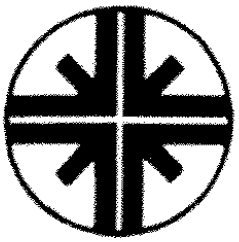

The Consultative Committee of Accountancy Bodies-Ireland

The Institute of Chartered Accountants in Ireland
The Association of Chartered Certified Accountants
The Chartered Institute of Management Accountants
The Institute of Certified Public Accountants in Ireland

ANTI-MONEY LAUNDERING – GUIDANCE FOR INSOLVENCY PRACTITIONERS IN THE REPUBLIC OF IRELAND

This guidance, which is specific to money laundering issues likely to arise in the context of insolvency practice, should be applied together with the generic CCAB-I guidance entitled "Anti-Money Laundering Guidance, Republic of Ireland", most recently revised in September 2010.

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November 2011

INTRODUCTION

1. This guidance, which is specific to money laundering issues likely to arise in the context of insolvency practice, should be applied together with the generic CCAB-I guidance entitled "Anti-Money Laundering Guidance, Republic of Ireland", most recently revised in September 2010, which contains the general guidance for the accountancy profession on this topic.

2. This document replaces guidance issued in December 2008 on this topic.

3. The statutory framework obliges designated persons to put in place procedures for the prevention, detection and reporting of suspicions of money laundering offences or the offence of financing terrorism. Designated persons, which category includes accountants, are required to comply with that statutory framework.

4. The definition of "designated persons" in Section 25, Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010, ("the 2010 Act") includes those "…acting in the State in the course of business carried on by the person in the State, who or that is…an auditor, external accountant or tax adviser..".

5. Each firm of accountants must have anti-money laundering procedures specifically in respect of:

   - reasonable measures for knowing the firm's clients and client identification;
   - record keeping:
   - reporting suspicions of money laundering and financing terrorism; and
   - education and training of principals and staff.

   The overall objective of these sets of procedures, considered in greater detail within the CCAB-I September 2010 guidance, is to ensure that the firm complies with the relevant legislation.

6. The guidance in Paragraphs 9 to 30 is concerned principally with those matters most likely to affect accountants acting as insolvency practitioners. These relate to identification, reporting suspicions, and avoidance of prejudicing an investigation.

7. Having regard to the Guidance, together with the equivalent generic CCAB-I guidance issued in September 2010, may provide insolvency practitioners with evidence of compliance with the obligation arising from the statutory framework. Failure to meet those obligations could have serious legal, regulatory, or professional disciplinary consequences.

8. Due to the complexities and ambiguities of the legislation the legal position in many areas/certain circumstances may not be clear. Practitioners may need to obtain legal advice and/or clarification from the High Court ("the Court").

IDENTIFICATION

9. It is important for an officeholder to be sure about the identity of the person or entity over which he is taking appointment given the urgency of the situation and the necessity not to delay when this might risk dissipation of assets and erosion of value. Initial contact with the company would include, for example, accepting instructions from directors to take steps to place a company into liquidation or to accept appointment as independent reporting accountant under Section 3 of the Companies (Amendment) Act 1990.

10. However, completion of the relevant identification procedures may not be possible prior to appointment. In those circumstances the procedures should be completed as soon as practicable after appointment (if possible, within 5 working days).

11. Where the insolvency practitioner is appointed by Court order without any prior involvement with the insolvent company, reliance on the order of appointment or winding-up order is considered to be sufficient evidence of identity. This would apply in the following cases:
    - Appointment as provisional liquidator by order of the Court;
    - Appointment as liquidator in a winding up by the Court (including by order following an examination); or
    - Appointment as examiner by order of the Court.

12. Where a statutory receiver is appointed under the National Management Agency Act, 2009, without any prior involvement with the insolvent company reliance on the order of appointment is considered to be sufficient evidence of identity.

13. Generally, the debenture under which the practitioner is appointed as receiver will refer to the receiver as agent of the company. In certain circumstances the receiver may be the agent of the debenture holder. Accordingly, prior to accepting that appointment, it would be appropriate for the practitioner to carry out the relevant identification procedures in respect of the directors of the company to which he/she is to be appointed.

14. Financial institutions are themselves designated bodies and, therefore, required to establish and operate the procedures set out in Paragraph 5 above. Where the practitioner is appointed receiver, whether over a specific property or all the assets of the company, the appointment is by an individual financial institution and it is that institution which is the receiver's client, not the company placed in receivership.

15. Where the holder of the debenture under which the receiver is appointed is an individual or an entity which is not a financial institution, the practitioner should carry out the relevant identification procedures on their initial contact with the debenture holder.

16. In a members' voluntary liquidation, where the member is appointed by a resolution of the company in general meeting, the relevant identification procedures would be obtaining a copy of the Articles and Memorandum of Association of the company, checking those details against the company's file in the Companies Registration Office, establishing the identity and addresses of the directors by reference to passports, utility bills, etc., as set out in the generic guidance, and (in appropriate particular circumstances) establishing the identity of some/all of the company's members other than the directors.

17. In a creditors' voluntary liquidation where the practitioner nominated by the members of the company is appointed liquidator, the procedures specified in Paragraph 16 apply. Where the liquidator is appointed by decision of the meeting of creditors convened under Section 267, Companies Act, 1963, the practitioner is appointed to a company which has already been placed in liquidation by resolution of its members. Therefore, the practitioner carries out appropriate identification procedures regarding the company. It may be necessary to check the identify of (some) members of the company if those persons are creditors of the company according to the Statement of Affairs and it is probable a distribution will be made to that category of unsecured creditors.

18. Where practitioners are providing services outside of formal insolvency proceedings, they should identify those parties entering into a contractual relationship with them. For example, where work is to be carried out for one party (e.g. a creditor or investor) in respect of a company, and both the investor and the company sign the letter of instruction, both the investor and the company must be identified. Where instructions letters are received from a group of creditors or investors, it will normally be sufficient to identify those parties who act on behalf of the group and enter into a contract with the practitioner (i.e. sign the letter of instruction), such as the agent or trustee.

REPORTING SUSPICIONS

19. The generic CCAB-I guidance, most recently revised in September 2010, deals with reporting of suspicions. The requirement to report relates to suspicion of any criminal activity resulting in proceeds, or cost savings, or involving financing terrorism, regardless of who may have committed the offence, or where it was committed, if the conduct would have been criminal if undertaken in the Republic of Ireland. The reporting obligation arises when the practitioner becomes suspicious, not when the conduct occurred.

20. However, particular focus is needed before, and immediately after, appointment on considering the way the business has been operated and assessing the risk of assets being tainted by crime. In such cases it may well be necessary, but not as a matter of routine in every case, to make an *external report* prior to performing the normal range of duties of collection, realisation and distribution of assets (see Chapter 8 of the generic CCAB-I guidance).

21. Practitioners need to be aware that, in circumstances where they suspect the assets of a company to which they have been appointed may be tainted by criminality, selling those assets may itself constitute an offence under Section 7 of the 2010 Act.

22. A similar situation arises if a practitioner is suspicious that the funds offered to purchase a business or assets are of criminal origin.

23. There is clearly scope for conflict between a practitioner's duty to achieve the best results for creditors and the obligations imposed on practitioners by the 2010 Act. . However, in view of the criminal sanctions attached to, for example, committing a money laundering offence or failing to report suspicions of money laundering or financing terrorism, it is probable that the latter will prevail. Practitioners may, in particular circumstances, wish to obtain legal advice and/or seek the directions of the Court.

24. Once a report has been made to the Garda Siochana, the insolvency practitioner considers whether or not the content of the report leads to a change in the client relationship. In particular, he/she needs to find a way to continue to deliver the contracted professional service without falling foul of the offence or prejudicing an investigation. This matter is considered in greater detail in Chapter 9 of the generic CCAB-I guidance issued in September 2010.

PREJUDICING AN INVESTIGATION

25. Section 49, Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010, specifies it is an offence to make any disclosure that is likely to "prejudice" an investigation. There are a number of exceptions to the disclosure prohibitions which are addressed in Sections 50 to 53 of the 2010 Act.

26. As was the case under earlier legislation, it is a defence (*Section 53*) that the insolvency practitioner did not know or suspect that the disclosure to which the proceedings relate was likely to prejudice the investigation.

COMPANY IS DESIGNATED PERSON

27. A practitioner appointed to a company which itself is a designated body will, if becoming responsible for the company's operation, need to be satisfied:

- the company has appropriate procedures in place to ensure its compliance with the statutory framework; and
- these procedures continue to function during the term of the practitioner's appointment.

28. In those situations where the practitioner has suspicion of a money laundering offence or financing terrorism he/she is obliged to report this, even in circumstances where the designated person has reported/is about to report the suspicion.

OTHER REPORTING OBLIGATIONS

29. Insolvency practitioners are subject to various statutory obligations. For example, Section 56, Company Law Enforcement Act, 2001, requires the liquidator of an insolvent company to report on the conduct of the company's directors. When making such reports the practitioner needs to be aware of the dangers of prejudicing an investigation as discussed in Paragraphs 25 and 26 above.

30. The practitioner may wish to ask the Financial Intelligence Unit, Garda Bureau of Fraud Investigation, as to whether he/she may refer in, for example, a "Section 56 report", to significant matters raised in the "suspicions report" previously made to that Unit.