

# Section 330 Proceeds of Crime Act 2002 – Reasonable Grounds for Suspecting

David Winch, May 2006

**The Proceeds of Crime Act 2002 requires a person engaged in an activity in the UK which falls within the regulated sector to make a report whenever, based on information or other matter which comes to him in the course of relevant business, “he knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering”. But what are “reasonable grounds”?**

This requirement is found in Section 330 of PoCA 2002 and is subject to certain exceptions and to professional privilege, as described in the Section (as amended by the Serious Organised Crime and Police Act 2005 and The Proceeds of Crime Act 2002 and Money Laundering Regulations 2003 (Amendment) Order 2006).

Where such a report is made as soon as is practicable after the information or other matter is received, then the report is not to be taken to breach any restriction on the disclosure of information (however imposed) and so the person making the report will not normally be liable to a claim for damages (or disciplinary action) for breach of confidence (Section 337).

Only persons engaged in activities within the regulated sector are required to make reports based merely on “**reasonable grounds for knowing or suspecting**” that another person is engaged in money laundering.

This article considers what is meant by “reasonable grounds” in this context, particularly in relation to situations faced by an accountant in general practice.

## Legal precedents

The concept of reasonable grounds for suspicion has been employed many times before in UK criminal law, for example a police officer is required to have “reasonable grounds” before exercising his power to stop and search someone.

The wording is also used elsewhere in the Proceeds of Crime Act. The most useful example perhaps is Section 289 which provides “if a customs officer or constable who is lawfully on any premises has **reasonable grounds for suspecting** that there is on the premises cash which is recoverable property or is intended by any person for use in unlawful conduct . . . he may search for cash there.” The Section also gives similar powers to search a person or any article a person has with him. If the customs officer or constable finds such cash he may seize it under Section 294 and detain it under Section 295. The cash may then be forfeit under Section 298, so these provisions carry a potentially painful bite!

Fortunately for us Section 292 of the Act required the Secretary of State to issue a code of practice in connection with the search power conferred by Section 289. This code of practice has been published on the Home Office website and can be downloaded from <http://www.homeoffice.gov.uk/crimpol/oic/proceeds/cop.html> .

## Code of practice

The code of practice includes a commentary on 'reasonable grounds for suspicion'.

The code of practice says:-

*"Whether there are reasonable grounds for suspicion will depend on the circumstances in each case. There must be some objective basis for that suspicion based on facts, information and / or intelligence. . . . Reasonable suspicion can never be supported on the basis of personal factors alone without reliable supporting intelligence or information or some specific behaviour by the person concerned. For example, a person's race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people being more likely to be involved in criminal activity. It should normally be linked to accurate and current intelligence or information."*

It would appear from this that the use of the term "reasonable grounds" in Section 330 requires that there must be some factual basis, related to an individual, underlying the suspicion that the individual may be engaged in money laundering, before a report may be required.

However in my view the law does not require that the underlying information is necessarily evidence of dishonesty or indicative of any particular criminal offence. It may be something which is simply unusual or unexplained.

## Does 'could' mean 'should'?

I would suggest that an accountant **COULD** properly regard a single expenditure which cannot be supported by an invoice as being sufficient to satisfy the legal test of information underlying a reasonable suspicion of money laundering, so **COULD** a single occurrence of suspicious behaviour; and a disclosure even on this basis would be likely to merit the protection of Section 337.

But before you contact SOCA for bulk supplies of disclosure forms on which to report every one of your clients, bear with me a while longer.

Whilst a single missing expenditure invoice **COULD** be sufficient ground for a reasonable suspicion, does it follow that an accountant **must** file a report with SOCA in every case of a missing piece of paper; or must a lawyer report every client who exhibits suspicious behaviour? In other words, if this **COULD** be sufficient does it follow that it **SHOULD** be sufficient; and that Section 330 **REQUIRES** that a report be made in every case?

UK law now defines money laundering very broadly. In effect it includes possession or handling or becoming concerned in an arrangement involving any proceeds of any crime committed at any time in any place. So a shoplifter taking a pair of jeans from a department store is guilty of theft **and** money laundering, because he has possession of the proceeds of a crime (the jeans which he stole). So, in the UK at least, money laundering need not involve either money or laundering!

### **Value in the context of ‘reasonable grounds’**

Although there is no de minimis rule in relation to the reporting obligations of professional firms in Part 7 of the Act or the Regulations and a report is required where reasonable grounds for suspicion exist, however trivial the amount which may have been laundered, there is no bar to consideration of the amount involved in the context of deciding whether or not there are reasonable grounds for suspicion.

An example may clarify my point. Suppose there is a business expense claimed for a £10 taxi fare, but no invoice or receipt can be produced in response to an enquiry by the accountant. It may be that there was a bona fide business expense of £10 on the taxi fare, or it may be that the expense was a personal one which should not have been claimed against the business, or it may be that the expense did not exist at all and the £10 was stolen from the business or drawn by the proprietor. I would take the view that it is not unusual for an invoice or receipt to be unavailable for a £10 taxi fare. So I would not regard this as a sufficient basis for a reasonable suspicion of money laundering.

Suppose however that there was a business expense claimed for a £10,000 repair of a business property, but no invoice or receipt could be produced in response to an enquiry by the accountant. It may be that there was a bona fide business expense of £10,000 on the business property repair, or it may be that the expense was a personal one, say on the proprietor's home which should not have been claimed against the business, or it may be that the expense did not exist at all and the £10,000 was stolen from the business or drawn by the proprietor. I would take the view that it is unusual for an invoice or receipt to be unavailable for a £10,000 property repair. So I would regard this as a sufficient basis for a reasonable suspicion of money laundering if the query could not be resolved to my satisfaction. In these circumstances I would expect to make a report to my MLRO under Section 330 (but I would also need to take into account any other relevant information in my possession and whether the client proposed to change the treatment of the £10,000 following my query, before making a final decision). The MLRO may then himself report the matter to SOCA.

### **Applying skills, knowledge and experience**

I take the view that Section 330 relating to “reasonable grounds” for suspicion applies to me because I am in business in the regulated sector and that the lawmakers would have had in mind that, as such, I would be expected to have certain skills and experience. To my mind, it follows that I should apply those skills and my experience in deciding whether or not I have reasonable grounds for suspicion of money laundering in any particular case.

In other words, I do not believe the law requires me to make a report to SOCA automatically whenever a particular piece of paper cannot be produced by a client in response to a query from me or whenever my client exhibits behaviour which could be regarded as suspicious.

A lawyer or accountant in practice will often have had a relationship with his client going back over a number of years. He may have an in-depth knowledge and understanding of the client's personal circumstances and his business and financial affairs. This knowledge will assist him to distinguish the routine from the exceptional and the unremarkable from the suspicious. This knowledge should be documented on the client's file, particularly when it becomes a factor in the professional's decision to make a report to SOCA and, perhaps even more importantly from the professional's point of view, when a decision is made **NOT** to make a report (since there are penalties for failing to report in appropriate circumstances).

In a professional office the person dealing with a client initially and in greatest detail is unlikely to be an experienced and qualified professional. But they are required to report to the MLRO if they have suspicions. Almost any customer or client, and almost any transaction, might involve money laundering. So how can less experienced staff be helped to focus on the ones which carry the greatest risk of actually involving money laundering, or for which there are reasonable grounds for suspicion? There is no simple rule which can be used to identify suspicious circumstances, so what guidelines can be produced to assist less experienced staff?

### **Guidelines for staff**

One approach to producing guidelines for less experienced staff would be to attempt to identify 'risk factors' which would indicate a higher than normal risk of money laundering. I would encourage staff to bring the matter to the attention of the MLRO where two or more such risk factors were present. That is not to say that the presence of these 'risk factors' is itself 'reasonable grounds' for suspicion, or that their absence means that there is no possibility of money laundering. However, where a number of these risk factors are present I would consider it appropriate for the matter to be reviewed by the MLRO who, using his skills, experience and the firm's knowledge of the client, can form an opinion as to whether a report to SOCA should be made.

In addition, there will be certain indicators which should, in my view, always trigger a report to the MLRO.

I would therefore suggest that staff engaged in an activity falling within the regulated sector be required submit a report to the MLRO immediately in three sets of circumstances:

- 1 Where there is evidence which is indicative of criminal behaviour of any kind which may produce a financial benefit for the perpetrator or anyone else, including:
  - theft of money or goods,
  - tax evasion (whether of direct or indirect taxes or duties),
  - fraud (including social security benefit fraud),
  - fraudulent trading (that is, dishonestly trading whilst insolvent),
  - falsification of documents or records of any kind,

- forgery or counterfeiting (including illegal copying of software, etc.)
- handling of stolen goods or funds,
- blackmail or extortion,
- prostitution, and
- trafficking of drugs or people.

Such offences usually, but not always, involve dishonesty or deception. If the customer or client is involved in any such criminal offence then, because of its wide definition, he is also likely to be engaged in money laundering. It follows that a report will be required (unless one of the exceptions applies).

- 2 Where there is evidence of any terrorist connection (this also applies to work **outside** the regulated sector).
  
- 3 Where any two or more of the following risk factors are known or believed to be present:-
  - A new client
  - A client which is unusual for the firm because of the client's location, type or size or because of the nature of the work or advice which the client requires
  - An unusual requirement for use of the firm's client account or money transmission facilities
  - A longstanding and significant non-moving balance in client account
  - Concerns about the honesty or integrity of the client
  - Poor business records or lack of supporting documents
  - Lack of appropriate internal accounting controls in the client's business
  - A cash based business
  - An unusual and substantial payment in cash
  - Movement of funds overseas or into or out of a foreign currency
  - A transaction without obvious legitimate purpose
  - An absence of an obvious legitimate source of the funds employed in the business or in a transaction
  - The reversal of an earlier transaction
  - The unexplained cancellation or suspension of a transaction
  - An unexplained and unusual change of instructions in the course of a transaction

- A previous transaction which has been, or should have been, the subject of a report (or would have been had the new law applied previously).

Staff members should include all the relevant information available to them in their report to the MLRO. Where any work or a transaction is in progress or imminent, full details of this must be included in the report.

Exceptionally, should a staff member consider that a report to the MLRO is **not** required in the above circumstances they must make a full file note of the circumstances and their reasons for not submitting a report to the MLRO.

### **Action by the MLRO**

When he receives information or a report the MLRO should review it, together with any other relevant information in the firm's possession and decide whether a report to SOCA is required. If a report to SOCA is required it should be made on the appropriate SOCA form as soon as is practicable after the information comes to him (normally by fax or online via the SOCA website).

When deciding whether a report is required an MLRO in the regulated sector should have regard to Section 331. An MLRO outside the regulated sector should have regard to Section 332. These sections impose criminal penalties on an MLRO who fails to act appropriately on receipt of a report or information. The maximum penalty is 5 years imprisonment and a fine.

The MLRO will not be excused from making a report to SOCA simply because he knows or suspects that a similar report has already been filed by another person or firm.

Once he has decided that a report is necessary the MLRO must ensure that nothing is done by anyone in the firm which might constitute a prohibited act without consent from SOCA. A prohibited act means an offence against any of Sections 327 - 329. In these circumstances it will normally be appropriate to suspend any work or transaction currently underway or imminent, pending consent from SOCA to continue. Where consent is requested a response from SOCA should normally be received within 7 working days of the submission of a report – more quickly in urgent cases.

The MLRO should also ensure that there is no tipping off which would contravene Section 333 or destruction of documents which would contravene Section 342.

It goes without saying that the MLRO should prepare and preserve full records of information received by him, communications he may have with SOCA and with staff and the reasoning behind each of his decisions.

## **Case study**

The following case study aims to illustrate the operation of the procedures under the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003.

All persons mentioned in this case study are fictional and any similarities to any real persons are purely co-incidental.

Penelope Bullock is an antiques dealer in Riversbridge. She has been in business many years and is a well respected customer at the Riversbridge Branch of Universal Bank, where she has had her business bank accounts for the past 5 years.

On 11 April 2006 she visited the bank with £85,000 in cash which she wished the bank to credit to an existing account in her name at a Channel Islands branch of the bank. Penny volunteered to the bank cashier that she had received the money from the estate of a friend of hers, who died earlier in the year.

The cashier was aware that the account at the Channel Islands branch offered interest of only 0.1% per annum and asked Penny if she would be interested in a High Interest Savings Account at the Riversbridge Branch, which would give a better return, or alternatively if she would like an appointment with one of Universal Bank's investment advisers. Penny responded that, for the present, she would rather the money were simply credited to her existing account at the Channel Islands Branch. The cashier accepted the cash on this basis.

Immediately after Penny left the bank the cashier filed a report with the bank's MLRO. The cashier noted in his report that: Ms Bullock is a long established and well respected customer at the branch; £85,000 is an unusually large cash deposit for Ms Bullock; it seems implausible that a legacy of this size from an estate would be received in cash; the transaction involves sending monies offshore; and the investment of the funds at such a low interest rate appears uneconomic.

The bank's MLRO considered the cashier's report and decided that he should report the transaction to SOCA and seek consent to proceed with it. He submitted his report to SOCA electronically later the same day. Within a couple of hours SOCA responded to the MLRO consenting to the transfer of the funds. The MLRO then gave his consent to the transfer to the cashier. The funds were then transferred to the Channel Islands Branch in accordance with Ms Bullock's instructions.

Ms Bullock remained unaware that a report of the transaction had been made to the authorities.

Ms Bullock has no known or suspected terrorist connections.

SOCA forwarded a digest of the information contained in the bank MLRO's report to Rivershire Constabulary Fraud Squad and to HM Revenue and Customs.

The authorities obtained information to the effect that Ms Bullock's account at the Channel Islands Branch of Universal Bank was opened in 2001. There have been several lump sum deposits since then and the balance in the account now exceeds £½ million.

The Fraud Squad made local enquiries which indicated that Ms Bullock has no known or suspected criminal activities or connections. They decided to take no further action on the report.

Examination of Ms Bullock's income tax returns by H M Revenue and Customs revealed no mention of any interest arising on an overseas bank account. Ms Bullock's level of drawings from her business as shown on her tax returns do not appear to support the size of deposits made in the Channel Islands account.

The Inland Revenue Special Civil Investigations Department decided to open an enquiry into Ms Bullock's tax returns and invite her, and her professional advisers, to an interview under their Code of Practice 9 (2005) procedure. In accordance with their normal practice, the Special Civil Investigations Department gave no clue that they have information concerning the Channel Islands bank account. Unfortunately, when asked for details of her income and assets during her initial interview, Ms Bullock failed to mention the Channel Islands account, which she had also kept secret from her accountant.

How might the story end?

Ultimately after a full investigation and report by specialist tax accountants instructed by Ms Bullock, incorporating various admissions by her, including the existence of the Channel Islands account, she agrees in October 2007 to make payment to HM Revenue and Customs in respect of tax, interest and penalties on estimated undeclared business takings of nearly £1 million over the entire period for which she has been in business. The total payable to HM Revenue and Customs is just slightly less than the total balance standing to the credit of her Channel Islands account. The remainder is swallowed up by professional fees.

Ms Bullock never finds out what triggered the Inland Revenue investigation, but she suspects (incorrectly) that she was 'shopped' by her ex-husband.

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