SUPPLEMENTARY ANTI MONEY LAUNDERING GUIDANCE FOR TAX PRACTITIONERS

Guidance for those providing tax services in the United Kingdom, on the prevention of money laundering and the countering of terrorist financing.

This Guidance is issued by

- ***Chartered Institute of Taxation***
- ***Association of Taxation Technicians***
- ***Institute of Chartered Accountants in England and Wales***
- ***Association of Chartered Certified Accountants***
- ***Institute of Chartered Accountants of Scotland and***
- ***HM Revenue and Customs***

as a supplement to 'Anti Money Laundering Guidance for the Accountancy Sector' published by the Consultative Committee of Accountancy Bodies (CCAB).

This supplementary guidance is not standalone guidance; it must be read in conjunction with the CCAB's *Anti Money Laundering Guidance for the Accountancy Sector* (AMLGAS) https://www.ccab.org.uk/documents/updated03072019AMLGuidance2018.pdf It focuses on tax specific issues.

This guidance was approved by HM Treasury on 14 June 2019. Because HM Treasury has approved this guidance, the UK Courts must take account of its contents in deciding whether a business or individual subject to it has committed an offence under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 or ss330-331 of the Proceeds of Crime Act 2002.

This guidance is not intended to be exhaustive. If in doubt, seek appropriate advice or consult your anti money laundering supervisory authority. If an anti-money laundering supervisory authority is called upon to judge whether a business has complied with its general ethical or regulatory requirements, it is likely to be influenced by whether or not the business has applied the provisions of this guidance.

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SUPPLEMENTARY
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FOR TAX PRACTITIONERS

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Glossary and interpretation

AMLGAS	**Anti Money Laundering Guidance for the Accountancy Sector**
CCAB	**The Consultative Committee of Accountancy Bodies**
CDD	**Customer Due Diligence**
CEMA	**Customs and Excise Management Act 1979**
CFA 2017	**Criminal Finances Act 2017**
DASVOIT	**Disclosure of avoidance schemes for VAT & other indirect taxes**
DOTAS	**Disclosure of tax avoidance schemes**
FA 2007	**Finance Act 2007 (and similarly for other FAs)**
GAAR	**General Anti-Abuse Rule**
HMRC	**Her Majesty's Revenue and Customs**
MLR 2017	**The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017**
MLTF	**Money laundering and terrorist financing**
MLRO	**Money Laundering Reporting Officer**
NCA	**National Crime Agency**
POCA	**Proceeds of Crime Act 2002**
SAR	**Suspicious Activity Report**
TMA	**The Taxes Management Act 1970**
UK	**United Kingdom**
VATA	**Value Added Tax Act 1994**

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

1. ABOUT THIS SUPPLEMENTARY GUIDANCE

1.1 This supplementary guidance uses the term 'tax practitioner' for someone offering tax services by way of business. The MLR 2017 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 AMLGAS, tax compliance services, i.e. assisting in the completion and submission of tax returns, are included within the term.

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

1.3 Tax practitioners are within the MLTF regime whilst they are providing services by way of business. They should exercise judgement in deciding whether the provision of tax services is by way of business. If a tax practitioner decides that a service is not by way of business, they should be prepared to explain the reasons for this opinion.

1.4 Whilst it is likely that any remunerated service will be judged to be in the course of business, the absence of remuneration is not sufficient to remove a service from the regime. Pro bono services provided through a business will normally fall within the regime. Unremunerated services provided to family members or as an unremunerated volunteer for a not-for-profit organisation will normally fall outside the regime.

2. TAX PRACTITIONERS, MLR 2017 AND POCA

2.1 This supplementary guidance focuses on predicate tax offences. The obligations placed on tax practitioners under MLR 2017 and POCA are covered in AMLGAS. These include:

- Responsibility and oversight
- Risk Based Approach
- Customer Due Diligence (CDD)
- Suspicious Activity Reporting (SAR)
- Record keeping
- Training and awareness

2.2 In particular, tax practitioners should also take proper care, under sections 327 to 329 POCA, to ensure they do not become involved in an arrangement which they know or suspect facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person when assisting clients.

2.3 Tax practitioners should follow their professional body's ethical guidelines, in particular *Professional Conduct in Relation to Taxation, relevant links below*

AAT: https://www.aat.org.uk/asset/professional-conduct-relation-taxation

ATT: https://www.att.org.uk/members/professional-standards-ethics/professional-conduct-relation-taxation

ACCA: https://www.accaglobal.com/gb/en/technical-activities/technical-resources-search/2019/february/professional-conduct-in-relation-to-taxation-pcrt.html

CIOT : https://www.tax.org.uk/professional-standards/professional-rules/professional-conduct-relation-taxation

ICAS: https://www.icas.com/technical-resources/tax-resources/professional-conduct-in-relation-to-taxation

ICAEW: https://www.icaew.com/technical/tax/pcrt

2.4 Where tax practitioners are uncertain of their obligations under the MLTF regime they should seek specialist help which could include seeking guidance from their AML supervisory body.

3. OVERVIEW OF THE TAX SECTOR

3.1 Tax work covers a broad range of activities from routine compliance work to complex tax planning and advice.

3.2 Tax compliance covers the preparation, processing or submission of returns to the tax authorities. These services can include bookkeeping and accounts preparation; giving a client specific tax advice (for example on whether something is liable to or allowable for a tax and on the amount of tax that is due); and reviewing or analysing data provided by a client.

3.3 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.

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

4.1 The money laundering risk areas that tax practitioners may encounter in practice (as well as the MLTF risks as set out at 4.3.3 of AMLGAS) 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/gains or deliberate overstatement of expenses/allowances/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.

(c) Where a client asks the practitioner to undertake planning which involves structures which appear to evade tax.

4.2 Tax practitioners need to be alert to the risk of assisting or facilitating the laundering of proceeds of crime whether through the evasion of taxes or otherwise. Where a client places significant importance on confidentiality about beneficiaries, owners or structures, tax practitioners still have an obligation to identify the beneficiaries. In addition, the insistence on confidentiality highlights the risk that the funds involved are potentially derived from the

proceeds of crime and you need to assess this. For example, s327 POCA specifically refers to transferring funds out of a UK jurisdiction so if a scheme moves funds between jurisdictions there exists the possibility of an offence under s327. See Section 4 of AMLGAS.

4.3 Tax practitioners should also take care where they have a client with complex international tax affairs to ensure that no tax evasion or other criminal activity is occurring. For example:

- Are clients resident in or otherwise associated with a number of jurisdictions yet paying little or no tax in any of them, and if so can this be attributed to legally robustly effective arrangements or not?;
- Are assets being transferred to trusts and/or to jurisdictions of risk in circumstances where there is no clear legal and rational choice to account for that?

4.3 Tax practitioners should take into account the findings of the most recent UK National Risk Assessment, together with any risk assessment and guidance issued by their relevant anti-money laundering supervisory authority.

5. CUSTOMER DUE DILIGENCE (CDD)

5.1 Customer due diligence and beneficial ownership is considered in detail in Section 5 of AMLGAS and tax practitioners should refer to that guidance in the first instance.

5.2 Tax practitioners 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, the other firm is the client of the advising firm and accordingly must be made subject to CDD. See paragraph 5.3.33 of AMLGAS.

5.3 In cases where there is significant contact with the other firm's client such that a business relationship with it is believed to have been established, then the other firm's client may also be deemed a client and CDD may be required for both the other firm and the other firm's g client.. See paragraph 5.3.34 of AMLGAS.

5.4 The advising firm is allowed to rely on CDD that the other firm has carried out on the client. However, there are strict criteria which must be met where reliance is being placed on another firm's CDD. See paragraphs 5.3.25 – 5.3.31 of AMLGAS.

6. MAKING A SAR

6.1 If a tax practitioner knows or suspects that a criminal offence, such as tax evasion, has been committed (however trivial), and that proceeds have been derived, then unless the privilege reporting exemption applies, they are obliged to report to NCA (or to their firm's MLRO where they are not a sole practitioner who must then decide whether a report needs to be made to the NCA). It is criminal offence not to make a report where one is required. See Appendix 1: *Do I need to make a SAR?* and sections 6.1 and 6.2 of AMLGAS.

6.2 Tax practitioners should take considerable care when communicating with clients or third parties after any form of SAR has been made so as not to commit an offence of tipping off. See sections 6.1.20 to 6.1.29 of AMLGAS.

7. THE PRIVILEGE REPORTING EXEMPTION

7.1 Tax practitioners should read this section in conjunction with paragraphs 6.2.22 – 6.2.32 of AMLGAS which cover the privilege reporting exemption and the crime/fraud exception in detail.

7.2 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 them in 'privileged circumstances'.

7.3 Tax practitioners should be aware that the privilege reporting exemption does not apply to 'information or other matters which are communicated or given with the intention of furthering a criminal purpose' – the crime/fraud exception.

7.4 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

(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.'

7.5 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'.

7.6 '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 of legal advice by the adviser 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.'.

In this context 'legal advice' (as referred to in the statute) given by a tax practitioner other than a lawyer includes tax advice.

7.7 The same knowledge or suspicion may give rise to opposing results depending on the circumstances in which it arose. Thus, if the information came in privileged circumstances, tax practitioners must not make a SAR, whereas if it did not come in privileged circumstances they must report.

7.8 As noted in para 7.3, overriding privilege is the crime/fraud exception. It is therefore vital to identify and record the provenance of all suspicions.

7.9 Examples of when the privilege reporting exemption might apply are in Appendix 2 below.

7.10 Where the privilege reporting exemption applies, it does not also exempt the practitioner from undertaking CDD.

7.11 As noted in para 6.2.32 of AMLGAS, whether privileged circumstances and the crime/fraud exception apply in a given situation is a difficult question with a fundamentally legal answer. Practitioners are strongly recommended to seek the advice of a professional legal adviser experienced in these matters.

8. TAX OFFENCES

8.1 Introduction

8.1.1 There are a number of tax offences which can give rise to the proceeds of crime and require the submission of a SAR. These are discussed further below.

8.1.2 Tax practitioners are not required to be experts in criminal law. They would however be expected to be aware of the tax planning requirements as set out in 3.9 of *Professional Conduct in Relation to Taxation* (see 8.1.5 below); the enablers of defeated tax avoidance schemes legislation as set out at schedule 16 to the Finance (No.2) Act 2017 and the boundaries between deliberate understatement or other tax evasion and simple cases of error or genuine differences in the interpretation of tax law. They should also be able to identify criminal conduct in relation to direct and indirect tax which is punishable by law. There will be no question of criminality solely in virtue of the fact that the client has adopted in good faith, honestly and without mis-statement a technical position with which HMRC disagrees. However, in such a situation, tax practitioners would need to take into account the provisions of 3.7 of *Professional Conduct in Relation to Taxation* in respect of alerting the client to the risks involved.

8.1.3 The main areas where offences may arise are:

- tax evasion, including making false returns (involving supporting documents), accounts or financial statements or deliberate failure to submit returns; and

- deliberate refusal to correct known errors.

8.1.4 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. There are other very limited exceptions regarding the reporting of overseas criminal conduct; see para 2.2.2 of AMLGAS.

8.1.5 Tax practitioners can and should apply the principles set out in their professional body's normal ethical guidance *Professional Conduct in Relation to Taxation* to persuade the client to act properly. If there is doubt in this regard, the practitioner will need to consider carefully whether they can commence or continue to act.

8.2 Direct tax offences

8.2.1 Tax legislation provides a civil penalty regime covering both fraudulent and negligent conduct. For example, Sch 24 FA 2007 – *Penalties for errors* provides for penalties for 'careless' or 'deliberate' behaviour. These civil provisions have been supplemented in recent years by some strict liability (i.e. criminal) offences, for which similar considerations apply as for indirect tax offences, see next section. For the purposes of this guidance, it is only dishonest (now called 'deliberate' in tax legislation) or fraudulent conduct which is reportable under POCA.

8.2.2 Where conduct may attract a civil penalty under the tax legislation but may also, on the particular facts, amount to criminal conduct, then the conduct is criminal, and should therefore be reported. By way of example only, knowingly assisting in the preparation of an

incorrect return etc. could give rise to a civil penalty under Sch 38 FA 2012 – *Tax agents: dishonest conduct* (for actions prior to 1 April 2013 see s99 TMA); the conduct concerned could amount to a criminal offence (such as false accounting or cheating HMRC) as well. A SAR should be submitted in any case where criminal conduct is known or suspected and proceeds have been derived, unless the privilege reporting exemption applies.

8.3 Indirect tax offences

8.3.1 Where indirect tax is concerned, innocent or negligent errors may be criminal offences as strict liability is imposed by such as s167(3) CEMA – *Untrue declarations, etc*. 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'.

8.3.2 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 to the fact that there is an offence under s167(3) CEMA. However, an innocent or negligent error will not be classed as money laundering where the person making the error was not aware/did not suspect that they had committed a criminal offence.

8.3.3 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).

8.3.4 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. A tax practitioner should make a judgement based on their knowledge of the client: 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. If a practitioner believes a SAR is necessary, they should consider explaining in the SAR that the report is being made as a result of s167.

8.3.5 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 is a large number of specific criminal offences in the indirect taxes legislation and these are outlined in section 8.4 below. However, in essence they all amount to variations on tax evasion and involve some intent to avoid paying the correct amount of tax.

8.3.6 Unwillingness or refusal to correct indirect tax errors should be treated as set out in section 9 below.

8.4 Other offences applicable across indirect tax

8.4.1 There is a range of other crimes in the VAT and duties legislation, covering for example:

- 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;
- the failure to furnish a supplementary declaration under the Intrastat procedure;
- fraudulent evasion of VAT (s72(1) VATA 1994);
- production, furnishing or sending of false documents and statements (s72 (3) VATA);
- conduct which must have involved an offence (s72(8) VATA);
- possession and dealing in goods on which VAT has been evaded (s72(10) VATA); and
- supplying goods or service without providing security (s72 (11) VATA).

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

8.4.3 There are 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.

9 GUIDANCE ON SPECIFIC CIRCUMSTANCES

9.1 In all the situations below, tax practitioners should apply their professional body's normal ethical guidance, *Professional Conduct in Relation to Taxation* for example, to persuade their client to comply with the law. Should the client's intention in this regard remain in doubt, the tax practitioner should consider carefully whether they can commence or continue to act and should also consider whether they have an obligation to make a SAR (or report to their MLRO) if they have a suspicion of money laundering occurring

9.2 Innocent or negligent errors

9.2.1 It is not uncommon for tax practitioners to become aware of errors in or omissions 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 cause to believe that these came about as a result of an innocent mistake or oversight, they will not have formed a suspicion. However, in some cases, the tax practitioner may form a suspicion that the error or omission was intentional and should make a SAR unless the privilege reporting exemption applies.

9.3 Unwillingness or refusal to disclose to the tax authorities

9.3.1 Where a client indicates that they are 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 7 above and paragraphs 6.2.22 – 6.2.32 of AMLGAS). A tax practitioner will need to be careful in applying the privilege reporting exemption when the client has expressed a clear intention to evade taxes and needs to consider whether the crime/fraud exception applies.

9.4 Adjusting subsequent returns

9.4.1 It should be noted that the legislation applies to any conduct which constitutes the laundering of the proceeds of any criminal offence however small the amount involved. However, where the law permits the correction of small errors by making 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.

9.5 Intention to underpay tax

9.5.1 A client may suggest that they will in the future underpay tax which would be tax evasion and a money laundering offence when it occurs.

9.5.3 A SAR may well be required in such cases once there are proceeds of crime (i.e. once the tax has become due), depending upon the facts and circumstances and whether the privilege reporting exemption applies (see section 7 above and paragraphs 6.2.22 – 6.2.32 of AMLGAS). As in 9.3 above, a tax practitioner will need to be careful in applying the privilege reporting exemption when the client has expressed a clear intention to evade taxes.

9.6 Procedures under HMRC's Contractual Disclosure Facility (CDF) and Code of Practice 9 (COP 9)

9.6.1 In circumstances where a potential or current client asks a practitioner to act in the making of a disclosure under these procedures to HMRC, a suspicion of tax evasion will often, but not always, arise.

9.6.2 Tax practitioners should be aware that notification to HMRC is not a substitute for a report to NCA. Where appropriate a report must also be made to NCA 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. If the client instructs the practitioner to help settle their tax affairs with HMRC, this can be noted in the SAR. The tax practitioner (or their firm's MLRO where they are not a sole practitioner) should consider carefully whether the privilege reporting exemption applies.

9.6.3 There may be occasions where the tax practitioner does not hold sufficient information to make a detailed disclosure of their client's tax evasion to HMRC at the same time as they (or their firm's MLRO where they are not a sole practitioner) submits a SAR to NCA. However, the tax practitioner will be keen to protect their client's position by notifying HMRC of the tax evasion even if only in the broadest of terms before NCA does so that the case may be regarded as a voluntary disclosure. See Appendix 3.

9.7. Tax avoidance arrangements

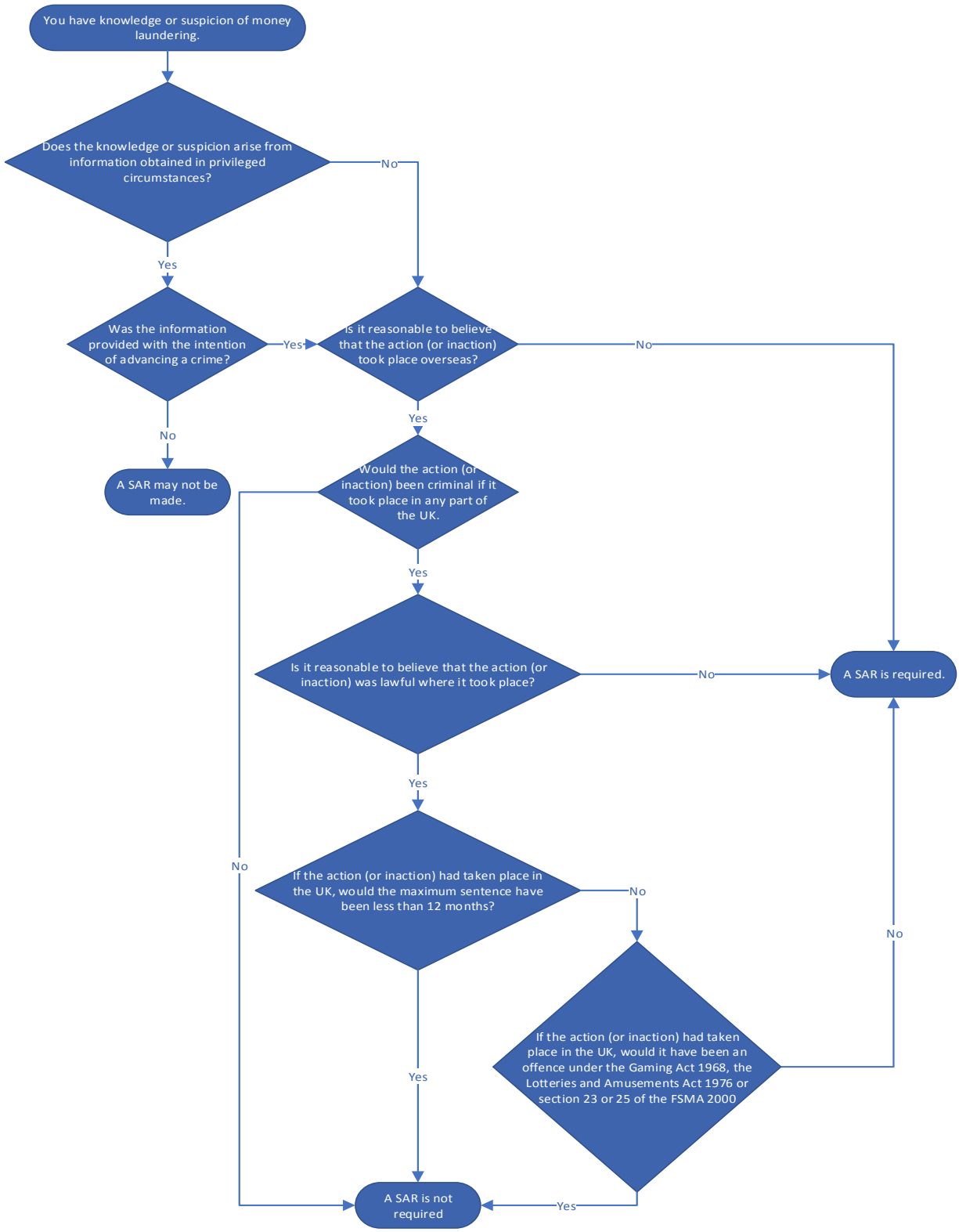
9.7.1 Tax avoidance is not a crime.

9.7.2 HMRC has, however, sometimes used COP 9 etc. where avoidance arrangements have been used. This may be for a number of reasons, for example a suspicion that the underlying transactions are fictitious or that documents have been backdated.

9.7.3 The same principles as noted in section 9.5 above are relevant. This applies whether or not the arrangements are disclosed under the DOTAS regime, or for indirect taxes the DASVOIT rules which came into force on 1 January 2018, or are challenged under the GAAR, neither of which in isolation determine whether tax evasion has taken place; the practitioner must make their own decision whether knowledge or suspicion of tax evasion exists.

Appendix 1
(para 6.1)

Do I need to make a SAR?



Appendix 2(a)
(para 7.8)

Examples of the application of the privilege reporting exemption

These examples are intended as general guidance only and are not a substitute for seeking legal advice in cases of doubt.

Examples of when the privilege reporting exemption <u>might</u> apply

- Advice on tax law to assist a client in understanding their tax position.
- 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

- 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.
- 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 <u>unlikely</u> to apply

- 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.

Appendix 2(b)
(para 7.8)

Examples of privileged/not-privileged circumstances and applying the crime/fraud exception

Privileged circumstances

You are approached by a long-standing client seeking advice on what to do about an undisclosed Swiss bank account, where the original money came from undeclared income. They are concerned about the arrangement agreed between the Swiss banks and HMRC. You explain their options and advise that they make a declaration to HMRC.

Clearly you now know that they have been evading tax; as such, they have committed a money laundering offence. However, the client approached you seeking advice on making an unprompted disclosure under the tax legislation of their undeclared income. It does not appear that this information was disclosed to you with the intention of furthering a criminal offence so it is covered by the privilege exemption. In such circumstances, tax practitioners should also consider whether they should continue to act if they have concerns that the client has not fully disclosed and so that they do not become complicit in further money laundering offences. You must not report them to NCA.

Having advised them to make a declaration, and explained the consequences, your advice remains privileged even if they subsequently decide not to follow your recommendation.

Not-privileged circumstances

Now contrast that with the situation whereby, during the preparation of the client's tax return, a member of staff encounters a bank statement from the Swiss bank account among the papers supplied by the client. You ask your client about this bank account; they then admit to the tax evasion. You have the same information as before, but received in a different way.

In this situation you must report.

Applying the crime/fraud exemption

Consider the situation where you act for a wife in an acrimonious divorce that is heading for the courts. The wife is claiming 50% of her husband's assets. In preparation for the hearing she notifies you of her husband's undisclosed Swiss bank account, providing you with full details. She wishes to claim 50% of that as well!

While this appears to be covered by litigation privilege, her intention in providing the information is to acquire criminal property (i.e. half the money in the Swiss bank account). It would fall under the crime/fraud exemption, so would not be privileged.

You would therefore need to report.

Appendix 3
(para 9.6.3)

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. **Do the money laundering requirements make any difference to HMRC's willingness to use Code of Practice 9 (COP 9)/Contractual Disclosure Facility (CDF) or their willingness to come to a settlement without prosecution?**

   HMRC have confirmed that the money laundering requirements do not affect enquiries under these procedures.

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

   Having taken instructions and collected all relevant information from your client, there are a number of disclosure facilities to consider. Website links can be found at the bottom of this Appendix.

   In the case of COP 9, you may wish to discuss what is involved in the disclosure process with the COP 9 Centre. Please note that they will not be able to discuss the specifics of the case. If your client wishes to be considered for the CDF, the request can be found at www.hmrc.gov.uk/admittingfraud, where you can also find additional information about CDF.

   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 NCA 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 NCA. See Section 3 of AMLGAS regarding the need to appoint a MLRO where you do not have one.

3. **Should I make a report to NCA when I receive a COP 9/CDF 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, i.e. 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 AMLGAS.

4. **When should I make a report to NCA?**

   The money laundering legislation says that NCA 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 following my submitting a SAR to NCA, the potential client may not instruct me to make a disclosure to help them settle their tax affairs with HMRC. Will HMRC monitor me as the tax practitioner named in the NCA report to see if a disclosure emerges, and if so for how long?**

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

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

   NCA will pass reports to a special intelligence unit within HMRC in the first instance. The unit will decide whether it is suitable for investigation towards criminal prosecution. If it is not, the case will either be considered for a compliance check using civil powers. 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 NCA, nor the identity of the original source of the intelligence, is disclosed.

7. **Does the need to report to NCA 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 NCA 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 etc. open?**

   HMRC have confirmed that a delay would not jeopardise the COP 9 etc. 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 etc. enquiry may not be available and that prosecution may follow; or at least that penalty abatements are at risk.

   Under the Contractual Disclosure Facility the client must make an outline disclosure of their deliberate conduct within 60 days of receipt of an offer from HMRC. HMRC agree not to criminally investigate with a view to prosecuting the deliberate conduct disclosed.

8. **Who should I contact in relation to COP 9?**

   The COP 9 Centre Helpdesk number is 03000 579336. The website link is given at Q.2.

9. **What is the position where HMRC already had concerns about a tax payer 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 COP 9 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 COP 9)?**

   HMRC have informed us that receipt of a report from NCA or any other notification will not necessarily make them deviate from their proposed course of action. HMRC will look at the NCA

report in context of all other information available to them regarding a case when prioritising the cases for investigation.

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

In practice, NCA can pass information to HMRC on the 8th day after receipt. Thereafter it depends on the priority given to the case.

Other facilities:

Links to HMRC's guidance on some of the disclosure routes are below which members might find useful. It is of course not for AML guidance to advise on how to make a disclosure to HMRC but up to the member to advise their client taking account of all the relevant circumstances.

Digital disclosure service:

https://www.gov.uk/government/publications/hmrc-your-guide-to-making-a-disclosure/your-guide-to-making-a-disclosure .

HMRC Campaigns:

https://www.gov.uk/government/policies/reducing-tax-evasion-and-avoidance/supporting-pages/hmrc-campaigns

refer to the guidance for that campaign
https://www.gov.uk/government/organisations/hm-revenue-customs/contact?keywords=&contact_groups%5B%5D=campaigns .

Offshore Disclosures:

https://www.gov.uk/guidance/offshore-disclosure-facilities

worldwide disclosure facility
https://www.gov.uk/guidance/worldwide-disclosure-facility-make-a-disclosure

CDF should be the normal route if the client is admitting fraud and should only be used if admitting guilt. Clients who have committed fraud are free to use other disclosure routes (that means any route such as a letter, not just an HMRC facility) but they will still have to disclose what they have done and will not be protected from prosecution if they do not use the CDF.