

TAXGUIDE 4/09

MONEY LAUNDERING: SUPPLEMENTARY GUIDANCE FOR THE TAX PRACTITIONER

Guidance approved by HM Treasury on the prevention of money laundering and the countering of terrorist financing for those providing tax services in the United Kingdom issued on 25 June 2009 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales to be read as an Appendix to the CCAB anti-money laundering guidance

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The Tax Faculty of the Institute of Chartered Accountants in England and Wales

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Appendix to the CCAB anti-money laundering guidance

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FOREWORD

This Guidance is issued by:

- the Chartered Institute of Taxation,
- the Association of Taxation Technicians,
- the Institute of Chartered Accountants in England and Wales,
- the Association of Chartered Certified Accountants,
- the Chartered Institute of Management Accountants; and
- HM Revenue and Customs

as an Appendix to the anti-money laundering guidance released by the Consultative Committee of Accountancy Bodies (CCAB).

This supplementary Guidance is not stand alone Guidance; it must be read in conjunction with the CCAB's anti money laundering guidance (www.icaew.com/moneylaundering) to which this Guidance is an appendix. It focuses on the interaction between anti money laundering compliance and tax offences and covers the issues that a tax practitioner is most likely to encounter in practice.

The comments received on the exposure draft of this guidance have been considered and incorporated where appropriate. HM Treasury has approved this guidance. This means that the Courts must consider the content of the Guidance when determining whether an accountant's or tax practitioner's conduct gives rise to an offence under either the Proceeds of Crime Act 2002, Terrorism Act 2000 or the Money Laundering Regulations 2007.

This guidance replaces that in TAXGUIDE 4/08 published in August 2008, which is withdrawn.

Glossary and interpretation

CCAB	The Consultative Committee of Accountancy Bodies
CDD	Customer Due Diligence
CEMA	Customs and Excise Management Act 1979
HMRC	Her Majesty's Revenue and Customs
ICTA	Income and Corporation Taxes Act 1988
JMLSG	Joint Money Laundering Steering Group
MLR 2007	Money Laundering Regulations 2007
MLRO	Money Laundering Reporting Officer
POCA	Proceeds of Crime Act 2002

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SAR	Suspicious Activity Report
SOCA	The Serious Organised Crime Agency
TMA	The Taxes Management Act 1970
UK	United Kingdom
VATA	Value Added Tax Act 1994

Words importing the masculine gender include the feminine, words in the singular include the plural and words in the plural include the singular.

Who we are

Details about the Institute of Chartered Accountants in England and Wales and the Tax Faculty are set out in the Annex.

PCB
25.6.09

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Note: This guidance is incomplete on its own. It must be read in conjunction with the CCAB's Anti Money Laundering guidance.

1. ABOUT THIS SUPPLEMENTARY GUIDANCE

1.1 This supplementary guidance has been developed by the Chartered Institute of Taxation, the Association of Taxation Technicians, the Association of Chartered Certified Accountants, the Institute of Chartered Accountants in England and Wales, the Chartered Institute of Management Accountants and HMRC for professionals providing tax services.

1.2 This supplementary guidance uses the descriptive term 'tax practitioner' for someone in business offering tax services. The MLR 2007 uses the term 'tax adviser' and defines a tax adviser as

'a firm or sole practitioner who by way of business provides advice about the tax affairs of other persons, when providing such services'.

The meaning of 'advice' is widely interpreted. For the purpose of this and the CCAB guidance, tax compliance services, ie assisting in the completion and submission of tax returns, is included within the term. It was considered that, for the purposes of this supplementary guidance, the term 'tax practitioner' minimises the risk of someone assuming that MLR 2007 does not apply to their business because they provide tax compliance services.

1.3 The term 'tax' covers all direct and indirect taxes including duties.

1.4 A tax practitioner providing tax advice privately on an unremunerated or voluntary basis (for example as an unpaid volunteer with the Citizens Advice Bureau) does not come within the scope of the MLR 2007 as he is not providing his services 'by way of business'. However tax advice given by way of business is within the scope of MLR 2007 even if it is provided to the client on a pro bono or unremunerated basis. See also paragraph 1.6 of the CCAB guidance.

1.5 The Treasury has approved this guidance. As noted in the CCAB's guidance approval means that the Courts must have regard to the guidance in deciding whether businesses or individuals affected by it have committed an offence under the MLR 2007 or ss 330-331 POCA or s21A of The Terrorism Act 2000..

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2. HOW TO USE THIS SUPPLEMENTARY GUIDANCE

- 2.1 This supplementary guidance is for professionals providing tax services. It focuses on the interaction between anti money laundering compliance or countering terrorist financing and tax offences and those issues that the tax practitioner is most likely to encounter. It is not intended to be a comprehensive guide to tax offences. It is not stand alone guidance – it must be read in conjunction with the CCAB AML guidance. The broad interpretation of ‘tax adviser’ means that this guidance cannot cover every aspect of tax work but the principles set out in the CCAB guidance and in this guidance apply to all taxes and duties.
- 2.2 A tax practitioner must have a clear understanding of his obligations under the anti Money Laundering legislation. Detailed guidance is given in the CCAB guidance as follows:
- | | |
|-----------|---|
| Section 1 | About this guidance |
| Section 2 | The offences |
| Section 3 | Anti money laundering systems and controls |
| Section 4 | The risk based approach to Customer Due Diligence |
| Section 5 | Customer Due Diligence |
| Section 6 | Internal reporting |
| Section 7 | Role of MLRO and SAR reporting |
| Section 8 | Consent |
| Section 9 | Post SAR actions |
- 2.3 Where a tax practitioner is uncertain of his obligations under the anti-money laundering legislation he should seek specialist help.

3. TAX PRACTITIONERS, MLR 2007 AND POCA

- 3.1 The obligations placed on a tax practitioner under MLR 2007 and POCA are covered in the CCAB guidance.
- 3.2 Paragraph 1.14 of that guidance sets out the role of the supervisory authorities and advises tax practitioners who are in business of the requirement to be supervised by a supervisory authority.
- 3.3 A tax practitioner should be aware of HMRC’s responsibility under MLR 2007 to regulate trust and company service providers, which may impinge upon the work they undertake for their clients. However if the tax practitioner is supervised by another supervisory authority for other tax and accounting services, that supervisory authority can act as supervisor for the trust and company service work.

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- 3.4 Whilst this supplementary guidance focuses on tax offences, a tax practitioner should be aware of the potential need to report to SOCA (or to his firm's MLRO where he is not a sole practitioner) where he knows or suspects or has reasonable grounds for knowing or suspecting, on the basis of information which came to him in the course of his work as a tax practitioner, that another person is engaged in money laundering. This means that where, in the course of his work, a tax practitioner has knowledge or suspicion of proceeds derived from any crime (ie not restricted to tax crimes) a report may be required.
- 3.5 In particular, a tax practitioner should also take proper care, under Section 328 POCA, to ensure he does not become concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person when assisting clients.

4. OVERVIEW OF THE TAX SECTOR

- 4.1 Tax work covers a broad range of activities from routine compliance work to complex tax planning.
- 4.2 Tax compliance includes the processing and submission of returns to the tax authorities.
- 4.3 Tax planning looks at advising on and structuring tax affairs in a tax efficient manner. This can sometimes involve the use of trusts, offshore entities and tax favourable regimes.

5. WHAT ARE THE MONEY LAUNDERING RISKS IN THE TAX SECTOR?

- 5.1 The money laundering risk areas that a tax practitioner may encounter in practice include the following:
- (a) Where a client's actions in respect of his tax affairs create proceeds of crime, for example:
- a client's refusal to correct errors (both for the past and on an ongoing basis); or
 - a client's deliberate under declaration of profits/income/gain or deliberate overstatement of expenses/losses.
- (b) Where during the course of dealing with a client's tax affairs a tax practitioner suspects or becomes aware that the client is holding proceeds of crime derived from criminal activity which may or may not be tax related.
- 5.2 The tax practitioner needs to be alert to the risk of assisting or facilitating the laundering of proceeds of crime whether through the evasion of taxes or otherwise. For example, where a client puts significant importance on maintaining the anonymity of beneficiaries or owners or in keeping confidential the structure of a complex plan ostensibly intended to minimise legally a tax liability, then the

possibility that the funds involved are derived from the proceeds of crime should be kept in mind.

6. TAX OFFENCES

6.1 Introduction

6.1.1 There are a number of tax offences which can give rise to the proceeds of crime and SARs. These are discussed further below. When a tax practitioner has identified proceeds of crime, he (or his firm's MLRO where he is not a sole practitioner) should consider carefully whether the privilege reporting exemption applies before submitting a SAR. See section 12 below and section 7 of the CCAB guidance.

6.1.2 A tax practitioner is not required to be an expert in criminal law but would be expected to be aware of the boundaries between deliberate understatement or other tax evasion and simple cases of error or genuine differences in the interpretation of tax law and be able to identify conduct in relation to direct and indirect tax which is punishable by the criminal law. There will be no question of criminality where the client has adopted in good faith, honestly and without mis-statement a technical position with which HMRC disagrees.

6.1.3 The main areas where offences may arise in direct tax are:

- tax evasion, including making false returns (including supporting documents), accounts or financial statements or deliberate failure to submit returns;
- deliberate refusal to correct known errors; and less commonly
- failure to obtain consent under s765 ICTA

6.2 Taxes Management Act 1970 ('TMA') tax 'offences'

6.2.1 The TMA provides a civil penalty regime covering both fraudulent and negligent conduct. It is only fraudulent or dishonest conduct which is reportable under POCA. The money laundering legislation is only concerned with the proceeds of criminal conduct. Therefore, it is only that conduct which the law treats as criminal offences which can lead to money laundering issues.

6.2.2 Where conduct may attract a civil penalty under the TMA but may also, on the particular facts, amount to criminal conduct then the conduct is criminal. By way of example, only, knowingly assisting in the preparation of an incorrect return etc could give rise to a civil penalty under s99 TMA, but the conduct concerned would typically amount to a criminal offence (such as false accounting or cheating HMRC) as well. Any case where fraudulent conduct is suspected should be reported unless the privilege reporting exemption applies. See section 12 below and section 7 of CCAB guidance

6.3 Prosecution policy – the need to report

- 6.3.1 In the tax environment, there are many circumstances in which the tax authorities have a long and established practice of dealing with matters on a civil basis. A policy view is taken that this is a more cost effective approach and that the interest and penalties that can be charged on a civil basis constitute sufficient restitution and deterrent.
- 6.3.2 This is the case across direct tax and VAT where criminal prosecutions are very much the exception.
- 6.3.3 However, the practices or anticipated practices of HMRC are irrelevant to the reporting obligations under POCA. If a tax practitioner suspects that a criminal offence may have been committed, and that there may be or may have been proceeds, whether actual or prospective proceeds, then unless the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance), he is obliged to report to SOCA (or to his firm's MLRO where he is not a sole practitioner) irrespective of the fact that a criminal prosecution may in the member's view be highly unlikely in practice.

7. RELUCTANCE TO CORRECT PAST ERRORS

7.1 Innocent or negligent error – direct tax

- 7.1.1 It is not uncommon for tax practitioners to become aware of errors in or omissions in current or in past years from clients' tax returns or any calculations or statements appertaining to any liability or an underpayment of tax, for example because a payment date has been missed. If the tax practitioner has no cause to doubt that these came about as a result of innocent mistake or negligence then he will not have formed a suspicion. However, in some cases, the tax practitioner may form a suspicion that the original irregularity was criminal in nature and should make a report unless the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance).

7.2 Innocent or negligent error – indirect tax

- 7.2.1 In the case of indirect tax, see section 11 below on handling the original error.

7.3 Unwillingness or refusal to disclose to the tax authorities

- 7.3.1 Where a client indicates that he is unwilling or refuses to disclose the matter to HMRC in order to avoid paying the tax due, the client appears to have formed criminal intent and hence the reporting obligation arises unless the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance). A tax practitioner will need to be careful in applying the privilege exemption when the client has expressed clear intention to evade taxes and needs to consider whether the crime/fraud exception applies. The tax practitioner should also consider whether he can continue to act and consult his professional body's guidance on such matters. This paragraph applies equally to potential clients for whom the tax practitioner has declined to act.

7.4 Adjusting subsequent returns

- 7.4.1 Where the law permits the correction of small errors by subsequent tax adjustments, and the original error was not attributable to any criminal conduct, then the adjustment itself will not give rise to the need to report, since no crime will have been committed. However, it should be noted that the legislation does apply to any conduct which constitutes the laundering of the proceeds of any criminal offence however small the amount involved.

8. INTENTION TO UNDERPAY TAX

- 8.1.1 A client may suggest that he will in the future underpay tax which would be tax evasion and a money laundering offence when it occurs.
- 8.1.2 A tax practitioner can and should apply his professional body's normal ethical guidance to persuade the client to comply with the law. Should the client's intention in this regard still remain in doubt, the tax practitioner should consider carefully whether he can commence or continue to act.
- 8.1.3 A SAR may well be required in such cases once there are proceeds of crime, depending upon the facts and circumstances and whether the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance). As in 7.3.1 above a tax practitioner will need to be careful in applying the privilege exemption when the client has expressed clear intention to evade taxes.

9. TAX EVASION

9.1 General

- 9.1.1 Where a tax practitioner knows or suspects, or has reasonable grounds for knowing or suspecting, that a client or other party is engaged in tax evasion in the UK or overseas, this will clearly amount to one or more of a number of possible criminal offences, such as theft, obtaining pecuniary advantage by fraud, false accounting, cheating HMRC, the offence of fraudulent evasion of income tax under s 144 Finance Act 2000 or a range of specific indirect tax offences (see section 11 below). Unless the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance) a tax practitioner should report the matter to SOCA (or to his firm's MLRO where he is not a sole practitioner) immediately.
- 9.1.2 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 immediately unless it is known to be lawful under the criminal law applying in that country and that conduct, if carried out in the UK, would attract a maximum sentence in the UK of less than twelve months, except as prescribed by order.

As in other cases, this is unless the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance). There are other very limited exceptions regarding the reporting of overseas criminal conduct; see 2.4 and 2.5 of CCAB guidance.

9.1.3 A tax practitioner can and should apply the principles set out in his professional body's normal ethical guidance to persuade the client to act properly. A tax practitioner will need to consider carefully whether he can continue to act if the client refuses to make a full disclosure to HMRC.

9.2 Civil Investigation of Fraud (CIF) Procedures

9.2.1 In circumstances where a potential or current client asks a member to act in the making of a CIF disclosure to HMRC a suspicion of tax evasion will often, but not always, arise.

9.2.2 A tax practitioner should be aware that notification to HMRC is not a substitute for a report to SOCA. Where appropriate a report must also be made to SOCA as soon as the tax practitioner has knowledge or suspicion or reasonable grounds for knowledge or suspicion that tax has intentionally not been paid when due. The tax practitioner (or his firm's MLRO where he is not a sole practitioner) should consider carefully whether the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance) before submitting a SAR.

9.2.3 There may be occasions where the tax practitioner does not hold sufficient information to make a detailed disclosure of his client's tax evasion to HMRC at the same time as he (or his firm's MLRO where he is not a sole practitioner) submits a SAR to SOCA. However the tax practitioner will be keen to protect his client's position by notifying HMRC of the tax evasion before SOCA does so that the case may be regarded as a voluntary disclosure. The practicalities of this situation are covered in a Question and Answer note agreed with HMRC attached as Appendix 1.

10. FAILURE TO OBTAIN TREASURY CONSENT – S765 ICTA

10.1.1 This section is relevant to members who deal with transactions by companies with international aspects - those transactions that may require consent relate to the creation or issuing or transferring of shares or debentures.

10.1.2 Under s766 ICTA 1988 companies, their officers and advisers may be guilty of criminal offences if a transaction requiring special consent under s765(1) takes place without such consent. The person needs to know that the actions were unlawful under s765(1) in order to be guilty of a criminal offence (s766(1)). In practice this is of limited assistance in cases of innocent oversight because s766(2) puts the burden of proof as to the person's state of knowledge on to the individual in the case of directors.

10.1.3 The next question is whether there are proceeds. If a client has undertaken a tax planning transaction for which Treasury consent was needed and would have been unlikely to have been granted, the tax not paid as a result of the planning would constitute proceeds from the crime. In other circumstances there may be no proceeds, but this will need to be considered on the facts. Where there are proceeds, the tax practitioner should finally consider whether the alleged offender knew or suspected that the proceeds arose from criminal conduct. The tax practitioner would usually advise the client that a criminal offence may have occurred, so that the client would then have the requisite knowledge.

10.1.4 When a tax practitioner realises that there has or may have been a breach of s765 ICTA, he (or his firm's MLRO where he is not a sole practitioner) will need to consider making a SAR based on the factors discussed above. He should also bear in mind whether the privilege reporting exemption applies (see section 12 below and section 7 of the CCAB guidance). The tax practitioner should also consider what other action is appropriate, for example, advising the client to notify HMRC.

11. INDIRECT TAX

11.1 Overview

11.1.1 Where indirect tax is concerned, innocent or negligent errors may be criminal offences as strict liability is imposed by such as s167 (3) CEMA which provides:

'If any person –

(a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or any officer, any declaration, notice, certificate or other document whatsoever; or

(b) makes any statement in answer to any question put to him by an officer which he is required by or under any enactment to answer,

being a document or statement produced or made for any purpose of any assigned matter, which is untrue in any material particular, then, without prejudice to subsection (4) below, he shall be liable on summary conviction to a penalty of level 4 on the standard scale'.

'Assigned matter' is defined in section 1 of CEMA as meaning 'any matter in relation to which the Commissioners are for the time being required in pursuance of any enactment to perform any duties'.

11.1.2 This broadly makes most errors, however innocent, criminal offences in VAT and all other indirect taxes. The fact that VAT matters are in practice handled under the civil penalties regime in most circumstances is irrelevant (see section 6.3 above) to the fact that there is an offence under s167(3) CEMA. However an innocent or negligent error will not fall to be classed as money laundering where the person making the error was not aware/did not suspect that they had committed a criminal offence.

11.1.3 Property is only criminal property for the purposes of POCA if it not only constitutes or represents benefit from criminal conduct, but the 'alleged offender knows or suspects that it constitutes or represents such a benefit' (s340(3)POCA). A client who has knowledge of s167 CEMA will 'know or suspect' that they are in receipt of funds once they become aware of the error or mistake so the normal SAR regime applies. There is no presumption that the client is aware of the strict liability offence in s167(3) and a practitioner does not have to investigate the client's knowledge, but should make a judgement based on his knowledge of the client. If a practitioner believes a report is necessary but that the client made an error or innocent mistake they should consider making reference to this opinion in any SAR they make.

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11.1.4 Where the practitioner suspects that the irregularity may have amounted to tax evasion or tax fraud, the need to make a SAR should be considered on the usual basis and in the same way as for direct tax. There are large numbers of specific criminal offences in the indirect taxes legislation and these are outlined in paragraphs 11.2 and 11.3 below. However in essence they all amount to variations on tax evasion and involve some intent to avoid paying the correct amount of tax.

11.1.5 Unwillingness or refusal to correct indirect tax errors should be treated as set out in 7.3 above.

11.2 Other offences applicable across indirect tax

11.2.1 There is a range of crimes in the Customs and Excise legislation, covering such areas as:

- the bribing of a Commissioner, officer or appointed or authorised person;
- the obstructing of an officer performing any duty, or similar conduct;
- production, signing etc of untrue documents and statements;
- the counterfeiting or falsifying of documents;
- obstructing, or failing to assist in, the inspection of a computer;
- the breaching of conditions applied in respect of relief from VAT conferred on specified classes of persons, such as members of visiting forces; and
- the failure to furnish a supplementary declaration under the Intrastat procedure.

In addition there is the common law offence of Cheating the Public Revenue.

11.2.2 There are a number of other offences relating to particular indirect taxes and excise duties, such as stamp duty and stamp duty land tax, alcohol, tobacco products and mineral oil duties, betting and gaming duty, aggregates levy etc. The legislation in respect of these duties, taxes and levies provides the offences specific to them.

11.2.3 As VAT is the indirect tax most commonly advised upon by tax practitioners further details about specific offences applicable to VAT is given in 11.3 below.

11.3 Specific offences applicable in VAT

11.3.1 *Fraudulent evasion of VAT (s 72(1) VATA)*

A person who is knowingly concerned in, or is taking steps with a view to, the fraudulent evasion of VAT by him or any other person is liable under this offence. A person's conduct may amount to fraudulent evasion under this provision if he understates payments due to the Commissioners for a prescribed accounting period. In certain circumstances the over claiming of VAT (eg a refund in respect of bad debts) may also result in fraudulent evasion. If proceeds arose from such conduct, this would also constitute money laundering.

11.3.2 *Production, furnishing or sending of false documents and statements (s72 (3) VATA)*

This involves the production, furnishing or sending of a false document with the

intent to deceive. In addition, it includes knowingly or recklessly making a false statement. If proceeds arose from such conduct, this would also constitute money laundering.

11.3.3 Conduct which must have involved an offence (s72(8) VATA)

Where a person's conduct during any specified period must have involved the commission by him of one or more of the offences listed above, then, regardless of whether the specifics of the offence(s) are known, he is guilty of an offence. The purpose of this provision is to cover cases where it can be proved that an offence has been committed during a period spanning a number of prescribed accounting periods, but it is not clear to what extent it was committed in any particular prescribed accounting period within the total period concerned. It is only one offence, even if it covers more than one period. If proceeds arose from such conduct, this would also constitute money laundering.

11.3.4 The possession and dealing in goods on which VAT has been evaded (s72(10) VATA)

A person commits an offence, and is liable to penalties, if, having reason to believe that tax has been or will be evaded on them, he either acquires possession of any goods; deals with any goods; or accepts the supply of any services. If proceeds arose from such conduct, this would also constitute money laundering.

11.3.5 Supplying of goods or service without providing security (s72(11) VATA)

A person who is required, under VAT Act 1994 Schedule 11 para 4(2), to give security for the further payment of VAT as a prerequisite for making taxable supplies and who makes those supplies without the provision of security, has committed an offence. If proceeds arose from such conduct, this would also constitute money laundering.

12. THE PRIVILEGE REPORTING EXEMPTION

12.1.1 A tax practitioner should be aware that the privilege reporting exemption does not apply to 'information or other matter which is communicated or given with the intention of furthering a criminal purpose'.

12.1.2 A tax practitioner should read this section in conjunction with paragraphs 7.26 – 7.46 of the CCAB guidance which covers the privilege reporting exemption and the crime/fraud exception in detail.

12.1.3 In summary a tax practitioner who is a professional legal adviser or a 'relevant professional adviser' who suspects or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering is prohibited from making a money laundering report where the knowledge or suspicion comes to him in 'privileged circumstances'.

12.1.4 Relevant professional adviser is defined in s330(14) POCA as follows:

'an accountant, auditor or tax adviser who is a member of a professional body which is established for accountants, auditors or tax advisers (as the case may be) and which makes provision for

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- (a) *testing of competence of those seeking admission to membership of such a body as a condition for such admission; and*
- (b) *imposing and maintaining professional and ethical standards for its members as well as imposing sanctions for non-compliance with those standards.'*

12.1.5 The legislation does not list the professional bodies which meet the criteria but the CCAB bodies, the Chartered Institute of Taxation and the Association of Taxation Technicians meet the criteria and hence their members may be considered to be 'relevant professional advisers'

12.1.6 Privileged circumstances is defined at s330 (10) POCA as:

'Information or other matter comes to a professional legal adviser or other relevant professional adviser in privileged circumstances if it is communicated or given to him:

- (a) *by (or by a representative of) a client of his in connection with the giving by the adviser of legal advice to the client;*
- (b) *by (or by a representative of) a person seeking legal advice from the adviser; or*
- (c) *by a person in connection with legal proceedings or contemplated legal proceedings.'*

12.1.7 The CCAB gives guidance on when the privilege reporting exemption might apply. The CIOT and ATT took Counsel's opinion on the privilege reporting exemption and how it might affect their members. This advice included examples of when the privilege reporting exemption might apply and is unlikely to apply. Those examples together with the CCAB's are attached as Appendices 2 and 3.

13. CUSTOMER DUE DILIGENCE (CDD)

13.1.1 Customer due diligence and beneficial ownership is considered in detail in Section 5 of the CCAB guidance and a tax practitioner should refer to that guidance in the first instance. A tax practitioner should have regard to the financial restrictions list issued by the government and its advisory notices against countries with material deficiencies in their anti-money laundering and counter terrorist financing regimes. See paragraphs 5.32, 5.44 and Glossary Annex B of the CCAB guidance for further details and HM Treasury's website at www.hm-treasury.gov.uk/documents/financial_services/sanctions/fin_sanctions_index.cfr

13.1.2 A tax practitioner may be called upon to advise another professional firm. Unless there is a clear agreement between the firms that the advising firm is intended to form a client relationship with the other firm's client, or unless the advising firm comes into contact with and/or enters into a dialogue with the other firm's client, the other firm is the client of the advising firm and accordingly must be made subject to CDD.

13.1.3 In cases where the advising firm's involvement is also with the other firm's client, then the other firm's client must also be made subject to CDD. It may be possible for the advising firm to rely on the other firm's CDD of the client but there are strict criteria which must be met; see paragraphs 5.33 – 5.41 of the CCAB guidance.

**MONEY LAUNDERING AND DISCLOSURES TO HMRC:
A QUESTIONS AND ANSWERS GUIDANCE NOTE**

This note is an updated version of a note originally agreed between HMRC, the Association of Taxation Technicians and the Chartered Institute of Taxation.

Object of note

To provide guidance about the practical effect of the money laundering legislation on disclosures of tax evasion by tax practitioners.

Questions and answers

- 1. Will the money laundering requirements make any difference to HMRC's willingness to use Code of Practice 9 or in local offices their willingness to come to a settlement without prosecution?**

HMRC have confirmed that the money laundering requirements will not affect enquiries under Code of Practice 9 or local office procedures.

- 2. Which government departments should I as a tax practitioner inform when I am approached by an individual who tells me that he wants to make a full disclosure of undeclared taxable income and/or gains?**

Traditionally, you as a tax practitioner, having taken instructions and collected all necessary information from your client, will have informed the relevant office within HMRC, depending on the circumstances.

But if you have reasonable grounds for knowing or suspecting that your client has intentionally evaded tax then the money laundering laws will also apply. You or your Money Laundering Reporting Officer (MLRO) if you have one, will be obliged also to make a report to SOCA in the specified form unless the privilege reporting exemption applies. Where you have a MLRO, you must notify him or her and they will in turn consider whether a report should be made to SOCA. See Section 7 of the CCAB anti money laundering guidance regarding the need to appoint a MLRO where you do not have one.

- 3. Should I make a report to SOCA when I receive a CoP 9 enquiry letter from HMRC?**

It is your knowledge or suspicion that counts rather than HMRC's suspicion. You should make up your own mind whether such a letter gives you grounds for making a report applying the criteria in Section 330 POCA 2002, ie do you know or suspect, or have reasonable grounds for knowing or suspecting, that the client is engaged in money laundering as defined at Chapter 2 of the CCAB anti money laundering guidance.

4. When should I make a report to SOCA?

The money laundering legislation says that SOCA must be told 'as soon as is practicable after the information or other matter' that gave rise to the knowledge or suspicion was received.

5. It is possible that the potential client may not instruct me at all. Will HMRC monitor me as the tax practitioner named in the SOCA report to see if a disclosure emerges, and if so for how long?

HMRC recognize that the potential client may go elsewhere (or nowhere) for advice. They have said they have no intention of monitoring reputable practitioners after SOCA reports have been submitted.

6. Once I have told SOCA, what happens next assuming no other agency is involved?

SOCA will pass reports to a special intelligence unit within HMRC in the first instance. The unit will consider whether it is suitable for investigation towards criminal prosecution. If it is not, the case will either be considered for enquiry under a Civil Code of Practice or be referred to HMRC's Centre for Research and Intelligence in Llanishen, Cardiff. Where it is considered appropriate to pass intelligence on to relevant staff in taxpayer-facing offices neither the fact that the intelligence has come from SOCA, nor the identity of the original source of the intelligence, is disclosed.

7. Does the need to report to SOCA before I am ready to tell HMRC affect the timing of my providing information to HMRC about my client's undeclared income and or gains? Although I have made a report to SOCA when approached by a potential client with a tax disclosure to make, I may not immediately be able to approach HMRC because I will have to be formally instructed and the approach to HMRC approved by the client. Collecting and collating the information will inevitably take time especially where several individuals or entities are involved. How long will HMRC regard as a reasonable period before the approach is made while leaving the option of using CoP 9 open?

HMRC have confirmed that a delay would not jeopardise the CoP 9 approach where it would otherwise be available provided that the taxpayer is taking active steps to regularise their affairs. Doing nothing involves the risk that a CoP 9 enquiry may not be available and that prosecution may follow; or at least that penalty abatements are at risk.

One option, having obtained the client's permission, is to put down a marker by writing to HMRC, saying you have been instructed by a named client to act for them in coming to a settlement about undeclared income or gains. You would also provide a date by which you expect to be able to let HMRC have these details.

8. To which HMRC office should I send the marker letter?

Under these circumstances all letters should be sent to the Centre for Research and Intelligence, Ty Glas Road, Llanishen, Cardiff, CF4 5YF.

9. How long a time period for providing the information would HMRC consider reasonable in my 'marker' notification?

It will depend on the circumstances of each case but HMRC have indicated that they will take a reasonable approach.

Your estimated timetable will obviously depend on your assessment of the likely complexity of your client's affairs.

10. What happens if I miss my self-imposed deadline set out in my marker letter?

HMRC appreciate that the information may be difficult to obtain. You should obviously inform HMRC if you wish to extend your self-imposed deadline. You will need to update HMRC from time to time to reassure them that the client is taking active steps to help you move matters forward.

11. What is the position where HMRC already had concerns about a taxpayer and the money laundering notification is the trigger for the raid or the launch of an investigation? HMRC may not be prepared to wait, possibly due to concerns that documents might be destroyed. Would a CoP 9 enquiry still be a possibility for my client if the normal conditions are met (for example if the raid does not indicate that my client is unsuitable for a CoP 9 enquiry)?

HMRC have informed us that receipt of a report from SOCA or your 'marker' notification will not necessarily make them deviate from their proposed course of action. HMRC will look at the SOCA report in context of all other information available to them regarding a case when prioritizing the cases for investigation.

12. Will HMRC wait for a reasonable period of time before launching an enquiry on receipt of a report from SOCA?

In the majority of cases, given the time it would take for SOCA to pass information to HMRC and for HMRC to consider what action to take, the time lag between the report to SOCA and the making of a voluntary disclosure to HMRC may not be an issue in practice. You should monitor the receipt of acknowledgements to track progress. If you are concerned you could consider the use of a marker letter as discussed above.

EXAMPLES OF WHEN THE PRIVILEGE REPORTING EXEMPTION MIGHT APPLY

For the privilege reporting exemption to apply the information must come to a legal professional adviser or a relevant professional adviser in privileged circumstances. Whether the privilege reporting exemption applies will depend on the specific facts of the case. These examples are intended as general guidance only and are not a substitute for seeking legal advice in cases of doubt.

Examples included in the CCAB guidance

- advice on taxation matters, where the tax adviser is giving advice on the interpretation or application of any element of tax law and in the process is assisting a client to understand his tax position;
- advice on the legal aspects of a take-over bid, for example on points under the Companies Act legislation;
- advice on duties of directors under the Companies Act;
- advice to directors on legal issues relating to the Insolvency Act 1986, eg, on the legal aspects of wrongful trading; and
- advice on employment law.

Further examples based on advice given to the CIOT and ATT

- advice on how to order or structure a client's tax affairs in a tax efficient manner;
- advice on disclosure obligations to the tax authorities, including advice given in the context of compliance work on reporting requirements and situations where previously there may have been failure to disclose.
- Suspicions derived from pre-existing documents may be covered by the reporting exemption where those documents come to the tax practitioner in privileged circumstances. For example, if a client asked for tax advice on settling past tax under declarations and provided copies of bank statements or invoices or past tax returns in order that the tax adviser could advise, that information could be regarded as having come to the adviser in privileged circumstances.

Examples where relevant professional advisers might fall within privileged circumstances as regards litigation privilege include:

- assisting a client by taking witness statements from him or from third parties in respect of litigation;
- representing a client, as permitted, at a tax tribunal; and
- when instructed as an expert witness by a solicitor on behalf of a client in respect of litigation.

EXAMPLES OF WHEN THE PRIVILEGE REPORTING EXEMPTION IS UNLIKELY TO APPLY

Examples included in the CCAB guidance

It should be noted that conducting audit work does not of itself give rise to privileged circumstances for this purpose, as the relevant professional adviser is neither providing legal advice, nor is he instructed in respect of litigation. Nor do routine book-keeping, accounts preparation or tax compliance assignments, though privileged circumstances may arise if the client requests or the adviser gives legal advice on an informal basis during the course of such an assignment

Further examples based on advice given to the CIOT and ATT

- Information uncovered during tax compliance work, for example spotting that personal expenditure had been claimed as a business expense in a previous year.
- Information uncovered during a tax due diligence assignment or other agreed upon procedures exercise which is for the purposes of producing an evaluation report or an assurance based opinion (other than an audit) to the client or a third party.
- Information provided by or communications received direct from any third party particularly if no advice has been sought in respect of the underlying detailed content by the client. For example, receipt of information or communications when acting as the client's tax agent.
- Information received about the client's or a third party's affairs which is outside the scope of the tax services in respect of which the adviser has been engaged.

ICAEW AND THE TAX FACULTY: WHO WE ARE

1. The Institute of Chartered Accountants in England and Wales (ICAEW) is the largest accountancy body in Europe, with more than 128,000 members. Three thousand new members qualify each year. The prestigious qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.
2. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department for Business, Enterprise and Regulatory Reform through the Financial Reporting Council. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy, including taxation.
3. The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter *TAXline* to more than 10,000 members of the ICAEW who pay an additional subscription.
4. To find out more about the Tax Faculty and ICAEW including how to become a member, please call us on 020 7920 8646 or email us at taxfac@icaew.com or write to us at Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ.