THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

18 March 2008

Our ref: ICAEW REP 33/08

Consent Regime Consultation
Organised and Financial Crime Unit
Home Office
5th Floor Fry Building
2 Marsham Street
London
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Dear Sir

OBLIGATIONS TO REPORT MONEY LAUNDERING: THE CONSENT REGIME

The Institute of Chartered Accountants in England and Wales [the Institute] welcomes the opportunity to comment on the consultation paper *The Proceeds of Crime Act 2002 - Obligations to Report Money Laundering: The Consent Regime* published by the Home Office in December 2008.

This response has been made after discussion with other members of the Consultative Committee of Accountancy Bodies, and their views taken into account.

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Summary and Main Points

We welcome this consultation. Though the consent regime appears to have been working reasonably well during few years for the accountancy sector, we appreciate other sectors find it impossible to comply with it in a strict sense. The regime depends for its working on elements of the regulated sector taking a pragmatic view at variance with a strict interpretation of the legal requirements – which cannot be desirable from a public policy point of view. We would, therefore, strongly support a reform of the legal basis of the regime, without delay, notwithstanding the improvements that have been made to its operation in recent years.

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However, although speedy reform is highly desirable, it is important for the wider implications of the consent regime to be taken into account, and conscious decisions made on their implications. It would be unfortunate if changes proposed were found to be unworkable in some situations or were to be challenged on a political or human rights level where these matters had not previously been considered.

In particular, the consultation repeatedly refers to the regulated sector, as if these were the only persons in the private sector likely to be affected by the regime. There may also be serious implications for persons outside the regulated sector, making authorised reports under Sections 227 to 229 of the Proceed of crime Act 2002 (POCA). We draw attention to some of these, in our comments below.

Consent and those outside the Regulated Sector

In Chapter 3 the Consultation gives an overview of the current consent regime. This is drafted in terms of the effect on law enforcement authorities and the regulated sector. The regime is fundamental to sections 327-329 of POCA, which applies not just to the regulated sector but to any person who avails himself of the consent regime in order to provide himself with a defence against allegations of money laundering.

Fungibility is not only an issue for banks – it is also (particularly) one for managers and directors in businesses, who uncover some element of criminality in their entity or among their subsidiaries or associated businesses, and for Non-Executive Directors who may discover themselves caught up in criminal organisations and may have serious problems of personal safety and/or tipping off concerns. The proposals in the consultation do not resolve issues for businessmen and this does require attention.

Responses to Consultation Queries on the Options outlined in the Consultation

Option 1: Build on the Current System

1. *In the light of your experience and the discussion in this paper, do you believe the consent regime as it stands is workable?*

   There have always been difficulties with the consent regime, in that the delays which are inevitably caused can result in commercial disadvantage and professional embarrassment. However, improvements in the speed with which consent is given in recent years have meant that these problems have been ameliorated to the point where we believe that in the case of the accountancy sector the costs to the profession can be considered proportionate in terms of the benefits in law enforcement terms. Therefore, in the case of practising accountants, we believe that the current regime is broadly workable, provided that the current flexible and timely system can be maintained.

   However, we do not think that the current regime works sufficiently well for some reporters, and that it therefore requires reform.

2. *Do you believe the additional measures proposed in option 1 can strengthen confidence in the existing regime?*

   We do not think that the additional measures set out under Option 1 would be sufficient to build a robust system, equally suitable to all persons submitting Suspicious Activity Reports under Sections 327 to 329 of POCA.

We do not think that it is acceptable to rely on the continuing of a pragmatic approach to prosecution being taken by law enforcement and prosecutors, which leaves elements of the regulated sector vulnerable to being in a position of having committed a money laundering offence. This would continue to be our view, whether or not clarification of prosecution policy is given – many entities base their ethical position on compliance with the law, regardless of the risk of prosecution.

We agree with SOCA's position, as set out in paragraph 5.4 of the consultation – it is already legally acceptable for SOCA to give consent for a pattern of transactions taking place over a period, and indeed this is already being done in some cases. Increased use of this option would be helpful and could result from the issue of more and more authoritative Guidance on the matter, but it would not (in our view) be sufficient to solve all the problems with the current regime.

Reliance on an attempt to clarify the legal position on fungibility through decided legal cases would be uncertain in its outcome, could provide a partial solution only and could have a long delay before the outcome is decided. We do not consider this an acceptable way forward.

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

3. *Do you believe Option 2 provides a viable alternative to the current consent regime?*

   Option 2 proposes a "twin track" approach, where institutions would have the options of applying for consent under the current system, or of filing a pre-notification of a potential money laundering transaction (or pattern of transactions). This would be our preferred solution, providing that sufficient resources are available to ensure that both systems work effectively and efficiently.

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?*

   It is important to the future of the City of London as a world class financial centre that its reputation for being able to carry out large scale transactions without delay is not damaged by an inability to secure fast and certain decisions where money laundering might be an issue. It is therefore essential that the current consent regime is retained as an alternate, if Pre-Event Notification is also introduced.

   The continuation of the current scheme is also an important option for those persons outside the regulated sector seeking consent through an authorised disclosure, who for business operational reasons may need the certainty of a consent.

5. *Do you have specific views on the new powers suggested in Option 2?*

   It is proposed that the introduction of PEN would be accompanied by the introduction of a swifter and less restricted regime for freezing of assets, backed by the consent of a senior police officer (rather than by the Court, as required at present) but that this should be followed up by a Court Order within 72 hours. This would be apparently be available in any circumstance where money laundering was suspected by that authority, not just where a money laundering suspicion report had been made, still less were a PEN had been made.

Our initial view is that this reform would be acceptable, to us and to our constituency, as a valid strengthening of the powers of the law enforcement authorities in the fight against crime. However, its application should be restricted to cases where a PEN is filed only and not given any wider application.

Option 3: Entrenching the "Course of Conduct" Approach to Reporting in Statute

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?*

   We would support the enshrinement in Statute of the practice of SOCA giving consent to a series or pattern of transactions if this was thought necessary. However, it would appear to us that SOCA can, and does, already give such consents when requests are framed appropriately and specifically. This issue may well be capable of being dealt with by SOCA reporting guidance.

   We would not support nominated officers being made subject to having to defend their position as regards having made sufficient reports to give a "reasonable picture" of the underlying criminal activity. It is inappropriate to lay this level of judgement at the door of the nominated officer.

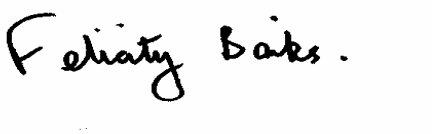
7. *Do you have any alternative approaches which you think might contribute to resolving any problems?*

   However the current problems on the consent regime are addressed, it is likely that a number of complexities and uncertainties will remain. The number of uncertainties for reporters on other aspects of the regime has been reduced, by the preparation and adoption of Guidance by representative bodies for the regulated sector, which is given formal recognition and approval by HM Treasury, and which must be taken into account by the Courts in their interpretation of these aspects of the law.

   It would be helpful if Guidance on reporting and consent procedures could be prepared by SOCA and approved by HM Treasury on the same basis as industry Guidance.

Please contact me should you wish to discuss any of the points raised in this response.

Yours sincerely



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