MONEY LAUNDERING GUIDANCE

FOR MEMBERS OF

National Federation of Property Professionals

Royal Institution of Chartered Surveyors

Association of Relocation Professionals

Association of Residential Managing Agents

November 2010

INTRODUCTION

This guidance has been co-authored by the National Federation of Property Professionals, Royal Institution of Chartered Surveyors, Association of Relocation Professionals, and the Association of Residential Managing Agents. It replaces previous anti money laundering guidance published by the co-authors. This guidance is intended to provide a general introduction to anti money laundering, counter financing of terrorism, bribery, and financial sanctions. The primary purpose is to help members develop their policies and procedures. This guidance must be read in conjunction with guidance issued by anti money laundering supervisors. Guidance cannot replace the need to seek legal advice as necessary.

It is very likely that this guidance will be taken into consideration by a prosecuting authority in their decision whether or not to prosecute a member of one of the co-authoring organisations for a criminal offence of money laundering, and by any court considering whether to convict a member of such an offence. It may also be taken into consideration by anti money laundering supervisors in relation to alleged breaches of the Money Laundering Regulations, and by disciplinary panels of the co-authoring organisations. However, to provide added certainty for members this guidance is currently being considered by the UK's Money Laundering Advisory Committee for formal approval. [1]

[1] For the purposes of section 330(8) and section 331(7) of POCA, and ML Regulation 45(8).

Structure of Guidance

Glossary

All acronyms are defined but in some instances readers may benefit from consulting the amended legislation directly.

Is the Glossary relevant to me?

The Glossary is relevant to all readers because it helps with the navigation and understanding of the guidance.

Part 1

Part 1 covers the Proceeds of Crime Act (2002), the Terrorism Act (2000), the Bribery Act (2010), and Financial Sanctions.

Part 1 includes answers to some Frequently Asked Questions.

Is Part 1 relevant to me?

The majority of the criminal offences arising from these pieces of legislation apply to all property professionals, and therefore all members of the co- authoring organisations must take Part 1 into consideration.

Part 2

Part 2 covers the Money Laundering Regulations 2007 which came into force on 15 December 2007, and which implemented the Third European Money Laundering Directive in the UK. The ML Regulations apply to the regulated sector including Estate Agents, Trust and Company Service Providers, High Value Dealers, Accountancy Service Providers, Financial Institutions, and Independent Legal Professionals, including independent legal professionals participating in the buying or selling of real property.

However, Part 2 is only intended as a summary and therefore readers who are in the regulated sector should also consult guidance issued by their anti money laundering supervisor. Information about supervisors is provided in Appendix 5.

Part 2 includes answers to some Frequently Asked Questions.

Is Part 2 relevant to me?

Members of the co –authoring organisations should establish whether or not their activities bring them into the regulated sector. However, Part 2 may also assist members whose business activities are outside the regulated sector but who may wish to comply with the Money Laundering Regulations as a matter of best practice.

Part 3

Part 3 is sector specific guidance for a diverse range of property disciplines. Part 3 is intended to complement the full guidance but cannot substitute it and therefore Part 3 should not be read in isolation.

Is Part 3 relevant to me?

In common with the rest of the guidance members are encouraged to read all sections of Part 3 widely whichever particular disciplines they or their firm undertakes and whether they are inside or outside of the regulated sector.

Appendix 1: Further Information

Appendix 2: Reporting inside the regulated sector

Appendix 3: Reporting outside the regulated sector

Appendix 4: Financial Sanctions

Appendix 5: Anti Money Laundering Supervision and Registration

Appendix 6: Money Laundering: The Confidentiality and Sensitivity of Suspicious Activity Reports (SARs) and the Identity of Those Who Make Them

Appendix 7: Test of HM Treasury Statement on Equivalence

GLOSSARY

AML: Anti Money Laundering.

AML Supervisors: OFT, FSA, and HMRC.

ARMA: Association of Residential Managing Agents.

ARP: Association of Relocation Professionals.

ASP: Accountancy Service Provider.

- An auditor is any person who is a statutory auditor within the meaning of Part 42 of the Companies Act 2006, when carrying out statutory audit work.
- An external accountant is any firm or sole practitioner who by way of business provides accountancy services to other persons.
- A tax adviser is any firm or sole practitioner who by way of business provides advice about tax affairs of another person.

Authorised Disclosures: Defined in section 338 of POCA including disclosures made to constables (including a SAR made to SOCA), customs officer, and Nominated Officers (MLROs).

Authorised Firm: Firms authorised and regulated by the Financial Services Authority under the Financial Services and Markets Act 2000.

Beneficial owner:

In the case of a body corporate a beneficial owner is any individual who:

- In the case of a body other than a company listed on a regulated market, ultimately owns or controls (whether through direct or indirect ownership or control, including through bearer shareholdings) more than 25% of the shares or voting rights in the body; or
- As respects a body corporate exercises control over the management of the body.

In the case of a partnership (other than a limited liability partnership) beneficial owner means any individual who:

- Ultimately is entitled to or controls(whether the entitlement or control is direct or indirect) more than 25% of the capital or profits of the partnership or more than 25% of the voting rights in the partnership; or

- Otherwise exercises control over the management of the partnership.

In the case of a trust 'beneficial owner' means-

- Any individual who is entitled to a specified interest in at least 25% of the capital of the trust property;
- As respects any trust other than one which is set up or operates entirely for the benefit of individuals falling within the definition above, the class of persons in whose main interest the trust is set up or operates;
- Any individual who has control over the trust.[2]

In the case of an estate of a deceased person in the course of administration, 'beneficial owner' means-

- In England and Wales and Northern Ireland, the executor, original or by representation, or administrator for the time being of a deceased person;
- In Scotland, the executor for the purposes of the Executors (Scotland) Act 1990.

Business relationship: A business, professional, or commercial relationship between a relevant person and a customer, which is expected by the relevant person, at the time contact is first established, to have an element of duration.

Cash: Notes, coins, and travellers cheques, in any currency.

CDD: Customer Due Diligence.

CFT: Countering Financing of Terrorism.

Client Account: Separate bank account which holds monies which do not belong to the property professionals. The funds belong to the customer or to counterparties.

Constable: Includes persons authorised by the Director General of SOCA.

Counterparty: The party to the transaction who has not instructed the property professional.

Credit Institution:

- As defined in Article 4(1)(a) of the banking consolidation directive; or

[2] More information about beneficial ownership and trusts is contained in Money Laundering Regulation 6.

A branch (within the meaning of Article 4(3) of that directive) located in an EEA state of an institution falling within sub-paragraph (a) (or an equivalent institution whose head office is located in a non-EEA state) wherever its head office is located when it accepts deposits or other repayable funds from the public or grants credits for its own account (within the meaning of the banking consolidation directive).

Currency: Notes and coins.

Customer: Although customer isn't defined in the MLR, the OFT's view is that this is the party who forms a contractual relationship with the property professional. Therefore references to 'customer' in this guidance have this meaning even though property professional may describe this party as their client.

EDD: Enhanced Due Diligence. A higher level of due diligence to reflect higher risk, including in relation to PEPs and persons not physically present for identification purposes.

Estate Agency: as defined in section 1 of the Estate Agency Act 1979:

Things done by any person in the course of business (including business in which he is employed) pursuant to instructions received from another person who wishes to dispose of or acquire an interest in land:

- For the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to acquire or, as the case may be, dispose of such an interest; and
- After such an introduction has been effected in the course of that business, for the purposes of securing the disposal or as the case may be, the acquisition of that interest.

NOTES

- The definition includes residential sales and buying agents. It also includes commercial agents and real property auctioneers.
- The definition excludes practising solicitors and their employees. However solicitors will need to register with the OFT if they have a separate business which provides estate agency services.
- The definition excludes estate agents based in the UK who deal exclusively with overseas property, although this exception is under review.
- Estate agents with companies registered abroad who deal with UK consumers may need to comply with the MLR and register with the OFT. The relevant test is where the estate agent carries on business and not where their company is registered. Whether the estate agent is carrying on business in the UK will

depend on the facts and their particular circumstances. If the estate agent has a presence in the UK (including agents acting on their behalf) and carry out significant business activity here, they are likely to be covered by the MLR. However, in some circumstances they may be regarded as carrying on business here even if the agent is not physically present in the UK and only does business with UK consumers through distance means of communication.

Other factors that may be taken into account when considering whether business is being carried on in the UK are:

- Whether advertising is directed at, or services/facilities offered to, prospective clients in the UK (for example, costs given in pounds sterling);
- Whether agreements are subject to UK law;
- Whether agreements are concluded in the UK;
- Whether services/facilities are provided in the UK, e.g. loans paid into UK bank accounts.
- Housing Associations can act as estate agents if they sell property on behalf of third parties who co-own properties with the Housing Association.
- House builders may also be estate agents if they help potential buyer's sell their current property by:

(i) Introducing the potential buyer to another Estate Agent; or

(ii) Introducing the potential buyer to a company who may wish to purchase the potential buyer's current property, e.g. a company in the house builders group.

- It is possible that lettings agents who get involved in the sale of leases for a premium may fall within the definition.

FIU: Financial Intelligence Unit which accepts SARs. The UK's FIU sits within SOCA.

FPO: Foreign Public Official. An individual who:

(i) Holds a legislative, administrative, or judicial position of any kind, whether appointed or elected, of a country or territory outside the UK (or any subdivision of such a country or territory);

(ii) Exercises a public function

- For or on behalf of a country or territory outside the UK; or
- For any public agency or public enterprise of that country or territory; or

- Is an official or agent or a public international organisation.

FSA: Financial Services Authority.

HMRC: Her Majesty's Revenue and Customs.

HMT: Her Majesty's Treasury.

HVDs: High Value Dealers. A HVD is any business prepared to accept high value payments for goods. A high value payment is a payment of at least 15,000 euro (or equivalent in any currency) in cash for goods, whether it be in a single transaction or several instalments.

Intermediary Mortgage Fraud: Dishonesty with a view to obtaining a gain or causing a loss in relation to mortgage lending by people who facilitate the relationship between customers and lenders.

JMLSG: Joint Money Laundering Steering Group.

Landlord: The owner of a property who grants a lease or tenancy, also known as the lessor.

Lettings Agent: Facilitates rental of property owned by a third party.

Managing Agent: Specialist in the management of the communal areas of blocks of long leasehold blocks of flats. The agent will be engaged by the landlord or the RMCo.

ML Regulation: Money Laundering Regulation. The reference will be to a specific regulation.

MLR: Money Laundering Regulations (2007).

MLRO: Money Laundering Reporting Officer. This is a common way to describe a 'Nominated Officer' who receives SARs made by others in their organisation, and who submits SARs to SOCA.[3]

NFOPP: National Federation of Property Professionals, comprising:

- National Association of Estate Agents;
- Association of Residential Letting Agents (including the Association of Professional Inventory Providers);
- Institute of Commercial and Business Agents; and
- National Association of Valuers and Auctioneers.

[3] Part 7 of POCA refers to Nominated Officer.

Occasional transaction: A transaction (carried out other than as part of a business relationship) amounting to 15,000 euro or more, whether the transaction is carried out in a simple operation or several operations which appear to be linked.

OFT: Office of Fair Trading.

PEP: A Politically Exposed Person is an individual who is or has been at any time in the preceding year, been entrusted with a prominent public function by a foreign country, Community institution, or international body. The definition of PEPs extends to cover immediate family members and known close associates.

Examples of PEPs include heads of state, head of government, ministers, members of parliaments, members of the supreme or constitutional courts or other high level judicial bodies, ambassadors and high ranking officers in the armed forces.

POCA: Proceeds of Crime Act 2002 (as amended).

Protected Disclosures: Defined in section 337 of POCA including disclosures made to constables (including a SAR made to SOCA), customs officer, and Nominated Officers (MLROs).

Regulated Sector: Defined by ML Regulation 3, including Estate Agents, Trust and Company Service Providers, High Value Dealers, Accountancy Service Providers, Financial Institutions, and Independent Legal Professionals, including independent legal professionals participating in the buying or selling of real property. Schedule 9 of POCA and TACT define regulated sector in the same way. Appendix 5 provides more information.

RMCo: Resident management companies who manage blocks of long leasehold flats.

RICS: Royal Institution of Chartered Surveyors.

SAR: Suspicious Activity Report which are protected and authorised disclosures for the purposes of POCA.

SDD: Simplified Due Diligence. SDD is sufficient if the property professional has reasonable grounds for believing that the customer, transaction, or product related to such a transaction, falls within ML Regulation 13. However CDD must be undertaken if the property professional in the regulated sector suspects money laundering or terrorist financing.

SOCA: Serious and Organised Crime Agency.

TACT: Terrorism Act (2000) (as amended).

Tenants: Parties who rent properties, also known as lessees.

TCSPs: Trust and company service providers.

A firm or sole practitioner who by way of business provides any of the following services to other persons-

- Forming companies or other legal persons;
- Acting, or arranging for another person to act-

(i) As a director or secretary of a company;

(ii) As a partner of a partnership; or

(iii) In a similar position in relation to other legal persons.

- Providing a registered office, business address, correspondence or administrative address for a company or any legal person or arrangement;
- Acting, or arranging for another person to act, as-

(i) A trustee of an express trust or similar legal arrangement; or

(ii) A nominee shareholder for a person other than a company who securities are listed on a regulated market, when providing such services.

UK: United Kingdom including England, Wales, Scotland, and Northern Ireland. The Channel Islands and Isle of Man are not part of the UK.

PART 1

LEGISLATION

PROCEEDS OF CRIME ACT (2002)

Definitions

1.1.1 An important first step in understanding POCA is understanding the breadth of the definitions used in the Act.

Criminal conduct

1.1.2 For both UK conduct and overseas conduct it is irrelevant when the conduct occurred.

(a) UK conduct

Criminal conduct is conduct which constitutes an offence in any part of the UK.

(b) Overseas conduct

If the person knows, or believes on reasonable grounds, that the activity which has been committed in a country or territory outside the UK is not unlawful under the criminal law then applying in the country or territory concerned, then it usually falls outside of the definition of criminal conduct and therefore outside of POCA, unless it would be punishable by imprisonment for a maximum term in excess of 12 months in any part of the UK if the activity had occurred in the UK.

1.1.3 However, the following remain outside of the scope of POCA:

- Offences under the Gaming Act 1968 (repealed);
- Offence sunder the Lotteries and Amusements Act 1976 (repealed);
- Offences under sections 23 or 25 of Financial Services and Markets Act.

Criminal property

1.1.4 Property which is, or represents, a person's benefit from criminal conduct where the alleged offender (money launderer) knows or suspects that it is such. Property is all property wherever situated and includes:

- Money;
- All forms of property, real or personal, heritable or moveable;
- Things in action and other tangible or incorporeal property.

NOTE:

1.1.5 Estate agents need to remember that criminal property isn't limited to currency, or to real or other property bought outright without the aid of mortgage. See FAQ 1.5.2.

The principal offences

1.1.6 All property professionals are at risk of committing these offences, although there are defences available:

(a) Section 327- Concealing, disguising, converting, transferring, and removing criminal property.

(b) Section 328 - Entering into an arrangement which you know or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

(c) Section 329 - Acquiring, using or taking possession of criminal property.

NOTE:

1.1.7 Property professionals may commit any of these offences by facilitating transactions, including by facilitating negotiations. A money laundering offence can be committed without actually handling the criminal property.

Penalty

1.1.8 Maximum 14 years custody and/or a fine.

Defences

1.1.9 It is a defence to all three principal offences if a authorised disclosure is made. A SAR is one type of authorised disclosure. If an authorised disclosure (SAR) is made before any money laundering takes place then appropriate consent is required before the 'prohibited act' takes place, See paragraph 1.1.5for information about SARS made after prohibited acts.

1.1.10 Who should apply for appropriate consent and who can grant it differs for property professionals who are inside or outside the regulated sector, see Appendices 2 and 3.

1.1.11 It is very important to seek consent as soon as knowledge or suspicion of money laundering is formed as this will prevent the transaction being delayed and minimise any risk of tipping off / prejudicing an investigation, see paragraphs 1.1.28 – 1.1.33 and 1.2.17 – 1.2.19.

1.1.12 There is a statutory timetable for appropriate consent:

(a) Notice Period

7 working days (excluding weekends and bank holidays) to either give or refuse appropriate consent for the prohibited act. The first day is the business day following the day when the SAR was submitted. If no response is received by the end of the Notice Period the prohibited act may continue.

(b)Moratorium Period

If consent is refused during the Notice Period the reporter must wait up to 31 days (including weekends and bank holidays) before undertaking the prohibited act. If no response by the end of the Moratorium Period the prohibited act may continue.

1.1.13 As appropriate consent is structured around a strict timetable employees are advised to keep a record of when they report to their MLRO, and MLROs are advised to keep a record of when they submit a SAR to SOCA, see Q18 of Part 1 for more information about how to make a SAR. SARs submitted electronically automatically generate an emailed receipt.

1.1.14 Although property professionals should seek appropriate consent it is important to remember that consent is not an absolute defence and therefore the provision of consent may not prevent a prosecution for money laundering if the system has been cynically misused. One of the reasons why appropriate consent may be refused is if there are concerns that the reporting party has made multiple reports about the same suspected person. In these circumstances the decision to keep acting for the suspected person may be brought into question. Details of how decisions are reached on appropriate consent is available from Home Office circular 029/2008, Proceeds of Crime Act 2002: obligations to report money laundering- the consent regime: Home Office Circular

1.1.15 Authorised disclosures, including SARs, can also be made after the money laundering has occurred if there is a good reason for his failure to make the disclosure before he did the act, and the disclosure is made on his own initiative and as soon as practicable for him to make it. It is uncertain what may constitute good reason.

1.1.16 There is also a defence if the person intended to make a disclosure but has a reasonable excuse for not doing so. This defence is untested in law, but breach of a contractual obligation may constitute a reasonable defence.

1.1.17 There is also an additional 'adequate consideration' defence for the Section 329 offence. This defence applies when consideration is paid for goods or services as part of a legitimate arms length transaction. The defence also applies to proper charges for services provided.

Failure to Report Offences

Section 330: **Failure to disclose: regulated sector**

1.1.18 A person commits this offence if he knows or suspects, or there were reasonable grounds for knowing or suspecting, as a result of business in the regulated sector, that another person is engaged in money laundering but he does not make a protected disclosure, such as a SAR.

1.1.19 There is a defence if a person accused of this offence has a reasonable excuse for not making a SAR, or the person did not know or suspect and not been provided with the training required by the MLR.

1.1.20 In deciding whether a person committed this offence a court must consider approved guidance, see Q6 of Part 1.

Section 331: Failure to disclose: nominated officers in the regulated sector

1.1.21 An MLRO in the regulated sector commits an offences if he knows or suspects, or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering (and this resulted from a disclosure made to them under section 330) but the MLRO does not make a protected disclosure, such as a SAR.

1.1.22 There is a defence if a person accused of this offence has a reasonable excuse for not making a SAR.

1.1.23 In deciding whether a person committed this offence a court must consider approved guidance.

Section 332: Failure to disclose: other nominated officers

1.1.24 An MLRO outside of the regulated sector commits an offence if he knows or suspects that another person is engaged in money laundering (as a result of an internal disclosure made to him by a colleague) but he does not make a protected disclosure, such as a SAR.

1.1.25 There is a defence if a person accused of this offence has a reasonable excuse for not making a SAR.

NOTE:

1.1.26 An MLRO outside of the regulated sector would be voluntarily appointed.

Penalty

1.1.27 Maximum of 5 years custody and/or a fine.

<u>Tipping Off/Prejudicing an investigation offences</u>

Section 333A: Tipping Off: regulated sector

1.1.28 A person in the regulated sector commits an offence if he reveals that a SAR has been made or reveals that a money laundering investigation is being contemplated or carried out. The offence relates to situations where the information came to the revealing person in the course of business in the regulated sector. If the information relates to a SAR then offence is not committed if the person does not know or suspect that revealing the information would be likely to prejudice such an investigation related to the SAR.

1.1.29 However there are a number of defences including not knowing or suspecting that revealing the information would be likely to prejudice an investigation. It is not an offence to disclose this information internally within the same firm.

Section 342: Offences of prejudicing an investigation

1.1.30 It is an offence to prejudice an investigation if a person knows or suspects that an investigation is, or is about to be conducted.

1.1.31 Those in the regulated sector can commit this offence if they reveal information likely to prejudice an investigation. Anybody can commit the offence of falsifying, concealing, or destroying documents relevant to investigations.

Penalty

1.1.32 Maximum 2 years custody and/or a fine.

NOTE:

1.1.33 The case of Jayesh Shah v HSBC Private Bank (UK) Limited [2010] EWCA Civ 31 has highlighted that in limited circumstances a court may be prepared to require authors of SARs to give evidence of the fact that they held a suspicion. It may be that by the time of any trial the dust may have settled sufficiently that tipping off issues are no longer relevant.

TERRORISM ACT (2000)

Definitions

1.2.1 An important first step in understanding the TACT is understanding the breadth of definitions which are used in the Act.

Terrorism

1.2.2 The use or threat of action where the use or threat is designed to influence the government or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious or ideological cause. This may involve:

- Serious violence against a person;
- Serious damage to property;
- Endangering a person's life, other than that of the person committing the action;
- Creating a serious risk to the health or safety of the public or a section of the public; or
- Intending to seriously interfere with or seriously disrupt an electronic system.

Terrorist property

1.2.3 Terrorist property is:

- Money or other property which is likely to be used for the purposes of terrorism (even if its original source is legal); or
- Proceeds of the commission of acts of terrorism.

Principal Offences

Section 15: Fundraising

1.2.4 It is an offence to be involved in fundraising if you have knowledge or reasonable cause to suspect that the money or other property raised may be used for terrorist purposes. You can commit the offence by:

- Inviting others to make contributions;
- Receiving contributions; or
- Making contributions towards terrorist funding, including making gifts and loans.

Section 16: Use and possession

1.2.5 It is an offence to use or possess money or other property for terrorist purposes, including when you have reasonable cause to suspect they may be used for these purposes.

Section 17: Arrangements

1.2.6 It is an offence to become involved in an arrangement which makes money or other property available to another if you know, or have reasonable cause to suspect it may be used for terrorist purposes.

Section 18: Money laundering

1.2.7 It is an offence to enter into or become concerned in an arrangement facilitating the retention or control of terrorist property by, or on behalf of, another person including, but not limited to the following ways, by:

- Concealment;
- Removal from the jurisdiction; or
- Transfer to nominees.

1.2.8 There is a defence to the section 18 offence if you did not know, and had no reasonable cause to suspect that the arrangement related to terrorist property.

Defences

Section 21: Cooperation with the police and arrangements with prior consent

1.2.9 A person does not commit an offence under sections 15 – 18 if he is acting with the express consent of a constable.

Disclosure after entering into arrangements

1.2.10 It is possible to make a disclosure if you are already involved in a transaction or arrangement involving terrorist financing so long as there is a reasonable excuse for failure to make a disclosure in advance. However reporting in advance is preferable.

Reasonable excuse for failure to disclose

1.2.11 There is also a defence if you intended to make a disclosure but have a reasonable excuse for failing to do so.

Penalty

1.2.12 Maximum14 years custody and/or a fine.

Failure to disclose offences

Section 19- Failure to disclose

1.2.13 If a person believes or suspects that another person has committed an offence under any of sections 15 to 18, and bases his belief or suspicion on information which comes to his attention in the course of a trade, profession, business or employment, the person commits an offence if he does not disclose to a constable as soon as is reasonably practicable:

- His belief or suspicion; and
- The information on which it is based

Section 21A – Failure to disclose: regulated sector

1.2.14 A person commits an offence if he knows or suspects, or has reasonable grounds for knowing or suspecting that another person has committed or attempted an offence under any of Sections 15 to 18 of TACT, and the information or other matter on which knowledge of suspicion is based or which gives reasonable grounds for such knowledge or suspicion, came in the course of business in the regulated sector.

Defences:

1.2.15 Section 19 and Section 21A have defences of reasonable excuse, or an internal report has been made in accordance with employer's procedures.

Penalty

1.2.16 Maximum5 years custody and/or fine.

Tipping Off Offences

Section 21D: Tipping off regulated sector.

1.2.17 It is an offence to reveal to a third person that a SAR has been made if revealing the information might prejudice any investigation that might be carried out as a result of the SAR. It is also an offence to reveal that an investigation into allegations relating to terrorist property offences is being contemplated or carried out if revealing the information is likely to prejudice that investigation.

1.2.18 However, it is not an offence if the disclosure is within the same firm.

Penalty

1.2.19 Maximum 2 years custody.

Bribery Act 2010

1.3.1 Bribery is related to money laundering, professional ethics, and good corporate governance. One of the best ways to avoid getting in trouble for bribery is to abide by the ethical rules which apply to your profession and/or your membership of a professional or trade body.

1.3.2 The Bribery Act will come into force in April 2011. The new offences cover the briber and the bribed, plus there is a specific offence of bribing a Foreign Public Office and an offence for corporates which fail to prevent bribery.

1.3.3 Bribes are defined widely as a financial or other advantage. A bribe can be of low or high value. Matters such as promotional expenses and hospitality must be analysed in the context of the Bribery Act, although transparency, proportionality, and the companies' adequate procedures, are likely to be taken into consideration by prosecuting authorities**.** See paragraph 1.3.10.

Section 1: Bribing another person

1.3.4 Where a person, or third party acting on their behalf, gives, promises or offers a bribe to another person to perform improperly a relevant function or

activity, or to reward a person for the improper performance of such a function or activity, or where the briber knows or believes that the acceptance of the bribe in itself constitutes the improper performance of a function or activity. It is irrelevant whether the person to whom the advantage is offered is the same person who it is intended will perform the function improperly.

Section 2: Being bribed

1.3.5 Where a person, or a third party acting on their behalf, requests, agrees to receive or accepts a bribe to perform a relevant function or activity improperly. It is irrelevant whether the recipient receives or accepts the advantage directly or through a third party, or whether it is for the potential recipients benefit, or for the benefit of a third party.

NOTE

1.3.6 A section 1 or 2 offence is committed if the expectation of the briber/ person bribed is for a function or activity to be performed in breach of good faith, impartially, or a position of trust. This will be judged according to UK reasonable standards even if the offence takes place overseas. Overseas customs will not be taken into consideration unless bribes are permitted by local written law.

Section 6: Bribery of a Foreign Public Official

1.3.7 Where a person, or a third party acting on their behalf, offers, promises or gives a bribe to an FPO in an attempt to influence them in their capacity as a FPO and obtain or retain a business advantage. It is irrelevant whether the influence intended or received is within the scope of the FPOs' actual authority. However, it is not bribery if FPO is permitted or required by law to be influenced by financial or other advantages (this excludes local custom or tolerance).

NOTE

1.3.8 Sections 1, 2 or 6 not only cover offences carried out in the UK but also overseas provided the accused person is a British national or ordinarily resident in the UK.

Section 7: Corporate offence of failure to prevent bribery

1.3.9 A UK commercial organisation can be found guilty of bribery where someone associated with the organisation is found to have bribed another person with the intention of obtaining or retaining business, or an advantage in the conduct of business.

1.3.10 However, there is a defence if the company can show that it had adequate procedures designed to prevent bribery The Secretary of State will be issuing guidance on adequate procedures which will be available from the web site for the Ministry of Justice: www.justice.gov.uk. Transparency International has also issued guidance on adequate procedures: www.transparency.org.uk

NOTE

1.3.11 This is a strict liability offence: intention or knowledge are not required.

An associated person is somebody performing services on the corporate's behalf. An associated person's capacity does not matter and therefore an associated person may be the corporate's employee, agent or subsidiary, or a person over whom corporate has not direct control.

1.3.12 Both of the following categories of company can commit a section 7 offence:

- UK entities that conduct business in the UK or elsewhere; and
- Any corporation, wherever formed, which carries on business or part of a business in the UK.

1.3.13 An overseas company that carries on any business in the UK could be prosecuted for failure to prevent bribery even when the bribery takes place wholly outside the UK and the benefit or advantage to the company is intended to accrue outside the UK. For this reason adequate procedures should apply worldwide and to all persons associated with a company.

1.3.14 US companies must note that although facilitation payments are exempt under the US Foreign Corrupt Practices Act, they are not exempt under the Bribery Act.

Penalty

1.3.15 For individuals a maximum10 years imprisonment plus an unlimited fine.

1.3.16 Senior officers (such as a director, manager, secretary or similar officer) are personally criminally liable if they have consented to or connived in bribery. However, if the offence is committed wholly outside the UK, then the senior officer may only be prosecuted if they have a close connection with the UK, including being a British citizen or ordinarily resident in the UK, or they are a body incorporated in the UK.

1.3.17 Convicted commercial organisations may face unlimited fines. In addition they may be debarred from tendering for government contracts, under Article 45 of the EU Public Sector Procurement Directive 2004.

Financial Sanctions

1.4.1 Everybody in the UK is subject to the financial sanctions regime, whether they work inside or outside of the regulated sector.[4] There is no provision in law to take a risk based approach to compliance with these obligations. Practical compliance needs to be demonstrated by the retention of appropriate records.

1.4.2 Financial sanctions are set out in statutory instruments and/or EC regulations relating to the specific regime, including the Terrorism (United Nations Measures) Order 2009

[4] US citizens are also subject to US sanctions, whoever they work for and wherever they work.

and the Al Qaida and Taliban (Asset Freezing) Regulations 2010. The offences imposed can be broadly described as:

- Dealing with the funds or economic resources of a designated person
- Making funds, financial services or economic resources available, directly or indirectly to a designated person
- Making financial services or economic resources available to any person for the significant benefit of a designated person.
- Knowingly and intentionally participating in activities that would directly or indirectly circumvent the financial restrictions, enable or facilitate the commission of any of the above offences.

1.4.3 In respect of each prohibition, it is a defence not to have known or had reasonable cause to suspect that the prohibition was being breached. HM Treasury has the power to grant licences exempting certain transactions from financial sanctions. Licence requests are considered by HMT on a case by case basis to ensure that there is no risk of funds being diverted for terrorism. Also see Appendix 4 for information about how to obtain a licence from HMT which allows dealing with designated persons.

Penalty

1.4.4 The penalties for a breach of sanctions are set out in each statutory instrument. A person guilty of an offence is liable on conviction to imprisonment and/or fine. The maximum term of imprisonment is currently seven years where the offence is imposed under the UK financial sanctions regime, or two years where imposed under the EC regime.

PART 1

Frequently Asked Questions

1.What is money laundering?

Money laundering can be committed by criminals intent on disguising significant proceeds which they have obtained from acquisitive crimes. In other words money laundering can be the process by which the true source and ownership of the proceeds of crime is changed so that they appear to come from a legitimate source. Money laundering can take place through a web of transactions, perhaps involving multiple accounts and overseas transactions, which it may be difficult for the police to follow.

However, money laundering can be far less sophisticated, involving small amounts of criminal property arising from omissions and false disclosures, such as tax evasion or criminal property obtained as a result of mortgage fraud. In cases of suspected current or historic mortgage fraud by persons regulated by the FSA you may report to the FSA and lenders as well as to SOCA.

Money laundering can be limited to a single transaction and money laundering doesn't necessarily alter the visibility or otherwise of the dirty money to law enforcement, e.g. swapping one property for another can constitute money laundering

2. What is criminal property?

Criminal property which is, or represents, a person's benefit from criminal conduct, where the alleged offender knows or suspects that it is such. Property includes all property whether situated in the UK or abroad, including money, real and personal property, things in action, intangible property and an interest in land or a right in relation to any other property. Any type of acquisitive crime which takes placed in the UK gives rise to criminal property and therefore money laundering. However, special rules apply if the underlying crime took place overseas, see the definition of 'criminal conduct' at paragraphs 1.1.2 and 1.1.3.

Criminal property is often mixed with legitimate funds or other assets, but this does not alter its illegal status. Although outright purchases made with currency can be a warning sign of potential money laundering, criminal property can take many other forms such as improperly obtained mortgage funds. Remember that a money laundering offence can be committed by a property professional without actually handling the criminal property.

3. What is knowledge or suspicion of money laundering?

POCA does not define knowledge or suspicion. However, the courts have defined knowledge means actual knowledge and therefore knowing something to be true.

The test for suspicion is subjective, i.e. the person must be suspicious themselves. Suspicion falls short of proof based on firm evidence, but it is more than mere speculation.

4. What are reasonable grounds to suspect money laundering?

The objective definition of suspicion could be met when there are demonstrated to be facts or circumstances from which a reasonable person engaged in a business subject to the MLR would have inferred knowledge, or formed the suspicion, that another person was engaged in money laundering.

The regulated sector is expected to have the knowledge that a reasonable person in their position and sector would have. For example property professionals in the regulated sector are not expected to have the same knowledge on, say, tax affairs as an accountant would, nor the same legal knowledge as a solicitor, but they would be expected to exercise a reasonable level of care and diligence, and be able to demonstrate that they took reasonable steps in the particular circumstances, in the context of a risk-based approach, to know the customer and the rationale for the transaction, activity or instruction.

5. What is the best way of avoiding criminal offences?

The MLR are preventative measures intended to help avoid or spot potential or actual money laundering. Some property professionals have a legal obligation to comply with the MLR, see Part 2 and Appendix 5.

As property professionals are subject to the primary legislation outlined in Part 1 of this guidance and therefore they should assess the risks of these issues arising in their business. This means thinking about the risk of the services provided in broad terms, and about the specific risks posed by particular individuals and transactions. Information obtained as a result of routine enquiries can be helpful and relevant, e.g. Why do you wish to move? What do you do for a living? Property professionals must use their professional judgement when determining the depth of their enquiries, and provided the enquiries are sensible and subtle they will not constitute tipping off. It may also be useful to use other sources of information, e.g. the internet.

The best approach is to combine all that is known about an individual or entity when making a judgement as to the level of risk they pose. Sufficient must be known to enable that which is unusual for that particular customer in the ongoing course of business to be identified as such.

6. What is approved guidance?

Approved guidance is issued by a supervisory authority or by any other appropriate body. For relevant supervisory authorities see Appendix 5. Professional associations and trade bodies such as NFOPP, RICS, ARP, and ARMA, are appropriate bodies. The guidance must also be approved by the UK's Money Laundering Advisory Committee and published in an appropriate manner, which usually means it will be publically available.

7. What do I need to bear in mind when seeking appropriate consent?

The wording of the SAR needs to be sufficiently wide to cover all anticipated prohibited acts, e.g. if a lettings agent needs appropriate consent to continue to receive rent on a monthly basis then the agent will need to make this clear in their SAR. If the SAR relates to lettings it may help to let SOCA know the rent and the length of the lease.

Be aware of the timetable for appropriate consent, see paragraph 1.1.12. It is preferable to request appropriate consent in good time, bearing in mind the statutory timetable for appropriate consent as well when things are likely to happen in practical and commercial terms. However, if you require consent urgently then make this clear in your SAR and explain the urgency.

The best way to avoid tipping off or prejudicing an investigation is to make SARs as soon as practicable However, if you run into difficulties then seek guidance from your professional body.

8. My firm regularly receives amateurish faxes and emails which make outlandish claims of enormous profit for relatively little investment, or requesting disclosure of bank account details so that monies can be deposited by unknown third parties. Should I be making SARs about this?

Transactions, or proposed transactions, as part of '419' scams are attempted advance fee frauds and not money laundering. Therefore they not reportable under POCA or TACT, unless the fraud is successful and the firm is aware of resulting criminal property.

9. Is tax evasion relevant to money laundering?

Yes. Evasion of any UK tax is a criminal offence and therefore is one of the underlying crimes that can lead to money laundering. For this reason property professionals need to be wary when property prices are set just below a stamp duty threshold, perhaps by manipulating the purchase price for fixtures and fittings.

Although purchasing property or land, especially woodland, can be a legitimate way to mitigate inheritance tax, property professionals need to be careful that this provision is being exercised legitimately.

Similarly if the suspected evasion is of taxes outside the UK, in circumstances which would be a criminal offence if the conduct occurred in the UK, this should also be reported unless you know or believe on reasonable grounds that the activity is lawful under the criminal law applying in the relevant country, and if carried out in the UK the activity would attract a maximum sentence in the UK of less than 12 months, see paragraphs 1.1.2 and 1.1.3.

A good way for property professionals to make sure they aren't getting involved in with anything illegal is to ask to see the tax advice which has prompted the transaction.

10. How can money laundering occur in property transactions, or how can property professionals come to know or suspect money laundering?

The broad definition of money laundering in POCA increases the risk of property professionals getting involved in money laundering. For this reason it is necessary for property professionals to be wary of all types of crime that may be connected to the sale and purchase, or letting, of property. These crimes may be related to the financing of these transactions, or to the illegal use of the property.

It is also important to appreciate that the obligation to make SARs relates to money laundering by customers, counterparties, and others. The obligation is not limited to customers.

The examples given below are intended to assist property professionals with their own risk assessments but they are not exhaustive:

- Criminal property can be used as full or partial consideration for the purchase of a property, or to pay rent, e.g. proceeds of drug dealing, prostitution, or human trafficking;
- Funds provided by financial institutions may not be legitimate if they have been obtained as a result of mortgage fraud; and
- If a landlord isn't complying with the legal requirements (which may amount to a criminal offence if breached) the funds saved may be criminal property e.g. breach of the Housing Health and Safety Rating System

Remember it doesn't matter when the crime occurred, so even if the crime occurred before a property professional was instructed it is a factor which must be taken into account.

Question 11 below outlines some warning signs of money laundering, and property professionals should also take into consideration the information available on the OFT and SOCA's web sites, e.g. SOCA's document entitled *Identifying Risks to your Business & Reporting Suspicious Activity* which is available from OFT Leaflet.

11. What is tipping off/prejudging an investigation?

Provided matters are handled sensitively these offences are not committed by:

- Making normal enquiries;
- A standard paragraph in all terms of business about money laundering, including the need to fulfil customer due diligence checks, and also outlining that property professionals are subject to legal requirements to report money laundering or terrorist financing and in these circumstances the usual duties of disclosure to customers and counterparties may be altered; and
- Refusing to act for a customer.

Questions which are sensibly put and which do not refer directly to criminality are unlikely to be tipping off/prejudicing an investigation. Failure to accept instructions is similarly not tipping off provided the reasons given for refusal are sensible. However, passing on an offer to purchase or rent a property may, in some circumstances, risk committing a tipping off or prejudicing an investigation offence. Dependent upon when knowledge or suspicion is formed the right course of action may be to make a SAR and seek appropriate consent to pass on the offer, or if a SAR has already been made, or you are aware of an ongoing investigation, then another course of action is to seek guidance from the authorities about whether it is safe to pass on the offer.

12. Will my report remain confidential?

The Home Office Circular 53/2005 provides some assurances for reporters about the confidentiality of their reports, see Appendix 6. Normally names of employees do not have to be forwarded by the MLRO to SOCA.

13. What risks should I look out for to help me and my colleagues spot suspicious behaviour?

Risk can be categorised into country or geographic risk, customer risk, and transaction risk.

Some warning signs are set out below but this is by no means an exhaustive list and neither are the circumstances noted automatically suspicious, but they are general indicators of what could be suspicious dependent upon the surrounding circumstances.

- Transactions which are not at arm's length /not between independent parties;
- No apparent reason for using the firm, e.g. the scale of the transaction or location of the property suggests that another firm would have been better placed to act;

- Part or full settlements in currency. This could indicate tax evasion , or avoidance of a confiscation order, insolvency, or a matrimonial settlement;
- Request that the estate agent or auctioneer hold large sums of money in their client account for no apparent reason, which is then refunded;
- Customer or counterparty declines services or facilities that they should find attractive. This may indicate a bogus transaction;
- Undertaking customer due diligence is difficult. Is their reluctance justifiable, or exaggerated and defensive?
- Customers and counterparties are unable or reluctant to provide information about the source of their funds/provenance of funds when this is requested. Although this is not a compulsory requirement for all transactions, in higher risk situations property professionals may wish to seek this information;
- Use of intermediaries without any justification and in order to hide involvement;
- Funds from the sale or rental of a property being sent to a high risk jurisdiction or to an unknown third party;
- Significant and unexpected improvement in financial position, e.g. buyers are unable to give any proper explanation for their increased funds;
- Sales at prices which are significantly above or below market price, or a transaction which appears uneconomic or inefficient;
- Pattern of the transaction inexplicably changes;
- Transaction progresses at an unusual speed- beware of requests for unusually or unnecessarily expedited transactions;
- Successive transactions, especially of the same property in a short period of time with unexplained changes in value;
- Introduction of unknown parties at a late stage of transactions;
- Property value is not in the profile for the consumer;
- Unusual sources of funding , e.g. use of complex loans or other obscure means of finance;
- There are unexplained changes in financial arrangements;
- Owner/landlord/builder is not fully complying with their legal obligations this may result in a saving. If the relevant legal obligation is criminalised if

breached this saving may represent criminal property and therefore money laundering.

14. How can property professionals become involved in bribery?

Property professionals can be vulnerable to bribes because of the role they play in facilitating transactions and in checking that owners or builders are complying with the applicable legislation, e.g. property professionals may be offered bribes to provide false certifications of compliance, or to improperly influence planning decisions, or to over or under value a property, or in the case of block and facilities managers to unfairly award maintenance contracts.

Overseas construction projects, including engineering projects, which involve countries where bribery is an acceptable way to do business, including bribery of public officials, may be particularly vulnerable. Hydrographic, minerals and waste management surveyors need to be aware of the risks of corruption if their work brings them into contact with countries on Transparency International's Corruption Index.

Property professionals need to be careful that their services and advice aren't prejudiced by their own interests

An area of vulnerability is if an estate agent acts in the sale of land to a house builder, and part of the deal is that the house builder will eventually instruct the same estate agent in the sale of properties they build on the land or the house builder pays the agent a separate fee for facilitating their purchase. This must be disclosed to the seller client.

In addition consumers who do not choose a solicitor who has a relationship with an estate agent must not be disadvantaged in anyway, e.g. their offer for the property not forwarded to the vendor, or misdescribed by the estate agent as not being a credible buyer.

Property professionals also need to be careful in relation to offering or accepting corporate hospitality. This must be reasonable and proportionate and not excessive.

15. The transaction I am working on is funded by an overseas institution. Is there anything I need to be aware of?

HMT has also issued a statement on money laundering controls in overseas jurisdictions which is available from: HMT. Transparency International's Corruption Perceptions Index may also be helpful: Transparency International

16. How can I minimise the risk of my client account being used for money laundering?

Money laundering is defined widely, and it is not necessary for property professionals to handle the criminal property for them to commit an offence of money laundering.

Having said this one of the ways property professionals can try and minimise the risk of money laundering is to only hold monies that directly relate to property transactions they are handling and not to provide a banking service. In fact it is usually unnecessary for estate agents to handle funds.

17. Are there any considerations which need to be borne in mind if a SAR is made?

Yes. Firstly take care not to commit the tipping off or prejudicing an investigation offence. The MLRO should control this risk by giving instructions and guidance to employees about how the relationship with the suspected person and other parties involved in the transactions should be managed going forward.

Previous work for the suspected person needs to be reviewed as in hindsight it may now be suspicious. Additional SARs may be necessary, and if they are then a clear explanation of why the transaction wasn't suspicious at the time could be included.

The MLRO should give very careful thought before agreeing to deal with the suspected person.

18. How to make a SAR?

<u>On-line</u>

The SOCA web site includes a section relating to on-line submission of SARs using the SOCA ONLINE system. The first step is registration, and SOCA provide a welcome pack to all new registrants. New registrants also receive an email thanking them for registering and are provided with pertinent information on how the UK FIU within SOCA operates the SARs regime, how to submit good quality SARs, the use of the glossary codes, and direct contact details.

Initial SARs are scrutinised by the UKFIU within SOCA and relevant feedback providing directly to the reporter regarding the quality of the SAR. Feedback is also provided on SARs made within the first six months after initial registration. This approach is intended to assist with the presentation of SARs, and to help SOCA monitor whether the feedback they have given has subsequently been followed. However feedback is not provided on the value of the information included in individual SARs.

Nowadays, virtually all SAR reporting to SOCA is handled on line (in excess of 96% of all SARs reported). Online submission has no cost to user firms so long as their firm has internet access. The benefit of on-line submission is that it automatically generates instant emailed confirmation of receipt, with a SAR Online reference number. Consent requests will be processed much more rapidly and efficiently if this online facility is used.

Hard copy

SARs can also be submitted in hard copy, although they should be typed and on the preferred form which is available from: SOCA

SARs submitted in this way aren't acknowledged.

If you require consent, you should submit your SAR by fax to: 020 7238 8256. You should keep proof of faxing.

19. What do I need to do if I know or suspect money laundering?

If you are an employee you should immediately make a report to your MLRO if you have one, and talk to them about how you should handle the transaction. If you do not have an MLRO you need to consider making a SAR yourself, and you may benefit from confidentially speaking with your professional body, see Appendix 1.

If you are the MLRO and you form knowledge or suspicion yourself, or as a result of a report made to you by a colleague, then you should report to SOCA. Remember you will need to consider how to handle any ongoing transaction for the suspected person, including whether appropriate consent is required. If you require consent then you must comply with the statutory requirements for appropriate consent and meanwhile the issue of tipping off needs to be handled carefully.

If you are an MLRO and you receive an internal report from a colleague but you decide not to report to SOCA for any reason, make sure you keep a confidential note of why you made this decision.

20. Is fraud relevant?

Yes, particularly intermediary mortgage fraud. If property professionals suspect intermediary mortgage fraud, and the improperly obtained mortgage funds have already been received, this should be reported to SOCA as money laundering. In addition the property professional may also wish to use the FSA's whistle blowing line to report the intermediary direct to his regulator: 0207 066 9200 or fcid@fsa.gov.uk. Also see Sector Specific guidance for auctioneers in Part 3.

21. I suspect a staff member of theft- what should I do?

If you have knowledge or suspicion of this form of criminal conduct, and of criminal property, you should make a SAR to SOCA and/or make a crime report. It doesn't matter if the victim was the employer or a third party. Although SOCA may

automatically refer the SAR to a local police authority, you may also wish to do so. You may also have duties to report to your professional body, and you may also wish to report to the suspect's professional body. These duties apply regardless of whether or not employment is terminated.

22. How should I deal with financial sanctions?

Paragraphs 1.4.1 – 1.4.4 and Appendix 4 deal with this issue.

The FSA has reviewed this area and identified some factors to take into account when assessing the likelihood of a person or entity being on the HMT list.[5]

- For individuals: place of residence, country of origin, citizenship, source of wealth, occupation, and countries to and from which transactions are to be made.

- For entities: location of business, country in which the business is incorporated, nature of business, beneficial owners of the business, directors, countries from which transactions are made and entities with which the transactions are effected.

HMT also provide a free email subscription service that will notify you of any AML/CFT announcements by HMT. Email: FCSubscribe@hmtreasury.gov.uk. Put SUBSCRIBE FINANCIAL CRIME in the subject field, and provide your name, company name, address, and telephone number.

The FSA has found the following regarding sanctions:

- Standard anti money laundering checks do not screen customers against the HMT list. Firms should not confuse HMT's financial sanctions regime with anti money laundering procedures.

- Financial sanctions apply to all transactions; there is no minimum financial limit.

- There are around 50 UK individuals and 12 UK entities on the current HMT list. It is not just foreign individuals or entities who are on the list.

- Politically Exposed Persons (PEPs) are not necessarily financial sanctions targets.

- Most listed individuals and entities are aware that they are on the HMT list, which is publicly available. The issue of 'tipping off' should therefore not generally arise.

[5] Financial services' firms approach to UK financial sanctions, published April 2009.

- Sanctions are relevant even when client money isn't held because the Terrorism Order extends to financial services as well as funds.

The FSA has produced a fact sheet for its small firms which property professionals may also find helpful: FSA Small Firms Sanctions

The impact of sanctions can be unexpected. For example, if you employ US citizens remember that they are also subject to US sanctions wherever they are and whoever they work for.

23. How could I become suspicious of terrorism?

Terrorists may use residential properties as a base for their activities. They may rent properties in specific locations. Stay alert if the people you are dealing with appear to have extreme views.

PART 2

THE MONEY LAUNDERING REGULATIONS 2007

The Risk Based Approach

2.1.1 Businesses which are subject to the MLR must ensure that their approach to anti money laundering and counter terrorist financing are appropriate to the level of risk, so that the greatest effort is focussed on circumstances where the risks of money laundering and terrorist financing are highest. This should allow businesses to be more efficient and effective in their use of resources and reduce unnecessary burdens.

2.1.2 The starting point should be an overall risk assessment of the vulnerability of products and services being misused for money laundering. Risk assessments should take into consideration the vulnerabilities posed by:

- Products and services provided;
- Financing methods;
- Customer/counterparty profile;
- Geographical location of:

(a) The person or business providing the products and/or services;
(b) The customers/counterparties;
(c) The location of the property itself;
(d) The location of the source of finance being used.

2.1.3 Businesses must document the risks that they identify and how they intend to manage those risks. For property professionals this may include:

- Funding from unusual sources;
- Inconsistent information;
- PEPs;
- Customers who are reluctant to produce their identity documents; and
- Transactions which do not make economic sense

2.1.4 However, these are broad examples are not detailed or exhaustive and therefore individual businesses must assess their own risks. These examples also aren't conclusive as there may be legitimate explanations, or it may be possible to effectively manage risks. Examples can only highlight areas which require greater

consideration, but whether money laundering or terrorist financing risks are posed requires consideration of the surrounding circumstances and professional judgment. MLROs should be consulted for advice and assistance by staff as necessary.

Requirements

2.2.1 The MLR impose preventative measures which are compulsory for the regulated sector, see Appendix 5. However, property professionals who fall outside of these definitions may wish to comply with the MLR as matter of best practice.

2.2.2 The requirements of the ML Regulations are:

- Registration with appropriate AML supervisors;
- Customer Due Diligence;
- Training;
- MLRO;
- Policies and procedures;
- Records;
- Ongoing Monitoring;
- Risk assessment and management;
- Reporting;
- Compliance management

2.2.3 Readers should also consult guidance issued by their AML supervisor about how to comply with the MLR:

- OFT: OFT
- HMRC: HMRC
- FSA :FSA

The JMLSG also publishes helpful guidance: JMLSG

Registration

2.3.1 Estate agents must register with the OFT, and there are also registration obligations for TCSPs, HVDs, ASPs, and Annex 1 Financial Institutions. . Property professionals should check the definitions in the Glossary and Appendix 5 provides more information, including the penalties for failure to register with the relevant AML supervisor.

2.3.2 It is intended that in general no firm will have more than one AML supervisor. Therefore if your firm conducts a range of activities which fall within the sphere of more than one AML supervisor then you should contact each potential supervisor to ascertain which of them will be your actual AML supervisor and therefore which register you should join. Keep records of your discussions and correspondence as there are penalties for failure to register.

Customer Due Diligence

2.4.1 CDD is required whenever a relevant person in the regulated sector forms a business relationship or undertakes an occasional transaction. In general business relationships should not be formed unless CDD is satisfactorily completed, however CDD can be undertaken during the establishment of the business relationship if:

- This is necessary not to interrupt the normal conduct of business;
- There is little risk of money laundering or terrorist financing;[6]and
- Provided that the verification is completed as soon as practicable after contact is first established.

2.4.2 Identification is part of CDD, but CDD is a broader concept implying a wider knowledge of customers and the reasons behind their transactions. The OFT describe this wider duty as obtaining information on the purpose or nature of the business relationship. It may be necessary to demonstrate to your AML supervisor that the level of checks made was appropriate on a risk basis. The extent of the wider due diligence undertaken should depend upon risk profile, cross reference.

Individuals as customers

2.4.3 The OFT's guidance outlines the two stages of the identification process:

- Identifying the customer by obtaining a range of information such as full name, residential address, date of birth; and
- Verifying this information through the use of reliable independent source documents, data, or information.

2.4.4 A reasonable approach is whether the information provided appears, on the face of it, to prove that the person is who they say they are.

2.4.5 Identification entails collating relevant person information, usually by asking the customer themselves. Verifying all or some this information can be achieved through

[6] As estate agency is covered by the MLR whether there is little risk of money laundering or terrorist financing needs to be judged on a case by case basis.

checking the information through personal documents, and/or the use of electronic software. Paragraphs 5.3.79- 5.3.81of the JMLSG's guidance provides some useful hints on how to choose an electronic software provider if that is your preferred method; JMLSG

2.4.6 If documents are used and the there are no risk factors are evident, then for most transactions and customers one of the following government issued documents will suffice:

- Valid passport;
- Valid photo card driving licence (both the paper part plus card with photograph);
- National identity card;
- Firearms certificate;
- Identity card issued by the Electoral Office for Northern Ireland.

2.4.7 If a customer doesn't have any of these documents, then paragraph 6.33 of the OFT's core guidance includes examples of alternative documents which may be used:

2.4.8 A government issued document (without a photo) which includes the customer's full name.

- Old style driving licence;
- Recent evidence of entitlement to state or local authority funded benefit such as housing benefit, council tax benefit, pension tax credit

2.4.9 Supported by secondary evidence such as:

- Utility bill;
- Bank, building society or credit union statement;
- Most recent mortgage statement from a recognised lender.
- Paragraph 6.35 of the OFT's core guidance confirms that where a member of the business's staff has visited the customer at his home address a record of this visit may constitute evidence of corroborating the individual's residential address.

2.4.10 Sufficient checks should be made of the documentary evidence to satisfy the business of the customer's identity. This may include checking the spelling of names, validity, photo likeness, whether address match, etc.

2.4.11 If these documents are also unavailable property professionals are encouraged to take an imaginative and risk-based approach in deciding whether what is available is acceptable in their professional judgement.

2.4.12 For information about who is an estate agent's customer, please see the definition of customer in the Glossary and Question 2 of Part 2.

Organisations as customers

2.4.13 If you act for organisations then there are particular considerations which apply to the due diligence process and paragraphs 6.37 and 6.38 of the OFT's core guidance is a useful starting point, and Part 1 of the JMLSG's guidance is also very useful.OFT Core If you are entering into a relationship with another business you should seek to identify the firm itself and to ensure that the person that you are dealing with has the authority to act on behalf of the firm.

Beneficial ownership

2.4.14 Remember that it is necessary to make checks on beneficial ownership, see the definition of beneficial ownership in Glossary.

2.4.15 Further information can be obtained from paragraphs 6.4-6.8 of the OFT's core guidance.OFT Core

Simplified Due Diligence

2.4.16 CDD is unnecessary certain categories of customers if a relevant person in the regulated sector has reasonable grounds for believing that the customer falls within the relevant definitions used in ML Regulation 13. Public authorities and some lenders may fall within the definitions. Further information can be obtained from paragraphs 6.15-6.17 of the OFT's core guidance.OFT Core

Enhanced due diligence

2.4.17 EDD is required if the customer has not been physically present for identification purposes. In these circumstances there must be specific and adequate measures to compensate for the higher risk, such as establishing the customer's identity by additional documents, data, or information, ensuring that the first payment is carried out through an account opened in the customer's name with a credit institution.

2.4.18 EDD is also required for PEPs. The decision to act for a PEP must be taken by senior management and there must be adequate measures to establish the source of funds involved in the transaction and enhanced ongoing monitoring of the relationship

2.4.19 There is also an EDD requirement in any situation which is higher risk of money laundering or terrorist financing.

2.4.20 The way to undertake EDD will be determined on a case-by-case basis and should be determined in a way that 'adds value' to the basic CDD already undertaken. The MLRO will probably want to play a role in the decision about what checks must be satisfied before the firm agrees to undertake instructions for the customer.

Reliance

2.2.21 As estate agents are usually the first party to be instructed in a transaction they are usually unable to rely on a third party.

2.2.22 However, if an auditor, insolvency practitioner, external accountant, tax adviser, independent legal professional, authorised credit institution, or financial institution (excluding a Money Service Business) has already conducted CDD, and provided they consent to being relied upon, an estate agent may rely upon them.

2.2.23 If the person being relied upon is not in the European Economic Area then in order to rely upon them their state must have certain equivalent requirements, see Appendix VII. However, property professionals ultimately remain responsible for CDD.

2.2.24 The party being relied upon must keep the information obtained for CDD purposes for at least five years from the date when the transaction with the customer is completed or from the date the business relationship ends. The third party must, on request, and as soon as reasonably practicable:

- Make available any information about the customer (and any beneficial owner) obtained when applying CDD measures; and
- Forward copies of any identification and verification data and any other relevant documents on the identity of the customer (and any beneficial owner) which were obtained for CDD purposes.

2.2.25 It would be sensible to confirm in writing with the third party that they consent to being relied upon, and that they will that they will provide the relevant documentation on request, and comply with the record keeping requirement see paragraphs 2.15.1 and 2.15.2.

2.2.26 Estate agents cannot be relied upon by others but see Question 8 of Part 2 in relation to certification of true copies of original documents.

Training

2.2.27 All relevant employees must be made aware of the law relating to money laundering and terrorist financing, and regularly given training in how to recognise and deal with transactions and other activities which may be related to money laundering or terrorist financing. See Chapter 8 of the OFT's guidance assist with what training should cover. OFT Core Guidance. An additional consideration is the corporate offence of failure to prevent bribery, and the importance of training in the context of the adequate procedures defence, see paragraph 1.3.10

2.2.28 Relevant employees are not defined in the MLR, but they are likely to include, as a minimum, all staff who deal with finances and who have contact with customers. As they take ultimately responsibility senior management will also need to be aware of the requirements.

2.2.29 The level of training provided to individuals needs to be appropriate to the money laundering risk posed by their role. MLROs are likely to require in- depth training. When staff move between jobs, or change responsibilities, their training needs may change. Ongoing training should be given at appropriate intervals to reflect risk levels.

2.2.30 The OFT or another AML supervisor may also ask to see training records. In addition if an employee were to be defending a charge of failing to make a SAR, they may seek to rely on the training defence, see paragraphs 2.2.27 – 2.2.29. An employer may then be asked to produce training records in court. Inability to do this could leave the firm and its senior management liable to a criminal offence arising from the breach of the training obligation. For these reasons we recommend that businesses should keep:

- A copy of the training materials or details of who has provided training if it is delivered externally;
- A list of who has undergone training and when, and their signature to that effect; and
- A schedule for refresher training.

Money Laundering Reporting Officer

2.3.1 The role of the MLRO is responsible for:

- Receiving internal suspicious activity reports from within the business;
- Deciding whether these should be reported to SOCA; and

- If appropriate making such reports to SOCA.

2.3.2 Sole traders with no staff, will be, by default, the MLRO and will be required to make suspicious activity reports to SOCA.

2.3.3 As the availability of an MLRO is a continuous requirement firms need to ensure that a deputy MLRO is available if the primary MLRO is ever uncontactable. However, the responsibilities of the MLRO cannot be delegated so even when a deputy is nominally in charge it is the primary MLRO who is ultimately responsible.

Policies and procedures

2.3.4 This guidance gives advice as to the type of information that policies and procedures should contain but this is not an exhaustive list as business models vary. Documented policies and procedures are important as they ensure that the systems are applied consistently and they enable a business to demonstrate its knowledge of, and compliance with, the MLR and legislation. AML supervisors may ask to see firm's policies and procedures**.** If used correctly policies and procedures can encourage the right culture. They also mean that checks are made to alert businesses of the possibility that criminals may be using the business to launder money or fund terrorism, or that there is a risk of representatives of the company giving or receiving bribes.

2.3.5 Policies and procedures must be appropriate, risk-sensitive, and achieve full compliance with the MLR. It is best practice for policies and procedures to cover all aspects of financial crime.

Policies

2.3.6 Policies should demonstrate the business's commitment to a culture that will detect, deter and disrupt money laundering and terrorist financing regardless of the commercial implications, and it should do so by formulating and announcing a written policy statement. A high-level policy will focus the minds of staff on the need to be constantly aware of the risks of money laundering and terrorist financing and how they are to be managed. It would be sensible to also cover the bribery given the new legislation, see paragraphs 1.3.9 – 1.3.17.

2.3.7 Policies should reflect a commitment to:

- A risk sensitive approach to combating and preventing money laundering and terrorist financing;
- There being an MLRO who will be responsible for reporting externally to the SOCA as appropriate, and who will monitor the effectiveness of the policies and procedures, and review them as necessary;

- Adequate customer due diligence checks, including, but not limited to, basic identification checks;
- On-going monitoring;
- Accurate and up to date record keeping and retention of records;
- The reporting by all staff of any knowledge or suspicion they may have, or reasonable grounds for suspicion to the MLRO;
- Staff training to meet the obligations of MLR and to assist them with their obligations to make reports; and
- A system requiring the MLRO to report in high level terms to their organisation's senior management; and
- Regular review to ensure learning from experience.

Procedures

2.4.1 A business must put in place achievable procedures to implement its AML and CFT policies. These procedures must be sufficiently detailed to allow staff to easily follow and understand them, but also be flexible enough to allow the MLRO sufficient discretion.

2.4.2 The procedures should also be easily accessible to staff and cover:

- How to carry out customer due diligence measures, including:

(a) How to identify customers on a risk basis, including beneficial owners;

(b) EDD for those considered to be higher risk, e.g. non face to face verifications and PEPs; and

(c) Which organisations are lower risk, e.g. organisations who are not subject to customer due diligence because they are eligible for Simplified Due Diligence, see paragraph 2.4.16.

- Scrutiny of unusual transactions and unusual customer behaviour in order to consider whether there are reasonable grounds for knowing or suspecting that money laundering or terrorist financing may be taking place or have taken place, including:

(a) Complex or unusually large transactions;

(b) Unusual patterns of transactions which have no apparent economic or visible lawful purpose; and

(c) Any other activity which may indicate money laundering or terrorist financing.

- The records to be kept, how long they should be kept, and where they will be kept including the nature of:

(a) CDD records, including identification records, e.g. a copy or photograph of, or the references to, the customer's identity documents , or evidence produced by electronic software

(b) Supporting records (originals or copies) for transactions

- When and how to conduct ongoing monitoring of transactions and activity of customers;
- A list of staff with responsibility for compliance with the MLR, including the identity of the MLRO, and if different the staff with responsibility for ensuring training is provided and policies and procedures are regularly reviewed;
- How to make an internal report to the MLRO;
- How to make a report to SOCA; and
- Regular review to ensure learning from experience.

Records

2.4.3 Records must be kept in relation to CDD checks, including the checks made on the customer's identity, e.g. a legible photocopy or photograph of documents, or clear and accurate note of relevant reference numbers taken from personal identification documents, or a copy of the report produced by electronic software. If the customer's details change during the relationship, records of these changes must be kept. Records of the transaction must also be kept.

2.4.4 These records must be kept for five years after the business relationship ends or transaction is completed. Paragraph 9.5 of the OFT's guidance confirms that records can be kept as original documents, photocopies of original documents, in computerised or electronic form.OFT Core Guidance

Ongoing Monitoring

2.4.5 Ongoing monitoring is particularly relevant for relationships of a significant duration. Checks should not be made and then forgotten as risk levels can change over time. This means:

(a) Ongoing scrutiny of transactions to ensure that the transactions are consistent with knowledge of the customer, his business and risk profile; and

(b) Keeping the documents, data or information obtained for the purpose of applying customer due diligence measures up-to-date.

Penalty

2.4.6 Civil and criminal penalties are possible. Officers of body corporates, partners, and officers of unincorporated associations, who consent or connive in the commission of an offence, or if an offence is attributable to their neglect, may commit a criminal offence. Penalties range from unlimited fines to a prison term of up to two years.

2.4.7 AML supervisors have powers to take action for breach of the MLR, see Appendix 5 for more information about the AML supervisors.

PART 2

Frequently Asked Questions

1. I am the MLRO for a property firm which bases some of its operations overseas. Is there is anything special I need to take into account?

Firstly you should consider whether any part of your firm falls within the definition of an estate agent, see Glossary. If yes, then that part of the business must comply with the MLR. UK entities must inform any overseas branches and subsidiaries of any policies and procedures which it has in place and overseas offices must comply with their local laws and regulations.

2. Who is my customer for the purposes of CDD?

Although customer isn't defined in the ML Regulations, the OFT's view is that customer is the party who forms a contractual relationship with the estate agent, who the estate agent may refer to as their client. For sales agents this will usually be the vendor, although in relation to repossessions it will be the lender (in which case only simplified due diligence may be appropriate for lenders, see paragraph 2.4.16). Buying agents' also fall under the definition of estate agent and their customers will be buyers.

Both sides to a transaction can pose money laundering risks, and on this basis you may wish to also conduct due diligence on counterparties as well as customers. If the counterparty is represented by another property professional then you may wish to take into account when deciding the level of risk and therefore the depth of the checks undertaken. It may be possible for the other property professional to co-operate with the provision of information, although technical reliance is not allowed for the purposes of ML Regulation 17.

3. I don't handle funds. Do I need to comply with the MLR?

Membership of the regulated sector is defined by ML Regulation 3 and this is not dependent on handling funds, see Appendix 5.

4. I am based in the UK and I deal with customers who are also based in the UK, but in relation to property which is overseas. Are these requirements relevant to me?

If all the property you deal with is outside the UK then the MLR will not apply to you. However, you should note that HMT are considering bringing this within the scope of the MLR in the future. Should this happen information will be available from your professional body and a note will also be put on the OFT's website.

5. I am dealing with a third party who is giving me instructions on behalf of somebody else. Is there anything I need to be aware of?

As you are not meeting the underlying customer you need to conduct EDD on them by making checks which go beyond basic CDD. You will need to collate information from a variety of sources, probably including asking the third party you are working with for information. It is also best practice to contact the underlying customer directly, and to also undertake due diligence on the intermediary.

Criminals may use third parties to avoid being linked with transactions. On the other hand there may be legitimate reasons for using a third party, e.g. they are assisting somebody overseas. It is a good idea to ask why a third party is being used, and to use professional judgement to assess the response received.

6. How and when should I check whether a customer is a PEP and if they are a PEP what do I need to do?

As part of your risk assessment you should consider the likelihood of your services being used by PEPs. Unless all of your activities or customers are higher risk you do not automatically need to check whether customers are PEPs. However, if you think they maybe a PEP then their status can be checked by asking them questions, using the internet, or using an electronic software product.

Senior management approval is required to establish a business relationship with a PEP and this decision should be documented. Adequate measures also need to be taken to establish the source of wealth and the source of funds which are involved in the proposed business relationship or occasional transaction. This means having an idea of how their wealth was generated. Enhanced ongoing monitoring is also required.

7. How am I supposed to know if a personal identification document is a fake or stolen?

You should take reasonable steps to try and avoid accepting fake or stolen documents. If you meet your customer, make sure you see the original document. From time to time SOCA issues guidance about the latest forms of fake documents and how to spot them, and your professional body may be able to assist you with locating this information.

8. I am unable to meet my customer, and there isn't a third party who I can rely upon to assist me with CDD. What other options are there?

You could ask an independent third party to certify that the photocopies which you receive are true copies of original documents which the independent third party has

seen. As this is not formal reliance for the purposes of the ML Regulation 17 you may use your professional discretion when deciding who you trust to certify copies. Although it is preferable to ask somebody who is subject to AML/CFT themselves other examples are medical professionals and social workers. If appropriate you should check their credibility with their regulator or professional association. You should keep details of the third party's contact information. Property professionals may also be asked to certify documents for others even though they cannot be formally relied upon.

9. I have identified my customer. What else do I need to do?

Property professionals tend to automatically gain information about their customers as part of their normal dialogue and assessment of their customer's needs, e.g. an estate agent is likely to gain an understanding of an individual's desire to move if they act in both their sale, and assist with their search for a new property. Information about how a transaction is be finalised is also important. How quickly an individual wants to move may relate to why they are moving, e.g. relocation in order to start a new job. This information is relevant to AML because it will allow the property professional to make a risk assessment and act accordingly. Remember that just because somebody is who they say they are doesn't mean there is no risk.

10. What is the risk based approach and how does it apply to me?

Property professionals who are subject to the MLR must undertake due diligence on their customers, including identification checks. However, the extent of the identity checks, and the broader due diligence enquires made may vary according to the risk. If the risk is lower then fewer checks are required, but of course if the risk is higher then more checks are required. It is best practice to make checks on counterparties in higher risk situations.

11. What is the enforcement policy of my supervisor?

AML supervisory authorities are expected to operate their compliance regimes in accordance with a risk based approach to supervision agreed by the Anti-Money Laundering Supervisors Forum. AML supervisors have extensive powers to require information and enter premises. The OFT's Enforcement Principles are available from: OFT.

12. My firm provides financial services as well as estate agency. The FSA is the AML supervisor for the financial services part. Does the estate agency side of my business also need to register?

FSA authorised estate agency businesses' compliance with the MLR is currently supervised by both the FSA and OFT, although his is under consideration. Such firms must register with the OFT, and if they have queries FSA authorised firms can contact the FSA on Tel: 0845 606 9966.

Estate agency business that are appointed representatives of FSA authorised firms are only supervised by the OFT under the MLR and must register with the OFT.

Any firms in these situations should make contact with the OFT: 0207 211 8200 / AMLD3@oft.gsi.gov.uk

13. Who should fulfil the role of MLRO?

The MLRO needs to be empowered to take decisions unilaterally. They must have sufficient resources to fulfil the role for their organisation. Dependent upon the size of the firm it may be necessary to have deputy MLROs as well as the primary MLRO who takes full responsibility. What's important is that staff knows who they need to report to, and so this should form part of the policies and procedures.

14. I visit people at home which makes it difficult for me to take photocopies of documents. What are my options?

You could make a careful note of the reference numbers and expiry dates, but a better option is to photograph the document and reproduce in a legible size.

15. I already need to keep records for tax purposes. Do the records I require for the purposes of the MLR need to be kept separately?

No. Duplication is not required as long as you comply with all the regulatory requirements which apply to you.

16. What is the difference between POCA & TACT, and the MLR? Who do they apply to?

The majority of the criminal offences in POCA and TACT and outlined in Part 1 apply to all individuals including all property professionals. However, there some specific offences which only apply to the 'regulated sector', which means those who must comply with the MLR including estate agents, see Appendix 5.

17. Do I need to join the OFT's anti money laundering register?

The OFT is the AML supervisor for estate agents, including sales agents, property auctioneers, and buying agents, who fall within the definition of estate agency, see Glossary. Since 1 February 2010 it has been a criminal offence if a firm provides estate agency services without OFT registration. More information is available from Appendix 5 and OFT FAQ

The OFT can refuse to register an estate agent if they fail to provide any of the information required for the OFT's registration form, including their name and the name of their business, the nature of their business, the name of their MLRO, turnover, and number of employees. The OFT may also refuse an application for registration if the information provided is false or misleading, or the initial

registration fee has not been paid. If the OFT subsequently discover that anyone registered has provided incomplete, false, or misleading information, or an inappropriate fee, the OFT can cancel their registration. Trading without registration is also illegal in these circumstances.

18. I have been asked to act for an estate in the sale of the deceased person's home. How do I undertake CDD?

In the case of an estate in the course of administration, the customer and beneficial owner is the executor(s).Estate agents should make sure they are being instructed correctly by checking the court documents which grant probate or letters of administration.

If the executor is a solicitor or accountant acting in the course of their business, and they are not named personally as executors/administrators, CDD can be undertaken by reference to their practicing certificates or an appropriate professional register.

19. I have acted for a customer for many years. Do I still need to undertake CDD?

Estate agents, HVDs, TCSPs, ASPs and FSA Authorised Firms, were subject to the Money Laundering Regulations 2003 which came into force on 1 March 2004. If you have never undertaken CDD on your customer because you started acting for them before that date, then you must now do so. Even if you have undertaken CDD more recently it is a good idea to refresh the information you have, perhaps by asking the customer to confirm that the information you already have on file for them is up to date and making a note of their confirmation

20. The work I do which is covered by the MLR is fairly minimal. Is there an exemption?

No sector is required to comply with the MLR or register with an AML supervisor if all of the following conditions are fulfilled:

- Total annual turnover in respect of the trust and company services does not exceed £64,000;
- The financial activity is limited in relation to any customer to no more than one transaction exceeding 1,000 euro, whether the transaction is carried out in a single operation, or a series of operations which appear to be linked;
- The financial activity does not exceed 5% of the property professional's total annual turnover;
- The financial activities are ancillary and directly related to the property professional's main activity;
- The financial activity is not to transmit or remit monies (or any representation of monetary value) by any means;

- The main activity is not estate agency (or certain other activities);
- The financial activity is provided only to customers of the property professional's main activity and is not offered to the public

21. I know that solicitors, lenders, and financial institutions, also need to comply with AML. How does this impact on my obligations as an estate agent?

If you are not the first party subject to the MLR who is engaged, it may be possible for you to rely on another person for the purposes of CDD, see paragraphs 2.9.1-2.9.3. However, you will still remain ultimately responsible for CDD, and for compliance with all of the other MLRs. Funds held or provided by financial institutions aren't necessary clean.

22. Where can I get help?

See Further Information Appendix 1.

PART 3

SECTOR SPECIFIC GUIDANCE

Part 3 is sector specific guidance for a diverse range of disciplines. In common with the rest of the guidance, Members of the co – authoring bodies are encouraged to read this part widely whatever particular disciplines are undertaken by them or their firm.

Sales and Buying Agents

1.Which property professionals are subject to the MLR, and what are the registration requirements?

Estate agents (including real property auctioneers and buying agents) must comply with the MLR. This definition covers sales agents, buying agents, and auctioneers, see full definition in Glossary.

Those caught by the statutory definition of an estate agent need to register with the OFT unless they also fall within another category defined in ML Regulation 3, in which case it is important to check which AML supervisor will take responsibility for your firm, see Appendix 5.

2. Can I leave everything to the solicitors who are going to process the transaction?

No. You must comply with the MLR and the legislation, including POCA. Even if solicitors receive the funds, property professionals may also become aware of unusual sources, and in these circumstances Property professionals should assess whether the source of funds is unexpected or unusual.

Remember estate agents are often the first party to be instructed on a sale/purchase, and they also often the only professional to meet both the seller and buyer, which may help them assess whether the transaction is suspicious, e.g. not at arm's length.

3. Are there specific risks which apply to overseas transactions?

Some countries pose a higher risk, see the Transparency International Index on corruption and HMT's list of high risk jurisdictions which can be located at HMT

The issues to consider are EDD under the MLR, POCA, TACT, Financial Sanctions, and the Bribery Act (once in force).

4. Lenders instruct me to sell properties which they have repossessed. In these circumstances, who is my customer?

Your customer is the lender, and therefore your obligations could be limited to SDD, see paragraph 2.4.16**.**

5. I act as a sub-agent which means that I receive instructions from other estate agents, not from their underlying customer.

In these circumstances your customers are the principal agent and the underlying seller, therefore you must undertake CDD on both of them.

It may be appropriate to treat the principal agent as an individual for the purposes of CDD, or see JMLSG and OFT guidance on how to approach CDD for different types of organisations. It may also be possible for a sub-agent to ask the principal agent about their CDD on the underlying seller. If the principal agent is forthcoming this will allow the sub- agent to take a risk based approach to CDD checks on the underlying seller.

6. I am handling a transaction which is solely funded by way of a mortgage. Do I still have to comply with the MLR?

Yes. The MLR apply when estate agency services are provided and regardless of how transactions are financed.

7. I am representing a seller, and the buyer is also represented by a buying agent. Does this impact on the checks I need to make?

Your legal obligation to undertake CDD on your own customer, the seller, is unaltered. Ordinarily it would also best practice to undertake CDD on the buyer. However the buying agent must undertake CDD on the buyer who is their customer and this may affect your decision whether or not to undertake CDD on the buyer yourself or the extent of the checks you make. In fact the buying agent may help you by providing information.

8. What particular risks apply to buying agents?

All estate agents, including buying agents, need to be particularly conscious that individuals involved in high value transactions maybe more likely to be PEPs. However, not all high net work individuals will be PEPs, and not all high value transactions will involve PEPs. If your customer is a PEP then EDD will be required, but this does not automatically mean all PEPs are dishonest or money launders.

Auctioneers

1. Are real estate property auctioneers covered by the MLR and do they have to register with the OFT?

Property auctioneers must comply with the MLR and they must register with the OFT as an estate agent. They may also have another AML supervisor because of the range of activities undertaken, see Appendix 5. You should contact your supervisors to ascertain the current position on supervision.

2. Are personal property auctioneers covered by the MLR and do they have to register with HMRC as High Value Dealers?

Personal property auctioneers are HVDs if they receive payment, or payments, in excess of (the equivalent of) 15,000 euros for a single transaction in cash. HVDs must comply with the MLR when they deal with cash transactions of this value, and they must register with HMRC as a HVD. Further information is available from Appendix 5. Categorisation as a HVD and registration with HMRC is quite separate from the issue of VAT registration.

3. Are there any specific money laundering risks which apply to auctioneers?

Chattels auctioneers need to be aware that the chattels they are auctioning may be stolen or forgeries. The seller may also be attempting to deceive potential buyers about the provenance of the item to improperly inflate the price. In common with other high value goods, chattels may be used by criminals as a method of payment which it would be difficult for law enforcement to detect.

All auctioneers should consider whether, or to what limit, they are prepared to accept currency as payment.

4. What are the implications of the Fraud Act for auctioneers?

The practice of auctioneers and third parties bidding on behalf of a seller on the seller's instructions may risk committing criminal offences under the Fraud Act (2006). This practice should not be applied to consecutive bids as this creates a false market.

Lettings Agents

1. Do letting agents need to register with OFT or HMRC?

Lettings agents are unlikely to need to register with OFT unless they are selling leases for a premium.

Lettings agents who provide a registered office, business address, correspondence or administrative address, or other related services for a company, partnership, or any other legal person or arrangement, may be a TCSP and therefore need to comply with the MLR and register with HMRC.

2. What specific risks apply to lettings agents?

Letting agents should be aware of:

- Tenants using rented properties for what could be illegal purposes, e.g. for prostitution, or the production and sale of drugs; and
- Landlords not complying with their legal obligations leading to a saving.

These crimes can generate criminal property and therefore require a SAR.

4. Can lettings agents accept currency?

It is not illegal for property professionals to accept currency but this is discouraged because use of the banking system provides proof of payment and a clear audit trail, even though it does not guarantee that the funds are legitimate. However, provided lettings agents have adequate insurance the decision whether or not to accept currency is discretionary, albeit it is advisable to publish a sensible limit. In addition if a landlord is seeking to evict tenants then the landlord's agent may need to justify their refusal of payment to the court.

5. What if my main business is as a lettings agent but I do some managing agency as a small side line?

There is no requirement for you to comply with MLR for either part of your business but the legislation applies to you, including POCA.

6. Do I need to carry out due diligence checks on potential landlord customers before contracting to carry out services for them?

Although the MLR do not apply it is sensible business practice to make basic inquiries of any potential customer to avoid committing a money laundering offence, and to protect the reputation of your business. Checking landlords' identity will also prevent invalid agreements which can lead to letting agents losing out on their fees.

7. What should managing agents and letting agents consider when they seek appropriate consent?

As lettings agents receive regular payments from the same source it may be necessary to seek a wide consent. The SAR needs to clearly drafted, and it can be helpful to provide SOCA with the anticipated amounts of rental payments and the length of the lease. Alternatively it may be preferable to stop the business, subject to the limitations of the tipping off offence/ prejudicing an investigation offence, see paragraphs 1.1.28 – 1.1.33 and 1.2.17 – 1.2.19.

Managing Agents

1. Do managing agents need to comply with the MLR?

Although managing agents are not usually covered by the MLR some managing agents provide TCSP services which are covered by the MLR, e.g. act as a Company Secretary or as a director of RMCo. However there is an exemption if all of the following conditions are fulfilled:

- The property professional's total annual turnover in respect of the trust and company services does not exceed £64,000;
- The financial activity is limited in relation to any customer to no more than one transaction exceeding 1,000 euro, whether the transaction is carried out in a single operation, or a series of operations which appear to be linked;
- The financial activity does not exceed 5% of the property professional's total annual turnover;
- The financial activities are ancillary and directly related to the property professional's main activity;
- The financial activity is not to transmit or remit monies (or any representation of monetary value) by any means;
- The main activity is not estate agency (or certain other activities);
- The financial activity is provided only to customers of the property professional's main activity and is not offered to the public.

2. What if I provide an office address for a number of RMCos but do not act as a company secretary or director?

You may still be a TCSP, but see Question 1 above for the exemption.

3. What if I provide bookkeeping and accountancy services for customers?

Although accounting services are covered by the MLR, accounting work undertaken by property professionals for customers falls outside of the relevant statutory definitions, see Glossary. Also see Appendix 5 (B) (iii) for more information.

4. What if my main business is as an estate agent but I do some management agency as a small side line?

Managing agents are not covered by the MLR but you will need to comply with MLR with regard to your estate agency business, and for any other activities you may perform which are covered by ML Regulation 3.

5. Should I accept large payments of service charges in advance?

You may do so but should consider whether the payment has come from lessees who may be involved in criminal activity and as such should be reported under POCA even though the lessees are not your customers.

6. Should I accept payments of ground rent and service charges in cash?

There is no reason under MLR why you should not but you may wish to avoid such payments to prevent problems of having to bank large sums of cash and ensuring the safety of your staff.

7. Do I need to carry out due diligence checks on potential resident management company customers before contracting to carry put services for them?

The MLR do not apply unless you are a TCSP because you are acting as company secretary or a director of the customer, see Appendix 5. For the full range of activities defined as TCSP see Glossary and Question 1 of this section. However it is sensible business practice to make basic enquiries of any potential customer to discover whether they may be beneficial or harmful to the reputation of your business.

8. If I suspect that a lessee is running a business which has a criminal purpose do I need to report this to the authorities?

You should make a report under POCA if you suspect criminal conduct and criminal property. This duty applies even though the lessee is not your customer.

9. What should managing agents consider when they seek appropriate consent?

As managing agents receive regular payments from the same source it may be necessary to seek a wide consent. The SAR needs to clearly drafted in order for SOCA to make this decision. Alternatively it may be preferable to stop the business, subject to the limitations of the tipping off offence/ prejudicing an investigation offence, see paragraphs 1.1.28 – 1.1.33 and 1.2.17 – 1.2.19.

Commercial Property

1. Do commercial agents need to register with the OFT?

Yes, because they fall within the statutory definition of an estate agent, see Glossary.

2. Are commercial agents subject to the MLR?

Yes, because they fall within the statutory definition of an estate agent, see Glossary.

3. What particular risks does commercial property work pose?

Commercial property can range up to very high value projects. Emerging markets which are attractive to foreign investment may pose a particularly higher risk of bribery.

Dispute Resolution

1. I conduct dispute resolution, e.g. as a mediator or arbitrator. Do I need to comply with the MLR or join the OFT's register?

No, the MLR do not apply to those who conduct dispute resolution. However POCA and other pieces of legislation do apply, see Part 1.

2. What do I need to be aware of?

It is important to bear in mind that disputes may be fabricated as a cover for money laundering, or witnesses may be paid for giving false evidence. Of course you must not accept bribes yourself, and you must consider your position, including possibility reporting to the police, if you are offered a bribe.

Machinery and Business Assets

1. I value machinery and business assets, e.g. when a company goes into administration or liquidation. Do I need to comply with the MLR or join the OFT's register?

No, the MLR and therefore registration do not apply. However POCA and other legislation do apply, see Part 1.

2.I value machinery and business assets when firms go into administration. What do I need to be aware of?

Improper preference being given to some creditors which prejudices others, e.g. a new company buying assets to the detriment of other creditors.

Valuations

1. What particular risks apply to valuations?

Valuers need to conduct their work professionally and objectively, so that they cannot be accused of being improperly influenced in their decision making process. False valuations can provide a basis for mortgage fraud, although a SAR is not required unless the fraud is successful and funds are obtained improperly. False valuations can also mislead courts dealing with matrimonial settlements.

2. What's the best way to stay compliant?

You should be clear on the purpose of the valuation and the context of the transaction. Clear terms of engagement should assist in helping customers to understand the service on offer and the limitations of any ancillary services such as recommendations of other professionals. Instructions which come via an intermediary are generally considered to pose a greater risk than those coming direct from the lender. You should perform appropriate due diligence on any instructing intermediaries and the instruction itself.

3. What risks do I need to bear in mind?

(i) Colleagues

You should be aware of the risks posed by staff and those wishing to infiltrate your firm. It is essential to perform due diligence on any new members of staff and ensure that an induction and monitoring programme is in place. Existing staff of all levels should be correctly supervised and employees should be vigilant of colleagues who may be tempted to become involved with fraud. Staff should receive regular training to ensure that they are and remain aware of the potential for, and indicators of mortgage fraud. See Question 20 in Part 1.

If you are suspicious about a mortgage intermediary, you can report the individual to the FSA, who have set up confidential routes for lenders and valuers to report suspected cases of mortgage fraud involving intermediaries. Further details can be found at the following link: FSA

(ii) Integrity of reports

You should take steps to prevent your reports from being altered. To protect the integrity of your reports, they should be signed and dated and not have gaps where additional information can be inserted. Electronic reports should be appropriately protected, for example through the use of passwords, encryption and use of read-only format. You should keep a signed and dated version of the original report

APPENDIX 1

FURTHER INFORMATION

Members of the NFOPP may seek further assistance from :	Telephone: 0845 250 6009. Email : regulation@nfopp.co.uk Web site: www.nfopp.co.uk
Members of RICS may seek further assistance from:	Telephone: 0207 695 1670 Email: regulation@rics.org Web site: www.rics.org
Members of ARP may seek further assistance from:	Telephone: 08700 737475. Email:enquiries@arp-relocation.com Web site:www.arp-relocation.com
Members of ARMA may seek further assistance from:	Telephone: 0207 978 2607 Email: info@arma.org.uk Web site: www.arma.org.uk

Serious and Organised Crime Agency

SOCA includes the Financial Intelligence Unit for the UK. Further information about the role of SOCA is available from: SOCA

International guidance

The Financial Action Task Force (FATF) is one of the International bodies which develops AML policy. The FATF has developed international guidance for real estate agents about how they can use they should take a risk based approach to AML. This guidance is available from: FATF guidance.

High risk jurisdictions

Transparency International public a Corruption perception index available from:TI

The Financial Action Task Force also publishes information on its web site to record countries which are expected to be the subject of countermeasures and others that have been identified as having varying degrees of inadequacy in the approach to anti-money laundering statutes and practices: FATF.

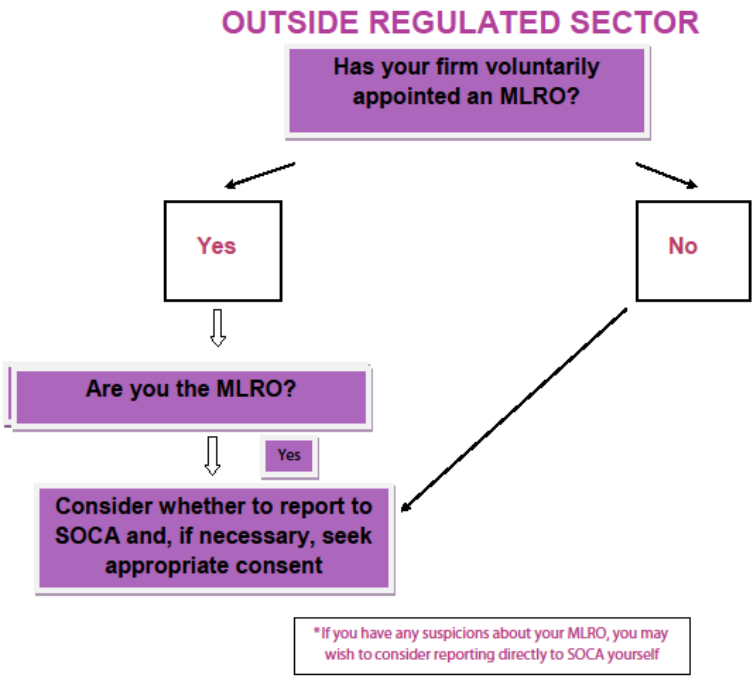
HM Treasury

HMT provide an email alert service for their announcements on AML/CFT. For more information see Question 22of Part 1.

Appendix 2


INSIDE REGULATED SECTOR
Are you the MLRO?
Yes
No
Consider whether to report to SOCA and, if necessary, seek appropriate consent
*Report to your MLRO
*If you have any suspicions about your MLRO, you may wish to consider reporting directly to SOCA yourself

Appendix 3


OUTSIDE REGULATED SECTOR
Has your firm voluntarily appointed an MLRO?
Yes
No
Are you the MLRO?
Yes
Consider whether to report to SOCA and, if necessary, seek appropriate consent
*If you have any suspicions about your MLRO, you may wish to consider reporting directly to SOCA yourself

Appendix 4

Financial Sanctions

The Treasury's Asset Freezing Unit maintains a consolidated list of financial sanctions targets (full list) who are designated persons and entities available at: HMT

The excel version of this list can be searched by using Control & F (edit and find). The list includes persons and entities that are based in the UK as well as overseas.

If the transaction involves a person or entity on the list you must:

- Suspend the transaction pending advice from the Asset Freezing Unit
- Contact the Asset Freezing Unit to seek a licence to deal with the funds
- Consider whether you have a suspicion of money laundering or terrorist financing which requires a report to SOCA

You must not:

- Return funds to the designated person without the approval of the Asset Freezing Unit

You must not proceed with instructions involving a designated person (target) without a licence from the HMT's Asset Freezing Unit.

Contact the Asset Freezing Unit to request a licence or obtain advice regarding financial restrictions at:

Asset Freezing Unit
1 Horse Guards Road
London SW1A 2HQ
Telephone 020 7270 5664 or 020 7270 5454
Fax 020 7451 7677
Email assetfreezingunit@hm-treasury.gov.uk

Under the TACT the Home Secretary may proscribe an organisation if they believe it is concerned in terrorism. The Home Office maintains a list of proscribed organisations which can be found at Home Office

Proscription makes it a criminal offence for a person to belong to or invite support for a prescribed organisation. It is also a criminal offence for a person to knowingly arrange a meeting to support a prescribed organisation, or to wear clothing or to carry articles in public which arouse reasonable suspicion that they are a member or supporter of the prescribed organisation.

Proscription means that the financial assets of the organisation become terrorist property and can be subject to freezing and seizure. If property professionals deal with proscribed organisations they must be particularly aware of the offences under TACT outlined at paragraphs 1.2.1 – 1.2.9.

Appendix 5

Anti Money Laundering Supervision and Registration

This Appendix is intended to assist property professionals with understanding who is their supervisor, and the registration requirements of the supervisor. AML supervisors also play a role in enforcing compliance with the MLR.

See Question 20 of Part 2 for the general exemption from the MLR and AML supervision and registration. This exemption is most likely to apply if property professionals only undertake a small amount of work covered by the MLR, and this work is secondary to their main activities which are not covered by the MLR.

A. Office of Fair Trading

The OFT is the AML supervisor for estate agents. Agents should consider whether their activities fall within the definition of estate agency as estate agents must register with the OFT.

Definition

See Glossary.

Help with registration

OFT : 0207 211 8200/AMLD3@oft.gsi.gov.uk

www.oft.gov.uk/mlr

Sanctions

- Civil Penalties

A civil penalty can be imposed for providing services without being registered, failure to update information provided for the purposes of registration, and not correcting in accurate information provided for the purposes of registration. However a penalty cannot be imposed if reasonable steps were taken and all due diligence was exercised.

- Criminal Offences

It is a criminal offence to provide services without being registered. It is also an offence to fail to update information provided for the purposes of registration, or not to correct in accurate information provided for the purposes of registration.

The possible penalties are:

- on summary conviction, to a fine not exceeding the statutory maximum[7];
- on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both.

NOTES

Registration can be refused if information isn't provided, false or misleading information is provided, or registration fees are unpaid. Registration can also be cancelled on these information grounds.

The OFT have published Enforcement Principles which are available from:OFT

The OFT has also issued an interim penalty policy specifically concerning business trading whilst being unregistered which is available from OFT interim policy.

[7] Currently £5000.

B. Her Majesty's Customs and Excise

HMRC is the AML supervisor for Trust and Company Service Providers (TCSP), High Value Dealers (HVD), and Accountancy Service Providers (ASPs). Property professionals should consider whether their activities fall within the TCSP or HVD categories.

(i) Trust and Company Service Providers:

Definition

See Glossary.

NOTES:

Lettings and managing agents may be TCSPs, although if these services are minimal they may fall under the exemption, see Question 2 of Part 2.

Help with registration and fit & proper test

HMRC's MLR Registration Team: 01702 366607 and HMRC

Sanctions

- Civil Penalties

A civil penalty can be imposed for providing services without being registered, failure to update information provided for the purposes of registration, and not correcting in accurate information provided for the purposes of registration. However a penalty cannot be imposed if reasonable steps were taken and all due diligence was exercised.

- Criminal Offences

It is a criminal offence to provide services without being registered. Registration can be refused if information isn't provided, false or misleading information is provided, or registration fees are unpaid. Registration can also be cancelled on these information grounds.

It is an offence to fail to update information provided for the purposes of registration, or not to correct inaccurate information provided for the purposes of registration.

The possible penalties are:

- on summary conviction to an unlimited fine[8];
- on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both.

It may be a criminal offence to make a false statement in order to pass the fit and proper test[9].

[8] Currently £5000.

(ii) High Value Dealers

Definition

See Glossary.

NOTES

Personal property auctioneers may be HVDs.

Help with registration

HMRC's MLR Registration Team: 01702 366607 and HMRC

Sanctions

- Civil Penalties

A civil penalty can be imposed for providing services without being registered, failure to update information provided for the purposes of registration, and not correcting in accurate information provided for the purposes of registration. However a penalty cannot be imposed if reasonable steps were taken and all due diligence was exercised.

- Criminal Offences

It is a criminal offence to provide services without being registered. Registration can be refused if information isn't provided, false or misleading information is provided, or registration fees are unpaid. Registration can also be cancelled on these information grounds.

It is an offence to fail to update information provided for the purposes of registration, or not to correct inaccurate information provided for the purposes of registration.

The possible penalties are:

- on summary conviction to an unlimited fine[10];
- on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both.

(iii) Accountancy Service Providers

Definition

See Glossary.

NOTE

The services which managing and letting agents provide do not tend to fall within this definition.

[9] Such an offence would be outside of the MLR.

[10] Currently £5000.

Help with registration

HMRC's MLR Registration Team: 01702 366607 and HMRC

Sanctions

- Civil Penalties

A civil penalty can be imposed for providing services without being registered, failure to update information provided for the purposes of registration, and not correcting in accurate information provided for the purposes of registration. However a penalty cannot be imposed if reasonable steps were taken and all due diligence was exercised.

- Criminal Offences

It is a criminal offence to provide services without being registered. Registration can be refused if information isn't provided, false or misleading information is provided, or registration fees are unpaid. Registration can also be cancelled on these information grounds.

It is an offence to fail to update information provided for the purposes of registration, or not to correct inaccurate information provided for the purposes of registration.

The possible penalties are:

- On summary conviction to an unlimited fine [11];
- On conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both.

[11] Currently £5000.

C. Financial Services Authority

The FSA supervises the anti-money laundering controls of many firms in the financial services industry.

Definition

(i) Authorised Firms

The FSA supervises the anti-money laundering controls in Authorised Firms that are subject to the Money Laundering Regulations 2007. These are firms like banks and stockbrokers that the FSA also regulates under the Financial Services and Markets Act, and which are also subject to wider supervision by the FSA, over, for example their prudential strength and selling practice. Such firms may own or control entities which provide property services.

(ii) Annex 1 Financial Institutions

The 2007 regulations also gave the FSA the role of regulating certain other types of business (like safety deposit box providers, leasing companies, share registrars and commercial lenders) under the Money Laundering Regulations. These are known as Annex 1 Financial Institutions and they must register with the FSA. The FSA only oversees these businesses' compliance with the Money Laundering Regulations.

NOTES

More details about the FSA's role under the Money Laundering Regulations 2007 can be found here: FSA role

Help with registration

(i) Authorised Firms

Most firms authorised by the FSA did not need to take action after the introduction of the Money Laundering Regulations 2007. The FSA was already responsible for supervising their compliance with the Regulations, and no further registration was necessary. However, if an Authorised Firm performs any of the activities below it must inform the FSA before doing so, or within 28 days of doing so. It is also necessary to immediately inform the FSA if these activities are discontinued:

- Trust and company services;
- Currency exchange (a bureau de change);
- Money transmission (or any representations of money) by any means;
- Cashing cheques that have been made payable to customers;
- It is subject to the EU's Payments Regulation.

Details of how to notify the FSA of these activities are set out in this publication: FSA Other Sectors

(ii) Annex 1 Financial Institutions

For details of how Annex 1 financial institutions can register with the FSA see FSA role

Sanctions

(i) Authorised Firms

Breach of the notification requirement is likely to be dealt with using the FSA's enforcement powers.

(ii) Annex 1 Financial Institutions

- Civil Penalties

Breach of these regulatory requirements may also result in a civil penalty of an appropriate amount, although a penalty cannot be imposed if reasonable steps were taken and all due diligence was exercised.

- Criminal Offences

It is a criminal offence to provide services without being registered. Registration can be refused if information isn't provided, false or misleading information is provided, or registration fees are unpaid. Registration can also be cancelled on these information grounds.

It is an offence to fail to update information provided for the purpose of registration, or not to correct inaccurate information provided for the purposes of registration.

The possible penalties are:

- On summary conviction, to a fine not exceeding the statutory maximum;
- On conviction on indictment to imprisonment for a term not exceeding two years, to a fine or to both.

.

Appendix 6

MONEY LAUNDERING: THE CONFIDENTIALITY AND SENSITIVITY OF SUSPICIOUS ACTIVITY REPORTS (SARs) AND THE IDENTITY OF THOSE WHO MAKE THEM

Summary

The Proceeds of Crime Act 2002 requires banks and other businesses in the regulated sector to report knowledge or suspicion of money laundering to SOCA. These reports are commonly known as Suspicious Activity Reports (SARs). Disclosure of SARs in certain circumstances might cause a real risk of serious prejudice to an important public interest. Where disclosure is likely to be ordered in such a case, the prosecution has to carefully weigh the options as to whether it should proceed with the prosecution or withdraw proceedings. The personal safety of the reporter, and the interests of the disclosing institution, should disclosure become necessary, will be among a number of considerations taken into account on a case by case basis, but depending upon the circumstances of the case, may not be sufficient to prevent disclosure of the reporter's identity.

Procedure to be followed

1. The following is the standard procedure to be followed by the police, other law enforcement agencies (LEAs) and the Serious Organised Crime Agency(SOCA) in relation to the disclosure under the Criminal Procedure and Investigations Act 1996 (CPIA) of SARs. The staged process should be for each item of unused material:

- Is it 'relevant'?
- Is it potentially 'sensitive' or non-sensitive?
- Does the 'disclosure test' apply?
- Is a 'PII application' necessary?

2. ‘Relevant’: Under the statutory CPIA Code of Practice[12], investigators must retain material which they obtain in the course of a criminal investigation and which may be relevant to the investigation. The content of the SAR will frequently be relevant to an investigation. Retained material which may be relevant to an investigation must be revealed to the prosecutor on a schedule of non-sensitive or sensitive material. The schedule of non-sensitive material will also be revealed to the defence

3. Potentially ‘sensitive’: Under paragraph 6.12 of the CPIA Code of Practice, in order to be ‘sensitive’, an item of unused material must pose a ‘real risk of serious prejudice to an important public interest’. The risk must be real, not fanciful, and any consequent prejudice, serious. Examples of sensitive material may include, depending on the circumstances, material given in confidence. Whilst the SAR regime in itself is in the public domain, individual SARs are given in confidence on the grounds that, for example, in certain instances criminal offences attach to “tipping off” third parties as to their existence or contents. The safety of the reporters is a prime consideration. Under paragraph 6.12 of the Code of Practice, another example of material which may be sensitive is material relating to identity of persons supplying information to the police who may be in danger if their identities are revealed.

4. ’Disclosable’: Any specific item listed on either schedule can only be disclosed to the defence if it meets the disclosure test: ‘there is something that might reasonably be considered capable of undermining the prosecution case against the accused or of assisting the case for him’. This means that items meeting the ‘sensitive’ test, but not meeting the ‘disclosure’ test, remain hidden and undisclosed to the defence. Items meeting the disclosure test will need a PII hearing.

5. PII Applications: The House of Lords judgement in the case of H&C, in February 2004, gives helpful guidance on potential PII applications and must be read and understood by all of those involved in the criminal prosecution process. Relevant extracts are printed at Appendix A. A key point is that it reinforces the CPIA disclosure test; there is no duty to disclose material that is neutral or that is damaging to the defendant: *‘if material does not weaken the prosecution case or strengthen that of the defendant there is no requirement to disclose it’*.

[12] See the revised version brought into operation on 4 April 2005: http://www.homeoffice.gov.uk/crimpol/police/system/investigations.html?=new

6. In the majority of cases involving suspicious financial activity the relevant material (such as a bank statement) is adduced in evidence as a result of production orders. Any underlying SAR may tend to strengthen the prosecution case or be neutral, in which case there is no requirement to disclose it. It should not be assumed, however, that documents that indicate some suspicion can only damage a defendant's case, as the basis for suspicion could in some circumstances assist a defendant's case. SARs that are inconsistent with the subsequent evidence uncovered may well assist the defence. Moreover it may be possible to disclose the SAR in a redacted form or by admissions (and thereby avoid the need for a PII application.) Each one will need to be considered on its own facts and checked carefully against the subsequent evidence.

7. Therefore, where a SAR is regarded by an investigator as relevant to an investigation, the disclosure officer should consider, on a case by case basis, whether the SAR (or parts) is (are) sensitive (in the sense that its disclosure would give rise to a real risk of serious prejudice to an important public interest) and whether, accordingly, it should only be revealed to the prosecutor on a schedule of sensitive material. Careful consideration must also be given to disclosing items meeting the disclosure test: whether it (or parts) undermine(s) the prosecution case or assists the accused. In rare cases a PII application may be necessary.

<u>All SARs to be considered individually</u>

8. The recipient of the information is usually SOCA in the first instance. They may then further disseminate the information to the police or other LEA. The police or other LEA may also receive the information directly from the reporter.

9. In all circumstances, prior to disclosure being considered to any defendant, the relevance and sensitivity of the content of the SAR, including the identification of the reporter, must be assessed.

<u>If disclosure is believed necessary, contact SOCA in writing</u>

10. In the circumstances when the police or other LEAs are seeking disclosure of a SAR held by SOCA then the request is to be made following the three step format below.

11. If the police or other LEA disclosure team believe, in discussion with the prosecution (as necessary) that the SARs (or other SOCA material) should be disclosed, whether at the initial disclosure stage or under the continuing prosecution duty, then they should write to the Assistant Director, Financial Intelligence Division, SOCA stating:

a the nature of the case being prosecuted;
b the issues in the case in respect of which the SARs are believed to be relevant;[13]
c what material and/or information believed to be held by SOCA;[14]

SOCA will respond

12. The decision on relevance is for the prosecution disclosure team but SOCA does reserve the right to make representations. Therefore if SOCA is not satisfied that the identified SAR or other material should be released (whether on the grounds that it is not relevant to the investigation, fails to meet the disclosure tests or, if it does, runs the risk of prejudice to a wider public interest) then it will seek legal advice. If that legal advice recommends that material is not to be released or further information is required before a decision on its disclosure can be made, then SOCA will make representations to the prosecutor.

Disclose by redaction or admissions

13. It is not necessary for disclosed material to remain in the form in which it was originally or derivatively recorded. In some cases it may be possible to disclose a SAR in redacted form, or by admissions.

[13] It may be that the relevant fact is only that a SAR had been made and not the content of the SAR

[14] This may include, if relevant, auxiliary material generated by SOCA in relation to the SAR(s).

Assess risk if further detail relevant (or identifiable)

14. It is essential that the police, or other LEA, should consult with the reporter before a decision is made which would have the effect of identifying him/her.

15. If the source branch or person, or a third-party is itself relevant, or if despite redaction the source would nevertheless be evident then a risk assessment must be made of the real risk of harm to that person from that particular defendant or organisation:

a. the police, or other LEA, are responsible, in consultation with the reporter, for the assessment of the threat i.e. the capability of the criminal organisation; and,

b. the police, or other LEA, are responsible, in consultation with the reporter, for the assessment of the vulnerability of the reporter to that threat.

If the assessment is that there is insufficient reason for concern then the full details will be disclosed. However, the risk assessment should be reviewed by the prosecutor before details are disclosed.

In cases of real risk, apply for PII

16. SARs are to be treated in the same way as any other intelligence material gathered during the course of an investigation. It is therefore vital that the reader is aware of the relevant legislation and current guidelines and applies those principles to the treatment of SARs. Relevant material is set out in Appendix A.

17. If the combined assessment is that a real risk exists then application for PII must be made on the grounds of a real risk of serious prejudice to an important public interest (bearing in mind the fundamental human right to life). The Judge will then balance that against the right to a fair trial and it must be expected that *the public interest in the fair administration of justice will always outweigh the public interest in protecting the identity of intelligence sources, where the withholding of such information is likely to deny the defendant an opportunity to cast doubt on the case against him*.

18. In such a rare and unfortunate situation the prosecutor must decide whether to withdraw from the prosecution or to proceed with the case and ask the police, or other LEA, so far as is practicable, to act to ensure the safety of the disclosing person(s).

Use of SARs in Civil Proceedings

19. Police and other law enforcement agencies should be aware that SARs may be used in civil proceedings. With the exception of cash forfeiture proceedings in the Magistrates' Court the use of SARs in civil proceedings is covered by Part 31 of the Civil Procedure Rules. The basic provision in most civil proceedings is that each party has to disclose the past or present existence of (a) the documents on which he relies and (b) the documents which adversely affect his or another party's case. These documents may then be inspected by the other side. However, in some circumstances a party can apply for an order allowing him to withhold disclosure on the ground "that disclosure would damage the public interest" (rule 31.19). The court has to weigh the public interest in the administration of justice and the Article 6 right to a fair trial against the public interest in the proper functioning of the public service, including that of law enforcement agencies (which may also raise ECHR rights, e.g. the Articles 2 and 8 rights to life and respect for private life, in the case of informers).

20. In cases of civil recovery proceedings under the Proceeds of Crime Act 2002, the Assets Recovery Agency recognises the difficulties that might arise if the identity of the person making the disclosure were to be revealed. The Agency will take all possible steps to protect the identity of the person in such circumstances,

and will follow the guidance as closely as possible in relation to notifying and discussion with the disclosing agency.

Background

Although the following does not specifically mention Suspicious Activity Reports, SARs are to be treated in the same way as any other intelligence material gathered during the course of an investigation. It is therefore vital that the reader is aware of the relevant legislation and current guidelines and applies those principles to the treatment of SARs. The guidelines include paragraph 7 of the attached Home Office Circular.

Legal Environment

The following is an extract from the Attorney General's Guidelines on the Disclosure of Information in Criminal Proceedings 2005 that underpins the law enforcement approach to disclosure:

> *'Every accused person has a right to a fair trial, a right long embodied in our law and guaranteed under article 6 of the European Convention on Human Rights. A fair trial is the proper object and expectation of all participants in the trial process. Fair disclosure to an accused is an inseparable part of a fair trial.*
>
> *Fairness does, however, recognise that there are other interests that need to be protected, including those of victims and witnesses who might otherwise be exposed to harm.'*

Below are extracts from the House of Lords Appellate Committee who, in February 2004, reported comprehensively on issues relating to the application of the

Criminal Procedure and Investigations Act 1996 (CPIA) and Public Interest Immunity[15].

"Para 17. The Criminal Procedure and Investigations Act 1996 gave statutory force to the prosecution duty of disclosure[16], but changed the test. Primary disclosure must be made under section 3(1)(a) of any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused. Secondary disclosure under section 7(2)(a) is to be made, following delivery of a defence statement, of previously undisclosed material which might be reasonably expected to assist the accused's defence."

"Para 35. If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it.[17] For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court."

[15] Regina v. H (Appellant); Regina v. C (Appellant) (Conjoined Appeals). 12th Report 2004

[16] The 1996 Act has been amended by Part 5 of the Criminal Justice Act 2003 with effect from 4 April 2005, but the changes do not affect the substance of the H&C judgement. The main change is the abolition of the old "primary" and "secondary" prosecution tests and their replacement with a single objective prosecution disclosure test which applies both at the initial prosecution disclosure stage and subsequently. The new test requires the disclosure (subject to Public Interest Immunity considerations) of any previously undisclosed material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.

[17] In the majority of cases involving SARs, the material is adduced in evidence as a result of Production Orders and so the underlying SAR tends to strengthen the prosecution case or be neutral.

"Public interest immunity

Para 18. Circumstances may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations. In such circumstances some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial."

" Para 36. When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:

> *(1) What is the material which the prosecution seek to withhold?[18] This must be considered by the court in detail.*
>
> *(2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below) be ordered.[19]*
>
> *(3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered?[20] If No, full disclosure should be ordered.*

[18] For the purposes of this paper, the material may be part or all of a SAR.

[19] A SAR may undermine the prosecution case or assist the defence case if, for example, the text within the SAR names a person other than the defendant as the directing mind behind the reported activity; or the SAR may report the customer's explanation for the funds that is later consistent with the stated defence at trial.

[20] For example, full disclosure would include the identity of the person making the SAR who may thereby be endangered this goes to the public interest in safeguarding persons from harm.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question[21] and also afford adequate protection to the interests of the defence?

> *This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see paragraph 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).*

(5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

(6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

> *It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review."*

[21] For example, by editing parts of the SAR.

APPENDIX 7

TEXT OF THE HMT STATEMENT on EQUIVALENCE

Member states participating in the EU Committee on the Prevention of Money Laundering and Terrorist Financing have agreed a list of equivalent third countries, for the purposes of the relevant parts of the Third Money Laundering Directive. The list is a voluntary, non-binding measure that nevertheless represents the common understanding of Member States.

In the UK the list is relevant to assessing whether a jurisdiction is equivalent for the purposes of simplified due diligence (Regulation 13, and Schedule 2 Paragraph 3 (b), of the Money Laundering Regulations 2007)[22] and reliance (Regulation 17)[23].

Common Understanding on Third Country Equivalence

These third countries are currently considered as having equivalent AML/CFT systems to the EU. The list may be reviewed, in particular in the light of public evaluation reports adopted by the FATF, FSRBs, the IMF or the World Bank according to the revised 2003 FATF Recommendations and Methodology.

Argentina

Australia

Brazil

Canada

Hong Kong

Japan

Mexico

[22] Simplified due diligence: The inclusion of a jurisdiction on the list means that a credit or financial institution based there is in a non-EEA state that imposes equivalent requirements to those laid down in the Third Money Laundering Directive. Regulation 13 (2) (b) (i) refers. The test in Regulation (b) (ii) will also need to be satisfied if simplified due diligence is to apply.

[23] Reliance. Regulation 17(2) (d) imposes four tests, (i) to (iv), all of which must be satisfied if reliance is to be placed on a non-EEA firm. While the equivalence list was specifically developed with simplified due diligence in mind, the UK accepts that it answers the test in 17(2) (d) (iii).

New Zealand

The Russian Federation

Singapore

Switzerland

South Africa

The United States

The following text forms a footnote to the Common Understanding).

The list does not apply to Member States of the EU/EEA which benefit *de jure* from mutual recognition through the implementation of the 3rd AML Directive. The list also includes the French overseas territories (Mayotte, New Caledonia, French Polynesia, Saint Pierre and Miquelon and Wallis and Futuna) and the Dutch overseas territories (Netherlands Antilles and Aruba). Those overseas territories are not member of the EU/EEA but are part of the membership of France and the Kingdom of the Netherlands of the FATF. The UK Crown Dependencies (Jersey, Guernsey, Isle of Man) may also be considered as equivalent by Member States.

The Crown Dependencies and Gibraltar

The Crown Dependencies are considered to be equivalent by the UK.

Gibraltar is also directly subject to the requirements of the Directive, which it has implemented. It is therefore considered to be equivalent for these purposes.

Equivalence in the context of the risk based approach

Firms should note that the list does not override the need for them to continue to operate risk-based procedures when dealing with customers based in an equivalent jurisdiction.