



Home Office

THE PROCEEDS OF CRIME ACT 2002

OBLIGATIONS TO REPORT MONEY LAUNDERING: THE CONSENT REGIME

CONSULTATION DOCUMENT
2007

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Introduction

The purpose of this paper is to seek stakeholder views on whether, and if so how, the law on money laundering 'consent regime' needs to be changed.

The Government welcomes views on any aspect of the paper's content, but particularly on the consultation issues that are raised in Chapter 5 and Annex A. The Government is keen to hear from representative groups/bodies.

The consultation is aimed at those with an interest in the obligations to report Money Laundering.

It is available as a printed document, and can also be downloaded from:
www.homeoffice.gov.uk

An Impact Assessment is also available within the body of this paper.

The Consultation is also open to other Government Departments, interested organisations and members of the public to contribute.

How to Respond

THE CLOSING DATE FOR COMMENTS IS 11 MARCH 2008

There are a variety of ways in which you can provide us with your views.

You can email us at:

CR.consultation@homeoffice.gsi.gov.uk

Or you can write to us at:

Consent Regime Consultation
Organised and Financial Crime Unit
Home Office
5th Floor Fry Building
2 Marsham Street
London
SW1P 4DP

Additional copies of this paper are available through our website:

www.homeoffice.gov.uk

ALTERNATIVE FORMATS

You should also contact the above address should you require a copy of this consultation paper in any other format, e.g. Braille, Large Font, or Audio.

Responses: Confidentiality and Disclaimer

The information you send us may be passed to colleagues within the Home Office, the Government and related agencies.

Furthermore, information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004)

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with the obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, by itself, be regarded binding on the department.

Please ensure that your response is marked clearly if you wish your response and name to be kept confidential.

Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.

The Department will process your personal data in accordance with the DPA - in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Individual contributions will not be acknowledged unless specially requested.

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Thank you for taking the time to read this document and respond.

What Will Happen Next?

The Consultation Period will end on **11 March 2008**

We expect to publish a summary of responses received within 3 months of the closing date for this consultation, and this will be made available on the Home Office website.

Chapter 1

Background

1.1 The Proceeds of Crime Act 2002 (POCA) created a single set of money laundering offences applicable throughout the UK to the proceeds of all crimes. These are set out in more detail in Chapter 2. There are separate offences of failure to disclose money laundering. The Act includes defences to these offences in certain circumstances.

1.2 This document concentrates particularly on the operation of the ‘consent regime’ in POCA. It explores the extent to which criticisms of and concerns about the current regime are justified, and discusses possible amendments to the regime. Whether we choose to preserve the current regime and improve the way it works, or whether we seek legislative change, the underlying principle must be to ensure proportionate burdens on industry, and the individuals working in it, while preserving the efficacy of the money laundering regime as a tool against serious crime and terrorist financing.

1.3 It is available as a printed document and can also be downloaded from www.homeoffice.gov.uk (where you can find additional information and references).

1.4 This consultation is being conducted in line with the Code of Practice on Written Consultation issued by the Cabinet Office. It will be available on the Home Office website. A summary of feedback on the results of the consultation will be published.

1.5 These proposals, if implemented, may lead to some additional savings and benefits for the regulated sector. There is a risk that maintaining the status quo might lead to increased costs if the number of consent requests from reporting institutions increased significantly. An Impact Assessment is at Annex D.

1.6 Our aim is to receive as many comments as possible in order to take appropriate action without unnecessary delay.

1.7 The Proceeds of Crime Act represented a radical shift in our effort against money laundering. In part, it reflected the UK’s need to implement various of our international obligations, under the FATF principles and Second EU Money Laundering Directives. It also, however, demonstrated a new domestic drive to focus on criminal financing and money laundering.

1.8 As the Anti Money Laundering/Counter Terrorist Finance strategy document made clear¹, our objective is to ensure the money laundering regime is proportionate, with a reasonable balance between the burdens imposed on industry and the benefits to the public in terms of criminal finances uncovered and money laundering prevented.

1 The Financial Challenge to Crime and Terrorism, published on 28 February 2007, can be found on HM Treasury website

1.9 Major steps have been taken to improve the workings of the money laundering regime. Where possible, we have shown ourselves willing to change the law to remove unnecessary burdens on industry; for example removing the requirement to report most transactions which are legal in the country they were carried out in, even if they would have been illegal in the UK – the so-called ‘Spanish bullfighter’ example. Similarly, Government amended POCA to remove the duty to report laundering in cases where neither the identity of the launderer nor the location of the assets were known. There may be cases however where neither the individual suspected of money laundering nor the whereabouts of the property are known but there is other information which may assist law enforcement. A disclosure would need to be made in those circumstances.

1.10 These relatively modest changes to the law have been accompanied by a fundamental review of the workings of the Suspicious Activity Regime by Sir Stephen Lander. His report set out 24 recommendations for action. In accordance with the timescale in the Lander review, all 24 recommendations have been addressed. These changes will ensure that the reports collected at some expense by the regulated sector are properly used and exploited by law enforcement, and impressive results are already being secured.

1.11 The consent regime remains however a source of some concern for parts of the regulated sector – in particular the banking sector. This consultation paper examines the extent to which there is a problem, and outlines a series of approaches to address the various concerns that have been raised.

Chapter 2

Proceeds of Crime Act 2002 (Part 7: Money Laundering) - A Summary

2.1 The Proceeds of Crime Act 2002 updates, expands and reforms the criminal law in the United Kingdom with regard to money laundering.

2.2 Part 7 of the Proceeds of Crime Act details the three principal money laundering offences: concealing, arrangements, and acquisition, use and possession, which all bite on acts carried out in relation to criminal property. Property is criminal property if it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly), and the alleged offender knows or suspects that it constitutes or represents such a benefit.

2.3 The three principal money laundering offences all apply to one's own as well as another's proceeds from crime. In court proceedings, it will not be necessary to link the proceeds or property to a specific predicate offence, nor to prove who committed the predicate offence which generated the proceeds. In order to secure a conviction it will only be necessary to prove that the laundered property was criminal property, generated as a result of criminal conduct. Criminal conduct is in turn defined as conduct which constitutes an offence in any part of the United Kingdom, or would constitute an offence in any part of the United Kingdom if it occurred there.

2.4 In addition to the three principal money laundering offences, there are related offences of failing to report where a person has knowledge, suspicion or reasonable grounds for knowledge or suspicion that money laundering is taking place. There is also a separate offence of tipping off a person that a disclosure has been made to SOCA. Section 333 of POCA criminalises tipping off with 3 elements:

- Knowledge or suspicion that a disclosure, commonly known as a Suspicious Activity report (SAR) has been submitted;
- The making of the disclosure; and
- The requirement that the disclosure is likely to prejudice any investigation that may follow the SAR.

Following a separate consultation the Government has laid new Regulations (SI 2007) 3398 to update the tipping off offence in POCA and to include tipping off provisions, and other provisions in the Terrorism Act 2000 to ensure compliance with the 3rd EU Money Laundering Directive.

2.5 There are three separate offences of failure to disclose which apply respectively to: persons working in the regulated sector, nominated officers in the regulated sector, and other nominated officers. Failure to make such a disclosure is an offence under section 330(1), and 331 (1) and 332 (1). The regulated sector is defined in Schedule 9 to the Proceeds of Crime Act 2002 Act (as amended by the Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2007 (SI 2007/3287).

2.6 Persons working in the regulated sector commit an offence if they fail to report where they had knowledge, suspicion or reasonable grounds for knowledge or suspicion that another is engaged in money laundering. All disclosures must be made either to an officer nominated by their employer to receive and process such reports or to SOCA. No offence is committed if a defendant did not receive specified training and did not actually know or suspect that money laundering was taking place (even though there may have been reasonable grounds for knowledge or suspicion). There is also provision that requires industry guidance, approved by the Treasury to be taken into account in any court proceedings, both in relation to this offence and the offence detailed below of failure to report by nominated officers in the regulated sector.

2.7 Section 330(6)(b) provides a defence to this offence where the person is a professional legal adviser, accountant, auditor or tax adviser and the information or other matter came to him in the circumstances set out in section 330(10). There are other exemptions and defences to the offences in sections 330-332.

2.8 Nominated officers in the regulated sector and other nominated officers must pass on the suspicions which are passed to them in their role as nominated officer. These suspicions must be passed directly to SOCA. The information need only be reported on to SOCA if the nominated officer agrees that there are reasonable grounds for suspicion.

2.9 The other sections of Part 7 of the Proceeds of Crime Act deal with the issue of consent -see paragraphs 3.1- 3.3 below, and with protected and authorised disclosures.

MONEY LAUNDERING REGULATIONS 2007

2.10 The Money Laundering Regulations 2007, and amending orders to the Proceeds of Crime Act 2002 and Terrorism Act 2000, are due to come into effect on 15 December 2007. Among other things the new Regulations provide more detailed obligations regarding customer due diligence, require firms to vary customer due diligence and monitoring and to take enhanced due diligence measures in higher risk situations. They allow firms to rely on certain other firms for undertaking customer identification and they clarify the arrangements for the supervision of firms.

2.11 The Regulations cover most UK financial firms (banks, building societies, money transmitters, bureaux de change, cheque cashers, savings and investment firms). In addition the Regulations cover legal professionals (when undertaking some activities), accountants, tax advisers, auditors, insolvency practitioners, estate agents, casinos, high value dealers when dealing in goods worth over €15,000 (euros) and trust or company service providers.

Chapter 3

The Consent Regime – An overview

3.1 The operation of the consent regime is one of the unique features of the UK's regime. All EU and FATF countries must have a regime requiring the reported sector to notify law enforcement when there are suspicions of money laundering. Furthermore, Article 7 of the First EU Directive (as amended by the Second Directive) specifically sets out that '[the] authorities may, under conditions determined by their national legislation, give instructions not to execute the operation' Article 24.1 of the Third Directive provides that "instructions may be given not to carry out the transaction". In a number of EU countries (for example Italy), the authorities have powers to freeze suspicious transactions once they become aware of them.

3.2 What is unusual about the UK system is that the regulated sector is required not only to report before the event suspicious transactions that they become aware of, but to desist from completing these transactions until a specific consent is received. This is the 'consent regime' in section 335 of POCA. A person does not commit one of the principal money laundering offences in sections 327-329 of POCA if he makes a disclosure before the 'prohibited act' takes place and obtains the appropriate consent. It has been noted that a prohibited act includes entering into an arrangement where a series of payments, rather than a single transaction, becomes the issue.

3.3 Appropriate consent is defined in section 335 of POCA:-

335 APPROPRIATE CONSENT

- (1) The appropriate consent is-
 - (a) the consent of a nominated officer to do a prohibited act if an authorised disclosure is made to the nominated officer;
 - (b) the consent of a constable to do a prohibited act if an authorised disclosure is made to a constable;
 - (c) the consent of an officer of Revenue and Customs to do a prohibited act if an authorised disclosure is made to a customs officer.
- (2) A person must be treated as having the appropriate consent if-
 - (a) the makes an authorised disclosure to a constable or an officer of Revenue and Customs , and
 - (b) the condition in subsection (3) or the condition in subsection (4) is satisfied.
- (3) The condition is that before the end of the notice period he does not receive notice from a constable or officer of Revenue and Customs that consent to the doing of the act is refused.
- (4) The condition is that-
 - (a) before the end of the notice period he receives notice from a constable or an officer of Revenue and Customs that consent to the doing of the act is refused, and
 - (b) the moratorium period has expired.
- (5) The notice period is the period of seven working days starting with the first working day after the person makes the disclosure.

- (6) The moratorium period is the period of 31 days starting with the day on which the person receives notice that consent to the doing of the act is refused.
- (7) A working day is a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (c. 80) in the part of the United Kingdom in which the person is when he makes the disclosure.
- (8) References to a prohibited act are to an act mentioned in section 327(1), 328(1) or 329(1) (as the case may be).
- (9) A nominated officer is a person nominated to receive disclosures under section 338.
- (10) Subsections (1) to (4) apply for the purposes of this Part.

3.4 The “consent” provisions in sections 327-329 and section 335 of the Proceeds of Crime Act 2002 (POCA) have two purposes: they offer law enforcement agencies an opportunity to gather intelligence or intervene in advance of potentially suspicious activity taking place; and they offer individuals and institutions who make reports seeking consent to proceed with a “prohibited act” the opportunity to avoid liability in relation to the principal money laundering offences in the Act. As regards intervention, at the moment the consent regime is used to enable SOCA or law enforcement time to get a restraint order if they think one is needed.

3.5 In 2006 SOCA received 213,000 Suspicious Activity Reports an increase of 8% over the previous year. Of this total over 9,600 SARs were consent requests under section 335. Recent analysis by SOCA indicates that the banking sector and solicitors are the highest contributors to the regime, with each contributing around 33% of all consent requests. In 2006 the average turnaround time for SOCA to deal with consent requests was 2.6 days. A small proportion of consent requests are refused annually. But even when consent is granted, this does not necessarily mean the suspicion was not well founded, or that no law enforcement action is taking place. Transactions are sometimes allowed to run in order to facilitate ongoing investigations or lead to a cash seizure.

3.6 The advantages in terms of law enforcement of the consent regime are obvious enough. Clearly, preventing criminals committing money laundering is even better than detecting it once it has happened. The consent regime is a powerful tool. For example, 1061 of last year’s consent requests related to transactions where there was a suspicion of involvement in tax credit fraud. 967 of these consent requests were refused, and funds recovered from this source alone were around £20m.

3.7 The regime also, however, poses some problems for the regulated sector themselves. Sir Stephen Lander in his report suggested that the consent provisions were operating ‘one sidedly’, and causing difficulties for some key institutions and sectors.

3.8 The majority of the responses to the consent issues raised in the consultation document on the 3rd EU Money Laundering Directive issued by HM Treasury in 2006 welcomed the fact that the consent regime was being reviewed. The overall conclusion of the respondents was that

- consent is a complex area
- consent provisions are difficult to comply with
- the whole area of consent needs considering

Chapter 4

Problems with the Consent regime?

4.1 Over the years since POCA came into force, there have been various complaints about the way the consent regime operates.

4.2 Solicitors and accountants in particular expressed concerns in the early years of POCA about the length of time the National Criminal Intelligence Service (NCIS) took to process consent requests. A delay of up to seven days was a problem for those dealing with complex transactions often being processed to tight timescales. Over the past few years, NCIS and now SOCA have improved performance considerably, with the average turnaround now 2.6 days.

4.3 Secondly, some members of the regulated sector were concerned about the risk of clashes between their duties in POCA and their other legal responsibilities towards clients. By seeking consent, many reporters have argued they open themselves up to the possibility of legal action for breach of contract by their clients. Others have argued that POCA itself includes clashing duties, and that it is not in practice possible to freeze a transaction as required under the legislation without alerting the customer that this has taken place, which in turn could lead the body vulnerable to charges under POCA's tipping off provisions.

4.4 Both these concerns have been largely addressed by some helpful recent court rulings, notably the Squirrel case and *K v NatWest*. In the latter case, the court considered the consent provisions and commented 'The truth is that Parliament has struck a precise and workable balance of conflicting interests in the 2002 Act'. The court explicitly ruled that the need to seek consent did not unreasonably interfere with a bank's responsibilities to its client. However it is recognised that freezing an account can be a major disruption of the bank/client relationship.

4.5 SOCA is working with the regulated sector to agree a form of wording that can be used with clients to explain delays to transactions where these have been caused by the submission of a consent request. There has never in practice been any danger of an unavoidable or inadvertent disclosure of law enforcement interest in an individual transaction while this is awaiting consent leading to a tipping off charge, but an agreed form of wording will certainly make life easier for regulated bodies. In turn, guidance for prosecutors on prosecuting POCA cases now comments

"Prosecutions under these provisions (sections 330-32) raise difficult public interest considerations. There is a strong public interest to ensure that professionals do not allow the regulated sector to be used for money laundering, however there is also the need to ensure that the regulated sector is encouraged to cooperate with SOCA. In cases of minor harm or where the offence has been committed as a result of a genuine mistake or misunderstanding, the public interest may better be served by referring the matter to the relevant regulatory or supervisory body to deal with the matter, rather than by pursuing a criminal prosecution or a caution.

In cases arising under section 336, nominated officers are often concerned that by refusing to comply with a client's request to complete a transaction, they will be committing an offence of tipping off contrary to section 333 POCA. Counsel has advised that if tipping off inadvertently occurs in these circumstances, the nominated officer would be protected by the defence accorded in 333(2)(b)"

4.6 CPS would also envisage taking into account any dealings a regulated body had had with SOCA in assessing whether 'tipping off' had been an unavoidable result of the consent process, in which case the defence applies. Here too, mistakes are possible on the part of the regulated body, and may well be dealt with more appropriately through the regulator as outlined above.

4.7 Some have expressed concerns about the process for refusing consent requests. The recent Court of Appeal Case of UMBS Online Ltd v SOCA (Case No/C1/2007/0500) made some recommendations that SOCA should provide better guidance on the principles it will follow in deciding whether to agree or refuse a consent request. SOCA is considering the judgement.

4.8 The last, and probably most significant, area of concern is the interaction between the consent provisions and the principle of 'fungibility'. Consent requests are made in those cases where institutions identify before the fact an activity which is suspected of being a 'prohibited act' under the money laundering provisions in sections 327-329. The consent regime requires consent to be obtained (or the moratorium period to have expired) before any 'prohibited act' can be carried out. The banking sector have argued that this causes them difficulties as banks are often unable to stop individual transactions or obtain consent for every transaction as many are automated.

4.9 It is the unified view of the BBA's Money Laundering Advisory Panel that this regime cannot easily be reconciled with the wide definition of criminal property in POCA and the principle of fungibility. It is their view that money in a bank account (as opposed to notes and coins) is fungible and that as a matter of property law a bank account is a single 'indistinguishable mixed fund'. Consequently, payments into an account can no longer be distinguished from the wider account. According to this view, once a suspicious transaction has been made, that transaction could be argued to have tainted the rest of the account, and possibly any other account held by the same individual. This would imply that all subsequent transactions on the suspect accounts become acts of money laundering under the provisions of sections 327-29.

4.10 In cases where consent is required, it has been argued that fungibility would mean that the reporting body could not simply freeze an individual transaction, but would be forced to freeze the entire account, and potentially make a series of additional consent requests for all other transactions, whether there was anything suspicious about these or not.

4.11 If correct, this interpretation would not only cause problems for the consent regime, however, but also for the whole reporting regime in Part 7 POCA. It could be argued that once an individual account had attracted suspicion, all subsequent transactions on this account become tainted and therefore require a Suspicious Activity Report to be made to SOCA.

4.12 Following similar concerns from banking representatives changes were made to POCA in the Serious Organised Crime and Policing Act 2005 (SOCPA) introducing 'threshold limits' enabling small transactions on suspect accounts to be exempted from the reporting requirement. The Minister taking the provisions through the Commons noted that a 'strict interpretation' of the law might otherwise

require a large number of low value reports on accounts which had already been brought to law enforcement's attention. These reports might for example relate to a large number of small payments out of an account, possibly including matters like monthly utility bills. The threshold was designed to put beyond doubt that these reports were not needed. In practice, the threshold introduced in SOCPA has not been used, mainly for technical reasons around the way banks run accounts.

4.13 Solicitors (the joint biggest users of the consent regime) and accountants are not generally affected in quite the same way as the banks by the principle of fungibility, at least when they are reporting on behalf of their own firms. Solicitors have, however, expressed concerns about fungibility when they are dealing on behalf of corporate clients. If a client discovers some criminal conduct in, say, a partly owned subsidiary, the principle of fungibility might be said to lead to the tainting of the entire accounts both of the subsidiary and of the parent company when this has received payments from the subsidiary.

DOES FUNGIBILITY APPLY?

4.14 There are some important points to make here. First, while fungibility is a well established principle, caselaw has concentrated on issues around tracing and following assets belonging to plaintiffs. There are clear practical reasons why the principle makes sense in this context. Whether courts would decide to extend this principle to govern the definition of acts of money laundering in POCA is unclear. Unless and until the courts actually rule on the issue, the legal position remains uncertain.

4.15 An alternative interpretation of the law would suggest fungibility is not a problem for POCA purposes. If £100 of criminal money is paid into a bank account with a credit of £1000, it is arguable that this will become mixed with the bank's money and legal title to the money will pass to the bank. For its part, the bank credits the depositor with a 'chose in action' to the value of the money deposited. It is this 'chose in action' that represents the criminal property, not the funds in the account. From the bank's point of view, it has given good consideration for the money in the form of the chose in action, and so it may possess the mixed funds without committing an offence under section 329. As a result, the £100 in the possession of the bank will no longer be criminal property, and nor will the rest of the account be tainted.

4.16 When the bank receives the criminal money, it is converting cash into a 'chose in action', and therefore only committing a criminal offence if it knows or suspects the criminal origin of the money and fails to make a report.

4.17 This analysis is founded on the defence contained, uniquely, in s.329 POCA. Case law suggests that the relationship between a bank and its customer may amount to an 'arrangement' for the purposes of s.328 POCA in which case the valuable consideration defence may not apply to offences under this section.

4.18 The legal strength of the interpretation advanced above has not been tested. Its attraction is that it provides a common sense and practical approach to the POCA provisions, which confines the reporting requirement to what the original policymakers in both the EU and UK intended, a simple duty to report on transactions that are in themselves suspicious. This approach moreover reflects the actual practice of most reporters in the regulated sector. There does not appear to be any evidence in practice of banks feeling forced either to freeze entire accounts or to bombard SOCA with reports on every single transaction in suspect accounts.

4.19 The Lander report refers to ‘anecdotal reports’ that some reporting institutions may, as a result of concerns about the consent regime, be submitting after the fact reports instead of seeking consent. There is no concrete evidence of this happening, and it seems surprising, given that delaying the notification of a suspicion in this way would itself be a criminal offence. Nevertheless the Lander report acknowledged that there were problems with the current consent regime.

4.20 The interpretation advanced in paragraph 4.15 has not been tested. However it would fit in well with the settled views of law enforcement, regulators and prosecutors. None of these believe there is any public interest in pursuing reporting institutions for entirely technical cases of ‘money laundering’ in failing to make large numbers of additional reports on technical money laundering activity in accounts which have already been notified to the authorities by a regulated body in accordance with its responsibilities under POCA.

Chapter 5

Options on the Way Forward

5.1 In deciding what approach to adopt, we need to take account the criteria which we believe the regime should fulfil. It should

- Present opportunities to law enforcement both to secure useful early intelligence and to restrain criminal property before it can be dispersed or removed from the jurisdiction etc
- Make it straightforward to prosecute those in the regulated sectors and beyond who collude with criminals, for example by concealing their activities or illegal profits
- Avoid criminalising normal business activity or trivial or technical fouls by reporters, or creating disincentives to compliance with money laundering requirements, or related collaboration with the authorities.
- Be sufficiently flexible to address the very different needs and problems of different parts of the regulated sector, notably banks on one side and other reporting bodies on the other
- Protect the reporters from civil action by their clients in respect of fulfilment of their POCA obligations, including the provision of additional information to the authorities on request

There are probably three main options

OPTION 1 : BUILD ON THE CURRENT SYSTEM

5.2 There is limited evidence that the current regime is broken, even though the regulated sector are understandably concerned about some of the pressures it puts on them. Reporters, law enforcement and prosecutors have adopted a pragmatic approach to the reporting and consent regimes, although the view of the regulated sector is that such an approach is unsustainable as it leaves their position vulnerable.

5.3 One basis for supporting this pragmatic approach would be the arguments on fungibility outlined above. Even if it were accepted that the principle of fungibility does lead to POCA money laundering offences affecting all transactions in a 'tainted' account, it might still be possible to come up with a workable approach.

5.4 SOCA's approach to the issue (supported in discussion with leading counsel) is that a single consent may be given to the execution of a number of transactions over a period of time as part of a course of conduct, since such a course of conduct may lawfully be charged in a single charge. A single money laundering offence can consist of a course of conduct and thus a single consent can be given to a series of similar transactions over a specified period. In cases where there is a range of different money laundering offences that may be committed, such as acquiring (s.329(1)(a)) and transferring (s.327(1)(d)), SOCA may give a single consent compendiously to that person being concerned in an arrangement to facilitate such acquisition and use under section 328(1).

5.5 Key issues are likely to be timeliness in securing decisions from SOCA, and assurances that the need to seek consent will not involve breaching duties to the client or getting caught up by tipping off

provisions. As has already been described, these concerns are mainly being addressed administratively, and a lot of progress has been made.

5.6 There have not in practice been any prosecutions for the sort of technical breaches of POCA which the principle of fungibility could give rise to. It might be possible, however, to provide some broad comfort with an agreed statement of the sort of public interest considerations likely to be taken into account in deciding whether to press charges for non disclosure or breaches of the consent provisions. Every case would continue to be taken on its merits, but this would at least give a useful steer

5.7 In the meantime, we might seek to get some clarity from the courts on the state of the law, recognising that some reporting institutions will not be comfortable about the lack of clear legal cover for the approach we are taking. A joint approach to the High Court by, say, representatives of the regulated sector and SOCA in an appropriate case might be possible, and has been done successfully in a number of other occasions recently. However it is recognised that there are risks attached to this option and it might also prove inconclusive.

5.8 Sticking with the legislation as it stands is the simplest option for law enforcement, an important advantage in itself in an area where the legislation is complex and has seen considerable changes over recent years. Its main disadvantage is that it still leaves the law rather unclear in the interim, and definitive legal ruling when it comes may not support the approach.

Consultation Questions: In the light of your experience and the discussion in this paper, do you believe the consent regime as it stands is workable?
Do you believe the additional measures proposed in Option 1 can strengthen confidence in the existing regime?

OPTION 2: PRE-EVENT NOTIFICATION/INTERIM ORDER TO RESTRAINT ASSETS

5.9 Following Sir Stephen Lander's report, there have been extensive discussions between law enforcement and the regulated sector about the SAR regime generally and consent in particular. In these discussions, an approach emerged for a 'twin track' system of reporting in cases where the reporting institution becomes aware of the activity before it happens. The option below takes this idea and, in order to secure the ability for law enforcement to intervene should they need to, builds on it by adding a possible new power, based on the existing restraint provisions in POCA.

5.10 TWIN TRACK APPROACH

1) Institutions would have the choice of freezing a transaction and asking for consent, as now. The current regime would continue to apply in cases where the institution decided to ask for consent.

2) Alternatively, reporting institutions could obtain a defence against money laundering by filing a Pre Event Notification ("PEN"). The defence would only be valid if the notification is submitted:

- as soon as suspicion, knowledge, or reasonable grounds for suspicion is held; and
- in the prescribed form and manner as in section 339A of POCA (subject to Parliamentary approval of the forthcoming Statutory Instrument about which there has been a separate consultation exercise).

5.11 Using this method there would be no obligation to freeze any transaction while awaiting consent. However, the reporter would maintain the option of voluntarily freezing account activity for up to 7 days to see if SOCA/ Law Enforcement wishes to intervene. This period would be extendable by a maximum of 31 days. These time periods mirror the moratorium in the current system.

5.12 Such a voluntary freezing by the institution would trigger a statutory protection for the reporter from being sued by the subject or any other related party for breach of mandate.

IMPACT ON REPORTERS

5.13 There are a number of advantages to this proposal to reporters. The provision of two different reporting options enables the regime to meet the needs of all parts of the reporting sector. Some reporters, notably solicitors and accountants, are likely to value the certainty of the existing regime, when they in effect know for sure whether they can proceed with a transaction or not within the time frame specified in legislation.

5.14 For the banks and other reporting sectors on the other hand, this proposal has a number of advantages. The need automatically to freeze individual transactions falls away, and with it the debate about how widely the freezing needs to go. Instead of having to find reasons to prevent a transaction taking place while waiting for SOCA to respond to the consent request, the banks would be in the much more comfortable position of only having to freeze when they undertook to do so voluntarily. They might take such a decision on the basis of their judgement on the likelihood of law enforcement interest, or possible concern of a specific predicate offence, factoring in their risk based approach.

IMPACT ON THE UKFIU

5.15 It will take extra capacity and functionality for the UKFIU to be able to process PENs, as well as SARs. This would have to be built into the SARs Transformation Project, meaning that delivery of this option will not happen immediately.

IMPACT ON LAW ENFORCEMENT AGENCIES

5.16 This option may create the risk that valuable intelligence leads will be lost if PENs cannot be analysed and acted on quickly enough. SOCA believe that the volume of PENs may be high, which will increase the pressure on its own FIU, and the FIUs of police forces and other law enforcement agencies to analyse them in order to determine an appropriate response.

5.17 There is an additional risk that firms would choose to use the PEN route rather than submitting requests for consent, but might submit the PEN with insufficient time for the transaction to be analysed and for an appropriate response to be determined. It would be important to stress that the defence against money laundering relies on PENs having been made in a timely manner.

5.18 However, the biggest impact on law enforcement would be that such an approach would remove the guaranteed window of opportunity that agencies currently have to intervene in transactions and have the assets frozen. In order to mitigate this therefore, such an approach would need to be accompanied by an ability to intervene in the event of a PEN, to secure funds from being moved on. Swift action would be required if the current benefits of the consent regime were not to be lost. In the case of tax credit fraud, for example, criminals' normal modus operandi is to start withdrawing funds by ATM as soon as the payments are received from HMRC into the bank account. There would not necessarily be sufficient time in such situations to obtain a Court Order, particularly in the absence of a voluntary freeze by the institution.

5.19 To address this, it is proposed to broaden the effect of the restraint provisions in POCA to enable law enforcement to freeze activity on the authorisation of a senior officer (e.g. ACPO rank), and on the basis that a court order would be obtained within 72 hours.

5.20 This would ensure that law enforcement could act immediately to prevent a transaction in cases where there would be no time to secure a court order. The high rank of the authorising individual and the length of time for which the order would be available would be key to ensuring that this was a proportionate response to suspected money laundering. Further work will need to be done on this issue.

5.21 From the point of view of the part of the regulated sector that preferred to operate this system rather than seek consent, this approach would be much more targeted than the current consent regime, and would enable the vast majority of transactions to flow more smoothly. As such, it should have useful deregulatory effect.

5.22 There are some additional advantages to law enforcement also. The current consent regime only bites on cases where a SAR or consent request have been made. This proposed new restraint power would go wider, and potentially allow assets to be frozen pending a court hearing on the basis of real time intelligence.

5.23 In summary, it is envisaged that the scheme might operate as follows:

- Where a member of staff of SOCA, a constable or a member of HMRC suspects or has reasonable grounds to suspect that a money laundering offence is being, has been, or will be committed (whether in response to receipt of a PEN or otherwise), and a criminal investigation has begun with regard to such an offence, he can impose an Interim Restraint Order prohibiting any person from dealing with property that is suspected of being criminal property, without judicial authority.
- The Interim Restraint Order needs the prior written approval of an officer of ACPO rank, or in the case of HMRC, a member of the Senior Civil Service, or in the case of SOCA a Deputy Director.
- The Order is valid for 72 hours (“hours” as defined in sec 295 of POCA, as amended by sec 100 of SOCPA 2005).
- Within 72 hours SOCA/ Police/HMRC must a) apply to the Crown Court for a Restraint Order (as in sections 40-47 of POCA) or b) notify the relevant parties that no application for a restraint order is to be made and that the suspended activity can go ahead.

Consultation Questions: Do you believe Option 2 provides a viable alternative to the current consent regime? Is it your view that it is worth continuing with the current consent regime as an option if the Pre Event Notification system and the new restraint power are introduced? Do you have specific views on the new powers suggested in option 2.

OPTION 3: ENTRENCHING THE ‘COURSE OF CONDUCT’ APPROACH TO REPORTING IN STATUTE

5.24 It might be possible to build on option 1, and possibly Option 2, to address head on the fungibility issue and its read across to reporting requirements.

5.25 As discussed above, on one view, the existence of one suspicious transaction in an account ‘taints’ the entire account. Every subsequent transaction on that account would then itself become a suspected offence under sections 327-29. The way POCA Part 7 is structured, this might require reporting

institutions to file SARs in every case in order to prevent themselves committing money laundering offences under sections 327-29. This is clearly not how the reporting system was intended to work.

5.26 If we assume that fungibility does taint the entire account in the way suggested, and also that it is not possible through the ‘course of conduct’ approach outlined above to justify not reporting on technical acts of money laundering, an alternative way of returning to the common sense position intended by those drafting POCA would be to adjust the defence provisions in POCA. Instead of requiring a specific report to be made to provide a defence against every single act of money laundering, however technical, the legislation could be amended to provide a broad defence when the reporting institution had made sufficient disclosures to give SOCA a ‘reasonable picture of the criminal activity’.

5.27 The point of this would be to provide some guidance to institutions on how many subsequent reports are needed once the first report has triggered suspicion that money laundering is going on. The drafting of the provision would basically encourage reporters to ignore concerns about fungibility and not report on technical acts of money laundering, but only make reports on transactions that are inherently suspicious.

5.28 What defines a ‘reasonable picture’ of the underlying criminal activity is key to this approach (as indeed it is to the ‘course of conduct’ approach discussed above). In the case of a criminal making heavy use of his account with a series of suspicious transactions, we would expect a large number of reports. In the case of a different account with one large suspicious payment in amongst a series of routine payments (eg utility bills), a report on the initial suspicious payment would suffice. In judging whether an additional report is needed on activity in an account previously reported on to SOCA, a reasonable yardstick for the reporting body might be whether the transaction would arouse suspicion in itself in an account not previously reported on.

5.29 This approach has the advantage of tackling head on the issue of fungibility, which has given rise to considerable concern. Unless carefully drafted, it could risk creating some additional uncertainty about the scope of the duty to report. It would be important to make it clear that having made one report in the past did not relieve reporting institutions of the need to report later suspicious activity.

5.30 A further disadvantage to introducing uncertainty about the scope of the duty to report is that it could introduce similar uncertainty into the definition of a serious criminal offence, where the failure to report carries a maximum sentence of 5 years imprisonment. It will ultimately be for the courts, and specifically the jury, to decide whether the level of reporting by a regulated body gave SOCA a ‘reasonable picture of the criminal activity’ or not. This greater level of uncertainty could on the one hand be said to be unfair to members of the regulated sector faced with the potential criminal sanction, although an alternative argument is that the potential breadth of the defence makes the prospect of securing a conviction much lower than under the existing offence. This proposal could only be pursued if the provisions could be formulated in a way that is sufficiently certain to meet the requirements of Article 7 of the 3rd EU Money Laundering Directive.

5.31 Option 3 is proposed as a potential refinement to either Options 1 and 2 rather than a free-standing option.

Consultation Questions: Do you believe Option 3 provides a viable refinement to Options 1 and 2 as regards resolving difficulties around the operation of the consent regime? Do you have any alternative approaches which you think might contribute to resolving any problems?

Annex A

Consultation Questions

1. In the light of your experience and the discussion in this paper, do you believe the consent regime as it stands is workable?
2. Do you believe the additional measures proposed in option 1 can strengthen confidence in the existing regime?
3. Do you believe Option 2 provides a viable alternative to the current consent regime?
4. Is it your view that it is worth continuing with the current consent regime as an option if the Pre Event Notification system and the new restraint power are introduced?
5. Do you have specific views on the new powers suggested in Option 2?
6. Do you believe Option 3 provides a viable refinement to Options 1 and 2 as regards resolving difficulties around the operation of the consent regime?
7. Do you have any alternative approaches which you think might contribute to resolving any problems?

Annex B

Consultation Co-ordinator

Responses to this consultation paper should not be sent to the consultation co-ordinator. However, if you have any complaints or comments specifically about the consultation process only, you should contact the Home Office consultation co-ordinator Nigel Lawrence by email at:

Nigel.Lawrence@homeoffice.gsi.gov.uk

Alternatively, you may wish to write to:

Nigel Lawrence

Consultation Co-ordinator

Performance and Delivery Unit

Home Office

3rd Floor Seacole

2 Marsham Street

London

SW1P 4DF

The Consultation Criteria

THIS CONSULTATION FOLLOWS THE CABINET OFFICE CODE OF PRACTICE ON CONSULTATION – THE CRITERIA FOR WHICH ARE SET BELOW

The six consultation criteria

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out Regulatory Impact Assessment if appropriate.

The full code of practice is available at:

<http://bre.berr.gov.uk/regulation/consultation/code/index.asp>

Summary: Intervention & Options

Department /Agency: Home Office	Title: Impact Assessment of Obligations to report money laundering: The consent regime.	
Stage: Consultation	Version: 1	Date: 29 November 2007
Related Publications: None		

Available to view or download at:

<http://www.homeoffice.gov.uk>

Contact for enquiries: Ibeawuchi Nwokocho

Telephone: 020 7035 4848

What is the problem under consideration? Why is government intervention necessary?

The most significant areas of concern centre on the issue of whether there is an unintended interaction between the POCA provisions and the general rules of banking law which would in theory taint the entire contents of a bank account once a suspicious activity had been identified. They have argued in particular that this causes them difficulties as many financial institutions are often unable to stop individual transactions or obtain consent for every transaction as many are automated.

What are the policy objectives and the intended effects?

The objectives of this policy is to increase confidence in the AML regime and to attempt to address the concerns of the regulated sector. At the same time it seeks to ensure proportionate burdens on industry, and the individuals working in it, while preserving the efficacy of the money laundering regime as a tool against serious crime and terrorist financing.

What policy options have been considered? Please justify any preferred option.

Option 1 : Build on the current system addressing concerns using guidance etc.

Option 2: Introduce a Pre-Event Notification/Interim Restraint Orders Regime to run along side the current consent regime.

Option 3: Entrenching the 'course of conduct' approach to reporting in statute (This is proposed as a potential refinement to either Options 1 and 2 rather than a free-standing option.) allowing for a defence of "reasonable picture".

Currently there is no preferred option.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

This will be developed as part of the final impact assessment.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Vernon Coaker MP

Parliamentary Under-Secretary of State for Crime Reduction.

.....Date: 3 December 2007

Summary: Analysis & Evidence

Policy Option: 1

Description: Continue to develop guidance based on pragmatic approach

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' It is not envisaged that there will be any significant costs in relation to this option. Some administrative costs may be incurred by Government as the regime develops and there may be also be related minor administrative associated with continually having to cascade developments in this pragmatic regime.
	One-off (Transition)	Yrs	
	£ None		
	Average Annual Cost (excluding one-off)		
	£ Minimal		
Total Cost (PV)			£
Other key non-monetised costs by 'main affected groups'			
None			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' The key benefit in this option is the increased confidence in the SAR regime. It is not yet clear the value of this benefit.
	One-off	Yrs	
	£ Unknown		
	Average Annual Benefit (excluding one-off)		
	£ Unknown		
Total Benefit (PV)			£
Other key non-monetised benefits by 'main affected groups'			

Key Assumptions/Sensitivities/Risks

There is a risk that in such a pragmatic approach the direction may not always be that envisaged, desired or catered for. There is also a risk of a large increase in SARs should the approach taken not provide reporting institutions with sufficient confidence.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?			UK		
On what date will the policy be implemented?			Undecided		
Which organisation(s) will enforce the policy?			SOCA		
What is the total annual cost of enforcement for these organisations?			£		
Does enforcement comply with Hampton principles?			Yes		
Will implementation go beyond minimum EU requirements?			N/A		
What is the value of the proposed offsetting measure per year?			£ 0		
What is the value of changes in greenhouse gas emissions?			£ 0		
Will the proposal have a significant impact on competition?			No		
Annual cost (£-£) per organisation (excluding one-off)		Micro	Small	Medium	Large
Are any of these organisations exempt?		No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase of	£ Minimal	Decrease of	£	Net Impact £

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Summary: Analysis & Evidence

Policy Option: 2

Description: Introduction of PEN Regime

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' There will be costs to both Government and industry in instituting processes etc. Unlikely to be significantly more notifications under the new regime than the current so most of these costs will be one of setup costs rather than ongoing costs Also some costs to LEA of enforcement orders - but not expected to be large
	One-off (Transition)	Yrs	
	£ Unknown		
	Average Annual Cost (excluding one-off)		
	£ Minimal		Total Cost (PV) £
Other key non-monetised costs by 'main affected groups' There will also be an increased level of uncertainty to industry due to the longer period during which assets may be frozen.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' It is expected to reduce the regulatory burden, leading to significant time and resource savings to industry. These are likely to continue into the long term.
	One-off	Yrs	
	£ Minimal		
	Average Annual Benefit (excluding one-off)		
	£ Unknown		Total Benefit (PV) £
Other key non-monetised benefits by 'main affected groups' This option will reduce the risk of tipping of criminals whilst at the same time increase choice available to reporting institutions. There is also the possibility of more asset seizures.			

Key Assumptions/Sensitivities/Risks Asset seizure could also fall due to loss of response period. Also there is a risk that legitimate assets could be frozen leading to damage to reputation of UK institutions.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	UK			
On what date will the policy be implemented?	Undecided			
Which organisation(s) will enforce the policy?	SOCA			
What is the total annual cost of enforcement for these organisations?	£ Unknown			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£ 0			
What is the value of changes in greenhouse gas emissions?	£ 0			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)
Increase of £	Decrease of £ Unknown	Net Impact	£

Key:	Annual costs and benefits: Constant Prices	(Net) Present Value
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Summary: Analysis & Evidence

Policy Option:	Description:
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' This option is likely to involve some small costs in relation to retraining etc. There is also likely to be some small costs to government.
	One-off (Transition) Yrs £ Unknown	
	Average Annual Cost (excluding one-off) £ minimal	
	Total Cost (PV)	
Other key non-monetised costs by 'main affected groups'		

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' There is expected to be some benefit to reporting institutions through a reduction in the number of SARs likely to be made.
	One-off Yrs £ None	
	Average Annual Benefit (excluding one-off) £ Unknown	
	Total Benefit (PV)	
Other key non-monetised benefits by 'main affected groups' Reducing number of SARs should lead to increase in the quality of information in those SARs which are submitted.		

Key Assumptions/Sensitivities/Risks

If definitions of "reasonable picture" not carefully considered may lead to confusion or a defence against failure to report suspicious activity.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	UK				
On what date will the policy be implemented?	Undecided				
Which organisation(s) will enforce the policy?	SOCA				
What is the total annual cost of enforcement for these organisations?	£ Unknown				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	No				
What is the value of the proposed offsetting measure per year?	£ 0				
What is the value of changes in greenhouse gas emissions?	£ 0				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%;">Micro</td> <td style="width: 25%;">Small</td> <td style="width: 25%;">Medium</td> <td style="width: 25%;">Large</td> </tr> </table>	Micro	Small	Medium	Large
Micro	Small	Medium	Large		
Are any of these organisations exempt?	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%;">No</td> <td style="width: 25%;">No</td> <td style="width: 25%;">N/A</td> <td style="width: 25%;">N/A</td> </tr> </table>	No	No	N/A	N/A
No	No	N/A	N/A		

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of £	Decrease of £	Net Impact £

Key:	Annual costs and benefits: Constant Prices	(Net) Present Value
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Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Background

Part 7 of the Proceeds of Crime Act 2002 (POCA) created anti money laundering provisions applicable throughout the UK to the proceeds of all crimes.

The regulated sector is required under these provisions not only to report before the event suspicious transactions that they become aware of, but to desist from completing these transactions until a specific consent is received. This is the 'consent regime' in section 335 of POCA.

The Problem

There have been various complaints about the way the consent regime operates. Solicitors and accountants in particular expressed concerns in the early years of POCA about the length of time the National Criminal Intelligence Service (NCIS) took to process consent requests. A delay of up to seven days was a problem for those dealing with complex transactions often being processed to tight timescales. Over the past few years, NCIS and now SOCA have improved performance considerably, with the average turnaround now 2.6 days.

Some members of the regulated sector were concerned about the risk of clashes between their duties in POCA and their other legal responsibilities towards clients. By seeking consent, many reporters have argued they open themselves up to the possibility of legal action for breach of contract by their clients. Others have argued that POCA itself includes clashing duties, and that it is not in practice possible to freeze a transaction as required under the legislation without alerting the customer that this has taken place, which in turn could lead the body vulnerable to charges under POCA's tipping off provisions. These have arguably been addressed to an extent by recent court rulings.

The most significant area of concern is the interaction between the consent provisions and the principle of 'fungibility'. This is an immensely complex legal issue, but broadly the bankers argue there is an unintended interaction between the POCA provisions and the general rules of banking law which would in theory taint the entire contents of a bank account once a suspicious activity had been identified, requiring individual requests for consent in every case, no matter how routine (e.g. regular mortgage payments).

The banking sector have argued that this causes them difficulties as banks are often unable to stop individual transactions or obtain consent for every transaction as many are automated.

The Options

Option One

Build on the current system

Under this option, the regime would continue to evolve under the pragmatic approach currently developed by the reporters, law enforcement and prosecutors. Just as with the tackling of the length of time taken to process consent request and the clarification of various issues via court rulings and guidance, we can seek to come up with a workable approach to the issue of fungibility.

Costs:

It is not envisaged that there will be any significant costs in relation to this option. However, some administrative costs may be incurred by Government in relation to its efforts to provide greater comfort through extra guidance and statements as the regime develops. There may be related minor administrative cost all round associated with continually having to cascade developments in this pragmatic regime.

Benefits:

Following the prospects of measured and stable developments in the regime, increased confidence in the system is considered to be the main benefit of this option.

Risk:

The main risks to this option are that of uncertainty within a regime that is pragmatic. The direction of developments in the regime may not always be envisaged, desired or catered for.

There is also a risk of a large increase in the submission of unwanted SARs to SOCA as organisations within the regulated sector seek to ensure that they are not committing Money Laundering offences.

Also, sectors within the affected industry may not be satisfied that enough has been done to address their concerns and there may be a resulting need to revisit these issues at a future date.

Option two

Option 2: Pre-Event Notification/Interim Order to Restrain Assets

This option is based on a 'twin track approach'. Institutions would have the choice of freezing a transaction and asking for consent, as with the current regime, or alternatively, could obtain a defence against money laundering by filing a Pre Event Notification ("PEN"). Under a PEN there would be no obligation to freeze any transaction while awaiting consent. A broadened restraint provisions in POCA would also be created to enable law enforcement to freeze activity on the authorisation of a senior officer (e.g. ACPO rank), and on the basis that a court order would be obtained within 72 hours.

Timing

It is not yet clear exactly how long it would take to instigate this option but would require new legislation which would mean that the costs and benefits of this option would be delivered significantly later than in option 1.

Costs:

In order to effectively implement this option, it is envisaged that there will be costs to both Government and industry in instituting processes, providing training and guidance, as well as setting up infrastructure, particularly in Information Technology. It is not expected that there will be significantly more notifications under the new regime than the current so most of these costs will be one of setup costs rather than ongoing costs.

Current estimates suggest that the number of Interim Restraint orders is likely to be small. Whilst this will impose some additional costs on law enforcement in terms of time of senior police officers etc it is not envisaged that these costs will be considerable.

There will also be an increased level of uncertainty to industry due to the longer period during which assets may be frozen. It is likely that this may impose some costs on industry though it is considerably less clear whether these costs will be significant.

Benefits:

Option 2 is expected to reduce the regulatory burden. It is expected that there will be significant time and resource savings to industry, particularly banks where they have had to stop transactions and costs of dealing with the related fall out with clients. In 2006 there were 9674 consent requests, of which Banks and Building Societies accounted for 43% (4168). Moving to this option would therefore significantly reduce the number of consent requests made and the associated costs.

It is expected that there will be a lesser likelihood of tipping of criminals and lesser cost to Industry to avoid this risk as the prospect of clients' money being held up is significantly reduced.

Government is expected to benefit from increased seizures following the interim restraint orders. It would be possible to apply more intelligence sources to the regime more readily.

Given that there are sectors which will prefer the certainty of the current regime and others which will prefer the immediacy of PEN this suggests that a twin track approach will also provide a significant benefit in the form of flexibility. Firms will be able to choose whichever of the two schemes ensures the minimum burden for them and will not be committed in advance to locking into a single scheme.

Risks:

The Pre-Event Notification aspects of this option would work to allow the execution of transactions while the detail of suspicion is being considered by law enforcement. It is envisaged that this will present a notable risk of possible loss of assets due to transaction already having proceeded and possibly left jurisdiction before freezing is possible.

There is a risk of loss or damage of reputation of UK financial Institutions due to increased uncertainty caused if seizures are on the increase as a result of the new administrative interim restraint orders, and particularly if some of these restraints were to be placed accidentally on legitimate funds. However, this risk must be balanced against increased reputational effects due to the increased speed by which certain transactions may be processed.

Option 3:
Entrenching the ‘course of conduct’ approach to reporting in statute

This is not put forward as a free-standing option but a potential refinement to either Options 1 and 2.

In this option, instead of requiring a specific report to be made to provide a defence against every single act of money laundering, however technical, the legislation could be amended to provide a broad defence when the reporting institution had made sufficient disclosures to give SOCA a “reasonable picture” of the criminal activity’

Timing

There remains considerable uncertainty with this option as to how quickly it could be enacted. It is likely to require new legislation and therefore could be expected to take a similar period of time to option 2.

Costs:

It is envisaged that there will be some costs to both Government and industry in instituting processes, providing training and guidance, as well as setting up infrastructure, particularly in Information Technology to implement this option.

Benefits:

This option is expected to reduce the regulatory burden through a drop in the number of SARs needed to be submitted and consequently a reduction in the cost of preparing SARs. It is expected that this will represent a significant time and resource saving to industry, particularly in relation to banks, where they have had to intervene to stop automated transactions as well deal with the related fall out with clients. It is not yet clear how many fewer SARs will be made this way but the consultation process should help to address this point.

Through reducing the number of SARs made it is hoped that this should serve, in turn, to increase the quality of the information provided in each SAR. This may lead to increased intelligence gathering and asset freezing.

Risk:

There is a notable risk of creating uncertainty about the scope of the duty to report, namely; what a “reasonable picture of the criminal activity’ is. This is an issue that may ultimately need to be resolved in the courts.

There is a risk that such a deregulation may provide by definition for some scope of criminal activity to go undetected. The particular wording would need to be considered very cautiously.

The reduction in number of SARs could lead to reduced intelligence picture.

Way Forward

It is accepted that the information provided in the Impact Assessment is not yet full or complete enough to make a recommendation on a preferred option. The concerns raised as to the current

situation means there is a need to address this issue as a matter of urgency .Therefore the intention is to go to public consultations with many of the costs and benefits still uncoded.

The consultation process should allow for a greater understanding of these costs and benefits. In order to ensure that the final decision fully reflects these for all relevant parties it is proposed that an expert panel be held as part of the consultation process. This would bring together experts on the costs to relevant companies, or industries, with the aim of providing a full and complete cost and benefit model for each option.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No

Annexes

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