular *client* where a *firm* has filed a *report*. In particular, no consent is required from *NCIS* to continue to carry on any function where a *report* has been made under section 330 of *the Act*, and the *firm* will not itself commit one of the main *Money Laundering* offences by continuing its work for the *client*.

The primary reason to cease work on a particular *transaction* would be that the *firm* could assist a money launderer by continuing with the work, in circumstances where the *firm* has not received consent from *NCIS*. Further guidance on this is given in Reporting Suspicions to *NCIS* (see section 20 above). Regardless of whether the *firm* ceases or continues to work, care must be taken to ensure that the potential money launderer is not tipped off.

### 23.3 Resignation

There is no obligation for a *firm* to continue to act for a *client* where it does not believe that it is in its commercial interests to do so. However, in circumstances where a *report* has been made, care must be taken to avoid tipping off the *client* or a third party. Further guidance on this matter is given in Appendix Three.

## 24 TRANSITIONAL ARRANGEMENTS

- 24.1 *Firms* which became subject to failure to *report* offence under *the Act* from 24 February 2003 (that is *firms* conducting business within the scope of *the 1993 Regulations*) generally do not need to report knowledge, suspicion, or reasonable grounds to suspect, *Money Laundering* if the information that gave rise to that knowledge or suspicion came to the *firm* or the *individual's* attention before that date. It is expected that a similar transitional provision will be included in any order to implement *the 2003 Regulations* and any amendment to Schedule 9 of *the Act*. This will mean that *firms* not currently within the regulated sector will only need to *report* knowledge or suspicions of *Money Laundering* if the information that gave rise to that knowledge or suspicion came to the attention of the *firm* or *individuals* after the date on which *the 2003 Regulations* come into effect (or if a *report* is necessary because the *firm* or the *individual* would commit one of the main *Money Laundering* offences). It is anticipated that this will occur three months after the date on which *the 2003 Regulations* are tabled in Parliament. Even where there is no obligation to *report*, the information which gave rise to a suspicion will still be useful when evaluating whether any new information gives rise to a need to make a *report*.
- 24.2 Despite the transitional provision outlined above, *firms* should be aware that they may still be under an obligation to make a report under *the TA 2000*, or under the legislation which preceded *the Act*, including *the 1993 Regulations* and the Drug Trafficking Act 1994.
- 24.3 *MLRO's* already appointed by *firms* on or before 24 February 2003 have a personal obligation, under section 332 of *the Act*, to *report* any knowledge or suspicion of *Money Laundering* which they have as a result of an internal *report*, even if they, and the person reporting to them, and/or their firm, were not within the scope of *the 1993 Regulations*.
- 24.4 Unless specified below, *firms* will not need to implement and maintain identification procedures for *clients* until the date on which *the 2003 Regulations* come into effect. From that date, *firms* are obliged to confirm the identity of new *clients* for *relevant business*, but not existing *clients* for *relevant business* with whom there is already a *business relationship*.
- 24.5 *Firms* which are authorised under the *FSMA 2000*, or are otherwise bound by *the 1993 Regulations*, have to maintain identification procedures under *the 2003 Regulations* except in relation to *clients* with whom a *business relationship* was formed before 1 April 1994 (reg 30(1)). That is the date the outgoing 1993 *Regulations* took effect. *Firms* which are authorised under *FSMA 2000* and authorised by the *FSA* need to follow the *FSA's* requirements as well.
- 24.6 Whilst mindful of these commencement dates, *firms* are advised to determine for themselves whether to maintain identification procedures for existing *clients*, particularly where the perceived risk inherent in a *client's* business, structure or location is considered to be high.

## 25 MONEY LAUNDERING LEGISLATION OUTSIDE THE UK

*Firms* are under no obligation under United Kingdom legislation to acquaint themselves with the *Money Laundering* legislation in other countries. However, if they visit other countries to provide services to United Kingdom or foreign *clients*, or have branches abroad, it would be wise to do so, in order to avoid committing any offences in those countries.

*Firms* should be aware that some countries, for example the United States, have legislation with extra-territorial affect. The most significant effect would be on *firms* with *clients* dealing in United States dollars.

## 26 MEMBERS IN BUSINESS

- 26.1 This guidance is written principally for *firms* and *individuals* in *firms*. Members employed by non-accounting entities will be subject to *the Act* and *the 2003 Regulations* where they are employed by a non-accounting entity that falls within the scope of *the Act* and *the 2003 Regulations* (see section 26.4 below for more details). These members should apply the guidance provided by their employers, guidance issued by the relevant regulator or trade association or, in the absence of such guidance, the aspects of this guidance that relate to the obligations on *individuals*.
- 26.2 Other members employed by non-accounting entities will generally not be subject to the failure to report offence imposed by section 330 of *the Act* nor *the 2003 Regulations* unless they apply to their employer's business. However, they should be aware that they could still commit offences under *the Act*. In particular, they could commit one of the primary *Money Laundering* offences (offences under sections 327-329 of *the Act*), or the offence of tipping off (section 333), or the offence of prejudicing an investigation (section 342). Therefore, they should at least familiarise themselves with the areas of this guidance that describe those offences.
- 26.3 All accountants remain subject to *the TA 2000* which is applicable throughout the United Kingdom, regardless of the nature of the business of their employer. It requires them to report possession of, and other activities relating to, terrorist funds, which include funds which are likely to be used for terrorist purposes as well as the proceeds of terrorism.
- 26.4 Apart from what might be summarised as banking, investment business (and other *FSMA 2000* regulated activities) and accountancy, the scope of *the Act* and *the 2003 Regulations* extends to include:
- money service operators
  - estate agency work
  - the business of operating a casino
  - insolvency practitioners
  - tax services
  - the business of providing legal services
  - company formation
  - trust formation, operation or management
  - the business of dealing in goods which involves accepting payments in cash of 15,000 Euro or more ("high value dealers"). This includes linked payments where the total is 15,000 Euro or more.
  - participation in securities issues and the provision of services related to such issues, advice to undertakings on capital structure, industrial strategy and related questions and advice, and services relating to mergers and the purchase of undertakings.
- 26.5 Money service operators and high value dealers are regulated by HM Customs and Excise as set out in Part III of *the 2003 Regulations*.

## 27 GUIDANCE

### 27.1 Status of Guidance

Both *the Act* (section 330(8)) and *the 2003 Regulations* (Regulation 3(3)) require the Courts to take into account guidance that has been approved by the Treasury when considering whether *individuals* or *firms* have complied with *the 2003 Regulations* or committed the failure to *report* offence. This guidance has not been so approved.

### 27.2 JMLSG Guidance

The leading guidance for the financial sector is Prevention of Money Laundering, Guidance Notes for the UK Financial Sector. This is published by the Joint Money Laundering Steering Group, Pinners Hall, 105-108 Old Broad Street, London EC2N 1EX.

The most recent version (December 2001) of the *JMLSG* Guidance Notes has been approved by the Treasury, and therefore the Courts are required to take it into account when considering whether *firms* within its scope have committed the failure to *report* offence. The *JMLSG* Guidance Notes are in the process of being updated to take account of both *the Act* and *the 2003 Regulations*. Treasury approval will be sought for the updated Guidance Notes.

The *JMLSG* Guidance Notes are written for the financial sector which is authorised by the *FSA*. Not unnaturally, much of the terminology and references reflect this. The *CCAB* bodies are in discussions concerning becoming a member association of the *JMLSG* and being bound into this guidance when a section has been tailored specifically for accountants. In the meantime, *firms* may find that some of the guidance is not directly appropriate to their business, though other elements of the guidance may be useful.

However, Chapter 4, Know Your Customer and Identification Evidence, is particularly comprehensive and it is recommended that it be followed where appropriate (see section 18.2 above). For those who can come to terms with the language and references, the following chapters and appendices are particularly relevant:

Chapter 2 What The UK Law, Regulations And Financial Sector Rules Require

Chapter 5 Recognising and Reporting Suspicious Activity

Chapter 7 Record Keeping

Appendix C Existing UK law

### 27.3 Useful Web-sites

When seeking further information in relation to *Money Laundering*, a list of useful web-sites would include (but is by no means limited to):

Association of Chartered Certified Accountants: <http://www.accaglobal.com>

Institute of Chartered Accountants in England and Wales: <http://www.icaew.co.uk>

Institute of Chartered Accountants in Ireland: <http://www.icaei.ie>

Institute of Chartered Accountants of Scotland: <http://www.icas.org.uk>

Chartered Institute of Management Accountants: <http://www.cimaglobal.com>

Chartered Institute of Public Finance and Accountancy: <http://www.cipfa.org.uk>

National Criminal Intelligence Service: <http://www.ncis.gov.uk>

NCIS disclosure template can be downloaded from: <http://www.ncis.gov.uk/disclosure.asp>

Her Majesty's Stationery Office: <http://www.hmsso.gov.uk>

Joint Money Laundering Steering Group: <http://www.jmlsg.org.uk>

Auditing Practices Board: <http://www.accountancyfoundation.com>

Financial Action Task Force: <http://www.fatf-gafi.org>

Bank of England information on terrorist Organisations: <http://www.bankofengland.co.uk/sanctions>

Treasury listing of known terrorists: <http://www.treas.gov/offices/enforcement/ofac/sdn/index.html>

US Government listing: <http://www.fbi.gov/mostwanted/terrorists/fugitives.htm>

## 28 DEFINITIONS AND ABBREVIATIONS

<i>(the) Act</i>	The Proceeds of Crime Act 2002
<i>(the) 1993 Regulations</i>	The Money Laundering Regulations 2003
<i>(the) 2003 Regulations</i>	The Money Laundering Regulations 2003
<i>Accountancy services</i>	Any service provided to a third party by way of business, which meets all of the following criteria: (a) the form and substance of the relationship between the service provider and the recipient are that of professional advisor/client, rather than employee/employer; (b) the service pertains to the recording, review or reporting of financial information for the service recipient; and (c) the service does not relate solely to the provision and/or installation of software for the production of financial records (this definition does not have the force of law - see section 2.2 above)
<i>Applicant for business</i>	A person seeking to form a <i>business relationship</i> , or carry out a <i>one-off transaction</i> , with a <i>firm</i> acting in the course of relevant business carried on by the <i>firm</i> in the UK. Referred to as a "client" in this guidance.
<i>Business relationship</i>	Any arrangement for the carrying out of <i>transactions</i> on a regular basis where the value of those <i>transactions</i> , or the total amount of any payments to be made by any person to any other in the course of the arrangement is not known at the outset. The agreement of terms of engagement with a <i>client</i> would be indicative of the start of a business relationship.
<i>CCAB</i>	Consultative Committee of Accountancy Bodies
<i>Client(s)</i>	See <i>Applicant for Business</i>
<i>Firms</i>	Firms of accountants including sole practitioners, partnerships, corporate practices and limited liability partnerships
<i>FSA</i>	Financial Services Authority
<i>FSMA 2000</i>	Financial Services and Markets Act 2000
<i>Individuals</i>	Includes the partners, directors, subcontractors, consultants and staff of a firm of accountants
<i>JMLSG</i>	Joint Money Laundering Steering Group
<i>Money Laundering</i>	For the purposes of this guidance, money laundering  Is defined to include those offences relating to terrorist finance, which require to be reported under the <i>TA 2000</i> , as well as the principal money laundering offences as defined in <i>the Act</i> . These offences are outlined in Appendix Two.
<i>MLRO</i>	Money Laundering Reporting Officer
<i>NCIS</i>	National Criminal Intelligence Service
<i>One-off transaction</i>	Any transaction other than one carried on in the course of an existing <i>business relationship</i>
<i>Relevant business</i>	Includes the provision of <i>accountancy services</i> by <i>firms</i> . See sections 3.3.2 and 26.4 for more details on the scope of this definition
<i>Relevant financial business</i>	A phrase used in The Money Laundering Regulations 1993 to define their scope as including, amongst other things, regulated activities as defined by the FSMA 2000.
<i>Report</i>	A report made by an <i>individual</i> who knows or suspects that <i>Money Laundering</i> is taking place, or has reasonable grounds for knowing or suspecting that it is. The report may involve a particular activity or <i>transaction</i> , and may be external (generally from the <i>MLRO</i> to <i>NCIS</i> ) or internal (generally from an <i>individual</i> to the <i>MLRO</i> ).
<i>TA 2000</i>	Terrorism Act 2000 (as amended by the Anti-Terrorism Crime and Security Act 2001)
<i>Transaction(s)</i>	<i>JMLSG</i> and <i>FSA</i> guidance is that this includes the provision of advice. This guidance follows that approach.

## APPENDIX I: NCIS DISCLOSURE FORM AND GUIDANCE NOTES

NCIS has produced a standard disclosure form which may be used by *firms* when filing *reports* with NCIS. The standard disclosure form, complete with drop down menus, and a guide to completing the standard disclosure form, can be accessed from NCIS's website

<http://www.ncis.gov.uk/disclosure.asp>

It is recommended that *firms* use the standard disclosure form when filing *reports* with NCIS.

## APPENDIX II: CRIMINAL OFFENCES UNDER THE ANTI-MONEY LAUNDERING LEGISLATION

### OFFENCES UNDER THE PROCEEDS OF CRIME ACT 2002

#### Money Laundering Offences

The following are Money Laundering offences under the specified sections of *the Act*:

- s327 - "concealing" criminal property (including concealing or disguising its nature, source, location, disposition, movement, ownership or rights attaching; converting, transferring or removing from any part of the UK)
- s328 - "arranging" (entering into or becoming concerned in an arrangement which the *firm* or an *individual* knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person)
- s329 - acquiring, using or possessing criminal property.

Under section 340(11), *Money Laundering* includes not only an act which constitutes an offence under sections 327, s328, or s329, but also:

- an attempt or conspiracy or incitement to commit such an offence;
- aiding, abetting, counselling or procuring the commission of such an offence; or
- an act which would constitute any of these offences if done in the UK.

The offences under sections 327, 328 and 329 are wider than they may initially appear, because of the width of the definition of criminal property (see sections 4.3 and 4.5 above).

Defences to the offences under sections 327, 328 and 329 include:

- a *report* was made to NCIS or the *MLRO* in respect of the act (ie, the concealing, arranging, acquiring etc.) and consent was received from NCIS or the *MLRO*, before the act took place
- a *report* was made to NCIS or the *MLRO* after the act, where there was a good reason for the failure to make the *report* before the act took place, and was made on the reporter's own initiative and as soon as practical
- it was the intention to make a *report* to NCIS or the *MLRO* but there was a reasonable excuse for not having done so.

For section 329, it is also a defence if the property is acquired or used for adequate consideration, so long as it is not known or suspected that the goods or services provided may help another person in carrying out criminal conduct.

#### Failure to Report Offences

Other offences under *the Act* include:

- s330 - failure by an *individual* in the regulated sector to inform NCIS or the *firm's MLRO*, as soon as practicable, of knowledge or suspicion (or reasonable grounds for knowing or suspecting) that another person is engaged in Money Laundering. For this purpose, money laundering is as defined in section 340(11) of *the Act*, and includes an attempt to launder money and aiding and abetting, as well as the offences in sections 327 to 329.

Defences include that there was a reasonable excuse for not having made a report to the *MLRO* or *NCIS*; or that the person does not know or suspect *Money Laundering* and their employer has not provided them with appropriate training.

The Court is obliged to take into account whether a person followed relevant guidance issued by a trade or professional body and approved by the Treasury, in deciding whether this offence was committed.

- s331 - failure by *MLROs* in the regulated sector to make the required *report* to *NCIS* as soon as practicable if an internal *report* leads them to know or suspect, or gives them reasonable grounds to know or suspect, that a person is engaged in *Money Laundering*.

It is a defence that there was a reasonable excuse for not having made a *report*. The Courts are obliged to take into account whether the person followed relevant guidance in deciding whether the offence was committed.

Section 332 creates a similar offence for *MLROs* who are not in the regulated sector. The key difference is that such *MLROs* must have knowledge or suspicion to commit the offence (reasonable grounds is not enough) and the Court is not obliged to take account of relevant guidance.

*Firms* should obtain legal advice before relying upon the reasonable excuse defences to the offences in section 327-332. Courts have defined reasonable excuse narrowly in other contexts. Each case will turn on its own facts. Circumstances that give rise to a reasonable excuse are likely to encompass the fear of physical violence or other menaces which make it unreasonable for the potential reporter either to disclose their suspicions or to refuse to act for the *client*. The extent to which they extend beyond this is unclear.

### **Tipping Off and Other Offences**

- s333 - the offence of tipping-off occurs when the *MLRO*, or any *individual* makes a disclosure which is likely to prejudice any investigation which might be conducted following a *report*, if they know or suspect that such a *report* (including an internal one) has been made. It is a defence if the person did not know or suspect that the disclosure was likely to prejudice the investigation
- s342 - any *individual* who knows or suspects that an investigation *into Money Laundering* (or certain confiscation or civil recovery investigations) is being, or is about to be, conducted, makes a disclosure which is likely to prejudice the investigation or if they falsify, conceal, destroy or otherwise dispose of documents relevant to the investigation (or causes or allows this to take place)
- s336 - *MLROs* also commit an offence if they consent to a transaction which they know or suspect is *Money Laundering* under ss 327 to 329, where consent has not been received from *NCIS* (either express, or implied by the passing of the seven day notice period or the 31 day moratorium period).

### **OFFENCES UNDER THE TERRORISM ACT 2000 (as amended by the Anti-terrorism, Crime and Security Act 2001)**

#### **Money Laundering Offences**

There are a number of offences under *the TA 2000*, which trigger an obligation to make a *report*. For the purposes of this guidance, all of these offences (outlined below, and as defined in sections 15 to 18 of *the TA 2000*) are included within the definition of *Money Laundering*.

Someone is engaged in *Money Laundering* under section 18 of *the TA 2000* if they enter into or become concerned in an arrangement which facilitates (by concealment, removal from the jurisdiction, transfer to nominees, or in any other way) the retention or control of terrorist property. It is a defence if the person did not know and had no reasonable cause to suspect that the arrangement related to terrorist property.

Property is terrorist property if it is:

- likely to be used for the purposes of terrorism; or
- the proceeds (whether wholly or partly, directly or indirectly) of the commission of an act of terrorism, or of acts carried out for the purposes of terrorism.

Further offences under *the TA 2000* which trigger a reporting obligation are:

- s15 - terrorist fund-raising (receiving, providing or inviting another to provide money or other property, where a person intends, or has reasonable cause to suspect, that it may be used for the purposes of terrorism)
- s16 - use of money or other property for the purposes of terrorism, or, possession of money or other property where a person intends or has reasonable cause to suspect that it may be used for the purposes of terrorism
- s17 - funding arrangements (entering into or becoming concerned in an arrangement as a result of which money or other property is to be made available to another, when a person knows or has reasonable cause to suspect that it may be used for the purposes of terrorism).

Other terrorism offences which constitute *Money Laundering* for the purposes of this guidance include:

- making funds available (making funds or financial (or related) services available directly or indirectly to or for the benefit of a person who commits, attempts to commit, facilitates or participates in the commission of acts of terrorism, or for the benefit of a person controlled, owned, or acting on behalf of such a person). This offence is created by the Terrorism (United Nations Measures) Order 2001.

### **Failure to Report Offences**

It is an offence under section 19 of the *TA 2000* for any person who believes or suspects that another person has committed an offence under sections 15 to 18 to fail to make a report as soon as reasonably practicable, where the information on which his belief or suspicion is based comes to them in the course of their trade, profession, business or employment.

Section 21A (inserted by Schedule 2 of the Anti-terrorism Crime and Security Act 2001) extends this offence, for people carrying on business in the regulated sector, to include an objective test. That is to include those with knowledge or suspicion, and also those with reasonable grounds for knowing or suspecting. For this purpose, the “regulated sector” can be extended by the Treasury by Order, and is expected to be brought into line with *relevant business* as defined in *the 2003 Regulations*.

There is a defence, in relation to both these failure to report offences, of reasonable excuse. In relation to the section 21A (regulated sector) offence, the Courts are required to take into account relevant guidance, which has been approved by the Treasury.

It is also an offence under *the TA 2000* (section 38B) for a person to fail to make a disclosure as soon as reasonably practicable to a constable if they have information which they know or believe might be of material assistance:

- in preventing the commission by another person of an act of terrorism, or
- in securing the apprehension, prosecution, or conviction of a person for a terrorist offence.

It is a defence for a person to prove that he had a reasonable excuse for not making the disclosure.

### **Tipping Off Offences**

Section 39 of *the TA 2000* creates offences where:

- a person discloses anything which is likely to prejudice a terrorist investigation, or interferes with material (including falsifying, concealing, destroying or disposing of it or permitting someone else to do so) likely to be relevant to the investigation, where he knows or has reasonable cause to suspect that a constable is or is proposing to conduct a terrorist investigation

- a person knows or has reasonable cause to suspect that a disclosure to the police under *the TA 2000* has been made, and he makes a disclosure which is likely to prejudice any resultant investigation or interferes with material likely to be relevant to such an investigation.

It is a defence if a person did not know or have reasonable cause to suspect that the disclosure or interference was likely to affect a terrorist investigation, or that he had a reasonable excuse for the disclosure or interference.

### **OFFENCES UNDER THE MONEY LAUNDERING REGULATIONS 2003**

At the time of writing, the final version of *the 2003 Regulations* is not available. This summary of offences under *the 2003 Regulations* is based on the consultation draft published by the Treasury in November 2002.

- Regulation 3  
Persons who carry on *relevant business* in the United Kingdom must:
  - comply with the requirements of *the 2003 Regulations*, in respect of identification procedures, record keeping procedures and internal reporting procedures
  - establish other appropriate procedures to forestall and prevent *Money Laundering*; and
  - take appropriate measures, so that employees are made aware of the relevant law on *Money Laundering* and trained in how to recognise and deal with possible *Money Laundering*.

An offence is committed by a *firm* which does not comply with these requirements, or by a partner or officer of the *firm* where they consented to or connived at the contravention of these requirements or the contravention was attributable to any neglect on their part.

- Regulation 28  
The Treasury may direct any person who carries on *relevant business*:
  - not to enter into or proceed further with a *business relationship*; or
  - not to carry out or proceed further with a *transaction*

in relation to a person who is based or incorporated in a country (other than an EEA state) to which the Financial Action Task Force has decided to apply counter measures.

An offence is committed by persons who fail to comply with such a direction.

### **APPENDIX III: TIPPING OFF**

In order to commit the offence of tipping off under *the Act*, *firms* and *individuals* need to:

- know or suspect that a *report* has been made under *the Act* (this includes both internal *reports* and *reports* to *NCIS*); and
- know or suspect that their actions will prejudice an investigation which might be conducted following that *report*.

It is important to note that the offence of tipping off covers not only tipping off the suspect that a *report* has been made, but any other disclosure of information that might be prejudicial to an investigation, such as informing a third party who then warns the suspect, or making a public statement which is likely to hinder an investigation.

The offence of prejudicing an investigation set out in section 342 of *the Act* does not require knowledge or suspicion of a *report* having been made, simply that an investigation is underway or may begin, but relates to a restricted set of investigations.

Nothing prevents a *firm* from making normal commercial enquiries to learn more about a *transaction* or to determine whether a concern amounts to a suspicion. This cannot amount to tipping off if it is done before an internal *report* is made, and the *individual* has no knowledge or suspicion that a *report* has been filed with *NCIS*. Once a *report* has been made, *firms* and *individuals* should take care in making any further enquiries and should consider only doing so under the *MLRO*'s direction. In addition, caution is required where circumstances exist, such that the offence of prejudicing an investigation may be committed.

*Clients* and potential *clients* may seek to ask direct questions as to the intentions of *firms* and *individuals* as regards reporting to *NCIS*. Responses need to be considered in the light of the dangers of tipping off and prejudicing an investigation, and *firms* may wish to consider taking a standard position of refusing to comment or to respond in any way to all such enquiries, and make clear that this is a standard response.

It is unlikely to be regarded as tipping off if a *firm* places a notice in its reception area or includes a standard paragraph in every engagement letter to the effect that it is obliged to *report* any knowledge, suspicion or reasonable grounds to suspect *Money Laundering* to *NCIS*. Clearly, there are circumstances where tipping off could occur, for example where a *firm* sends such an engagement letter immediately after they have been informed of a potential crime.

Auditors making a report to those charged with governance, in accordance with Statement of Auditing Standard 610, issued by the Auditing Practices Board, will need to take into account the possibility of tipping off. Disclosure to directors or senior management would represent tipping off if, for example, the auditors suspected the management or Board of the *client* of being complicit in the suspected *Money Laundering* or of being likely to pass on information to others, which in turn could prejudice a *Money Laundering* investigation. Similar issues arise, when considering whether to discuss possible *Money Laundering* suspicions with *clients*' internal audit function or *MLRO*. It would be advisable for *firms* to record the reasons for their decisions in this area.

## **APPENDIX IV: REPORTING GUIDANCE**

[This appendix is reserved for such further guidance on reporting suspicion as may be approved by HM Treasury]