

KREDITTILSYNET

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Circular no. 13/2006

Legislation on Measures to Combat the Laundering of Proceeds of Crime – guidance related to issues of particular importance for auditors and external accountants

Chapter 1: Rationale behind the circular

1.1 Introduction

A new Money Laundering Act and associated regulations went into force on 1 January 2004 (Act on Measures to Combat the Laundering of Proceeds of Crime, No. 41 of 20 June 2003 and Regulations on Measures to Combat the Laundering of Proceeds of Crime, No. 1478 of 10 December 2003). State authorised and registered auditors, authorised audit firms, authorised accountants and firms of accountants are also encompassed by this body of rules.

Kredittilsynet provided general guidance to the act and regulations in Circular No. 9/2004 to all institutions and individuals under Kredittilsynet's supervision. However, the agency recognises the need for a separate circular giving further guidance on issues undoubtedly of significance for auditors and accountants. Also in effect is Circular no. 9/2004 which can be downloaded from Kredittilsynet's website at www.kredittilsynet.no. The Money Laundering Act and the Money Laundering Regulations are included as annexes to Circular No. 9/2004.

The term "auditor" used in this circular denotes registered and state authorised auditors and authorised audit firms. The term "accountant" denotes authorised external accountants and authorised external accountancy firms.

The circular cites acts and regulations concerning measures to combat the laundering of proceeds of crime etc., but also rules regulating the activities of auditors and accountants. The Authorisation of External Accountants Act (No. 109 of 18 June 1993), and Authorisation of External Accountants Regulations (No. 196 of 8 February 1999) have both recently been revised and amended. The amendments are expected to come into force in the near future. The circular refers to the act and the regulations in their amended form.

1.2 Auditors' and accountants' role and obligations

The legislation contains various provisions on auditors' and accountants' role in bringing to light irregularities. Reference is inter alia made to the Auditors Act section 6-1 fourth paragraph which states that an auditor *may inform the police if, in the course of an audit assignment or other services, circumstances emerge that give*

reason to suspect that a criminal act has been committed. A similar provision in the Accountants Act section 10 fifth paragraph applies to accountants.

Reference is also made to the Financial Supervision Act section 3a) which requires the auditor in a firm under Kredittilsynet's supervision to report certain circumstances directly to Kredittilsynet.

The duty to investigate and report under the Money Laundering Act targets several occupational groups. Like many other entities with a reporting obligation, auditors and accountants are providers of information to ØKOKRIM. Information is registered and systematised by ØKOKRIM and may, either alone or together with other information, give rise to criminal proceedings. Due to the auditor's or accountant's specific knowledge of the entity's activities, their reporting is often a significant piece of the wider "jigsaw puzzle". However, reports of money laundering are not necessarily followed by concrete action on the part of ØKOKRIM. The auditor or accountant cannot therefore expect an answer or information on the outcome of a report he has made.

The main obligations under the Money Laundering Act and the Money Laundering Regulations are:

- checking ID when a customer relationship is established,
- making further inquiries if a transaction could be suspected of being connected with the proceeds of a criminal act (or with circumstances coming under the Penal Code section 147a) (terrorist activity) or section 14b) (terrorist financing)),
- reporting transactions to ØKOKRIM in cases where enquiries do not disprove suspicions,
- establishing proper internal control and communication routines, including training programmes.

1.3 Purpose of the Money Laundering Act

According to the Money Laundering Act section 1, the purpose of the act is to prevent and combat the laundering of proceeds of criminal acts. The act's travaux préparatoires (Proposition no. 72 to the Odelsting (2002-2003) page 22-23) state the following:

"The rules on measures to combat the laundering of proceeds of criminal acts are designed with several purposes in mind. The primary purpose of the rules is to prevent criminals benefiting from profit-motivated crime. They are also intended to facilitate the tracking down of the origin of criminal gains, thereby making it possible to uncover the criminal act which generated the proceeds, and in turn to identify who is behind the criminal acts and the money laundering concerned. The rules are also intended to prevent the procurement of financial resources to finance terrorist acts and to prevent financial resources and financial services being made available to terrorists and terrorist networks. The rules are further intended to protect financial institutions and enterprises etc., against exploitation by criminals and the ensuing risk of loss and reputation, credibility, confidence and money etc. ... On the other hand the rules are not intended to bring to light or to prevent unlawful circumstances which cannot be said to have some connection with the laundering of criminal proceeds or financing of terrorism."

(Kredittilsynet's underlining).

The travaux préparatoires of the act (Proposition no. 72 to the Odelsting (2002-2003) page 17) also state:

“Money laundering” is usually taken to mean activity whose purpose is to secure the proceeds of criminal acts such that the proceeds can be put to use by the perpetrator or others. Such activity can consist in using, converting, transferring, acquiring or possessing financial assets or in concealing such assets' true nature, origin, investment, right of disposal, movements, ownership, as well as attempts to commit or complicity in commission of the same, when the person acting knows or should know that the assets stem from criminal acts or from participation in criminal acts. ... The term money laundering includes both procuring for oneself or others a share of the proceeds of a criminal act (receiving alternative), as well as assisting in securing such proceeds for someone else (assistance alternative).

Kredittilsynet considers that the purpose of the act, including its definition of money laundering, has a bearing on understanding the provisions on the *duty to investigate* and the *duty to report*. See chapter 4 and 6 of this circular for further details.

Chapter 2: When do auditors and accountants come under the money laundering rules?

According to the Money Laundering Act section four, second paragraph, no. 1, auditors and accountants come under the act "*in the exercise of their profession*".

This means that all activity carried on by authorised audit firms and authorised accountancy firms is encompassed by the money laundering rules. This also applies in principle to the same activity engaged in by sole proprietorships.

In the case of auditors this means that services other than those regulated by the Auditors Act section 1-1 come under the money laundering rules. An auditor's advice to entities not subject to the audit requirement also comes under the Money Laundering Act since it is a natural part of an auditor's service provision/profession. In cases where it is a matter of advice to an audit customer, this applies irrespective of whether the services are provided by an auditor or a cooperating firm, cf the Auditors Act section 4-7 and the Auditors Regulations section 4-2.

Where accountants are concerned, services other than accountancy will also come under the money laundering rules pursuant to section 2 of the Accountants Act. Accountants regularly provide advice to entities with bookkeeping and accounting obligations, and such advice will be encompassed by the money laundering rules.

Accountants have traditionally been permitted to engage in several types of activity in firms authorised to carry on external accountancy. In such cases it must be considered which services are accountancy proper and which services are related services. Business which is clearly unrelated, and of an entirely different nature, falls outside the scope of the money laundering rules. The same applies to sole proprietorships.

Auditors and accountants may also engage in other types of activities through other firms or sole proprietorships, e.g. in commerce or agriculture. Such activity, which has no connection with the auditing or accounting activity, will not be regarded as "exercise of profession" and will therefore not be subject to the money laundering rules.

According to section 4, third paragraph, of the Act, the Act also applies to firms and individuals who perform services on behalf of or for entities with a reporting obligation. This means that employees and others who perform services on behalf of or for reporting entities will be subject to the obligations. Obligations directed at the firm or activity as such, for example the obligation to establish control routines, cf chapter 8 of this circular, will not be relevant for employees and others mentioned here.

Chapter 3: Identity verification

The Money Laundering Act uses the term "*identity verification*" and requires proof of identity, cf Money Laundering Act section 5. The purpose of identity verification is to ensure that the reporting entity knows the identity of the person with whom a customer relationship is to be established. Checks on identity documents, possibly supported by other checks, contribute to this.

According to the Money Laundering Act section 5 first paragraph first sentence, *entities with a reporting obligation shall on establishment of a customer relationship request the customer to show valid proof of identity.*

According to the Money Laundering Regulations section 2 second paragraph *state authorised and registered auditors are considered to have established a customer relationship once they have accepted an assignment, including counselling and other non-audit services, or sent an auditor's declaration to the Register of Business Enterprises, cf the Business Enterprises Register Act section 4-4.*

Where accountants are concerned, the Money Laundering Regulations section two third paragraph states that (authorised external) accountants *are considered to have established a customer relationship once they have entered into a written agreement on an assignment with a principal or an assignment requiring a written agreement, cf the External Accountants Act section 3.*

Kredittilsynet notes that both auditors and accountants are likely to have established customer relationships based on a verbal acceptance, even though the legislation requires written acceptance. The establishment of a customer relationship or taking on of an assignment may also be inferred from one's conduct. Hence an auditor or accountant who starts to work on an assignment before written or verbal acceptance is given may be regarded as having taken on the assignment under the Money Laundering Regulations section 2.

Identity verification shall be effected by personal appearance of the customer at the office of the auditor or accountant, cf the Money Laundering Act section five, fourth paragraph, first sentence. In Kredittilsynet's view, this provision does not prevent the

auditor or accountant from appearing at the premises of the customer and carrying out identity verification there, provided verification conforms to the provision of section 8, first paragraph, of the Regulations.

An exception to the requirement as to personal appearance applies where “*personal appearance constitutes a major inconvenience for the customer*” or “*is not practicable*”, cf the Money Laundering Act section five, fourth paragraph, second sentence. However, the premise for such exceptions is that identity can none the less be satisfactorily verified. In practice this means that the reporting entity enters into an agreement to outsource identity verification, cf the Money Laundering Regulations section 8, second paragraph, cf point 3.3 of this circular.

3.1 Legal persons

The identity verification requirements on legal persons are set out in section 6 of the Regulations. If a legal person is registered with the *Register of Business Enterprises*, a certificate of registration dating no further back than three months shall be presented. For legal persons registered with the Central Coordinating Register for Legal Entities, and not with the Register of Business Enterprises, a transcript from the Central Coordinating Register for Legal Entities shall be presented. The transcript shall contain all registered data on the entity, cf section 5 and section 6 of the Act on the Central Coordinating Register for Legal Entities, and not date further back than three months.

Both auditors and accountants may be requested to take on an assignment before a company is duly registered. In these cases a certificate of registration or a transcript from the Central Coordinating Register for Legal Entities cannot form a basis for identity verification. An instance of this type is commented on under point 2.5 in Circular No. 9/2004, which states that in the case of a limited company in the process of incorporation the incorporation document has to be presented in the original. The reporting entity must retain a copy of the document. Moreover, an identity check has to be carried out on the physical person(s) representing the company under incorporation.

Regarding the further requirements as to identification of legal persons, see Circular No. 9/2004 point 2.5.

3.2 Physical persons

As regards identification of physical persons, see points 2.3 and 2.4 and point 2.7 in Circular No. 9/2004.

3.3 Outsourcing of identity verification

Section 8, second paragraph, of the Regulations permits the outsourcing of identity verification. This option may be useful if it is burdensome for the auditor or accountant to conduct identity verification in person – for example where the auditor/accountant is at a location far from the customer.

Outsourcing is further described in Circular No. 9/2004 points 2.7.2.2 to 2.7.2.5.

3.4 Consequences of inability to carry out identity verification

If identity verification cannot be carried out in accordance with the rules, the customer shall be refused on this ground, cf Money Laundering Regulations section 9 first sentence. An auditor or accountant is not entitled to accept the assignment in such cases.

3.5 Retention of data recorded during identity verification

The Money Laundering Act section 8 and the Money Laundering Regulations section 15 require a copy of documents presented, and of data recorded, in the identification process to be retained for five years after the customer relationship came to an end. Such documents shall be destroyed within one year of the expiry of the retention period, cf section eight, third paragraph, of the Act.

There may be discrepancies between the above-mentioned provisions of the Act and the Regulations on the one hand and the retention requirements applying to auditors and accountants under special statute on the other. See the account of this issue in point 4.8 below.

3.6 Already existing customer relationships

The provisions apply to the establishment of new customer relationships. They do not require identity verification of entities who were customers before the rules went into force (1 January 2004). The same applies where an assignment is taken on for an existing customer.

Chapter 4: Requirement as to further investigation in the event of suspicious transactions

4.1 Duty to investigate under the Money Laundering Act section 7

The Money Laundering Act section 7, first paragraph, reads:

"If an entity with a reporting obligation suspects that a transaction is associated with the proceeds of crime or with offences covered by section 147a or section 147b of the Penal Code, further investigations shall be made in order to confirm or disprove the suspicion. This obligation also applies to employees of entities with a reporting obligation. (Kredittilsynet's underlining).

4.2 "Suspicion"

According to the Money Laundering Act section 7, "suspicion" is sufficient to trigger the obligation to investigate. Suspicion need not be strong in order to prompt investigation. Since the purpose of investigation is to confirm or disprove a suspicion, there is no cause to impose strict demands on suspicion to trigger the obligation to investigate.

Nor does suspicion need to be linked to any opinion on the nature of the criminal act which may have been committed in order to trigger investigation.

The suspicion may also be entirely or partly motivated by circumstances unrelated to the concrete transaction. While in many cases a transaction in itself gives no cause for

suspicion, knowledge of the customer's financial position may prompt a realisation that the money involved in the transaction cannot derive from lawful sources. The suspicious circumstances may also be related to a third party.

Kredittilsynet's Circular No. 9/2004 point 2.10 gives examples of "suspicious transactions" which may trigger an obligation to make further investigations.

The following may also be mentioned:

- the amount invoiced may be substantially in excess of market price. In such cases the laundering proceeds are the difference between the market price and the invoice price,
- a large difference between the purchase amount and selling price of real property that is resold a short time after purchase may indicate that "black" money has been employed for refurbishing,
- that turnover is inexplicably large in relation to purchased goods,
- meaningless transactions with no apparent purpose.

4.3 "Transaction"

The suspicion must be related to a "transaction". The term transaction is defined in section 2 of the Act and includes *"any transfer, intermediation, exchange or placement of assets"*. The Act's travaux préparatoires (Proposition no. 72 to the Odelsting (2002-2003) point 4.3.4.2) state that while the term "transaction" must be interpreted broadly, it does not include any activity whatsoever. The term embraces for example the opening of a bank account and renting of a safe-deposit box, which in everyday usage are not termed transactions. Hence a transaction may be involved even though no action is taken involving financial assets. The reporting entity is not required to have participated in executing the transaction concerned in order for the reporting obligation to arise.

The term "transaction" is also at centre stage in the accounting legislation, see for example the Accounting Act section 4-1 subsection 1. In this context the term has traditionally been interpreted as the transfer of control and risk. While the accounting legislation's definition of the term "transaction" receives no further mention in the travaux préparatoires to the Money Laundering Act, Kredittilsynet's position is that the term "transaction" in the Money Laundering Act can include more than what are deemed to be transactions under the accounting legislation.

In its letter of 17 January 2005 to the Norwegian Institute of Public Accountants, the Ministry of Finance gave the following comment on the term "transaction":

"However, the term "transaction" should, as mentioned above, be given a broad interpretation, and may, depending on the circumstances, include future transactions as well as transactions already undertaken. Hence, where there is a suspicion that a forthcoming transaction is connected with the proceeds of a criminal act, for example a suspicion that a client intends to transfer funds in respect of which he has evaded taxation payable to another jurisdiction, there will normally be an obligation to make further investigations, and possibly to report."

4.4 "Proceeds"

It follows from the Money Laundering Act section 7, first paragraph, that the transaction must be linked to the proceeds of a criminal act. The term "proceeds" is not defined in the Act, but the travaux préparatoires (Proposition no. 72 to the Odelsting (2002-2003) point 4.3.4.2, first paragraph) state that the term should be interpreted in the same way as under section 317 of the Penal Code which deals with the receiving of the proceeds of a criminal act and with money laundering.

The Penal Code section 317, first paragraph, reads:

"Any person who receives or obtains for himself or another person any part of the proceeds of a criminal act, or who aids and abets the securing of such proceeds for another person shall be guilty of an offence and shall be liable to fines or imprisonment for a term not exceeding three years. Aiding and abetting shall be deemed to include collecting, storing, concealing, transporting, sending, transferring, converting, disposing of, pledging or mortgaging, or investing the proceeds. Any object, claim or service substituted for the proceeds shall be regarded as equivalent thereto."

The travaux préparatoires to this provision (Proposition no. 53 to the Odelsting (1992-1993) page 24-25) state:

"The term "proceeds" means something acquired by means of a criminal act or otherwise closely associated with a criminal act. Examples of proceeds are stolen goods, money from a robbery, a legally imported weapons or illegally caught game, or income from drug sales, espionage or pimping."

The travaux préparatoires also state:

"Proceeds will not infrequently be money. But they could also be real property, chattels, a service, a claim or a legally protected interest or right."

They further state that the term "proceeds" is sufficiently broad in scope to cover at any rate some cases in which a criminal act has led to expense savings. However, they also state that proceeds cannot be perceived as synonymous with "advantage gained".

Hence "proceeds" means a capital or financial asset acquired by means of a criminal act or which is otherwise closely associated with a criminal act. The fact that any such proceeds have been altered or exchanged has no bearing on the reporting obligation.

4.5 "Criminal act"

Under section 7, first paragraph, of the Money Laundering Act a further requirements is that the transaction is associated with the proceeds of crime (i.e. a *criminal act*). According to this wording the term "crime" includes any criminal act without delimitation in terms of nature, gravity, the perpetrator or victim of the criminal act. The criminal act may be punishable under either the Penal Code or special statute. Criminal breaches of company or accounting legislation are included, as is tax crime regardless of whether the offence is of such a nature that it will be regularly reported to the police by the tax authorities.

Entities with a reporting obligation should confine themselves to making an objective assessment of whether or not there is suspicion of a criminal act. They should not consider whether or not the requirements for fault-based criminal liability are met.

Unlike customers in general, accountants and auditors are specialists in the accounting and bookkeeping rules, tax rules and company legislation. A significant element of the role of auditor and accountant is the obligation to draw attention to the reporting entity's faults and deficiencies, and to provide guidance on how the customer should proceed in this context. In cases where faults and deficiencies rooted in the customer's lack of expertise are rectified by the customer, the question of suspicion of a criminal offence will as a rule not arise, and no report should be made under the Money Laundering Act. The auditor/accountant is nonetheless expected to have satisfied himself that the circumstances have been rectified, and that this is duly documented as part of the accounting/audit process, for example by means of a correction voucher and/or notes in the working papers.

The Auditors Act section 5-1, third paragraph, requires the auditor to contribute through the audit process to preventing and bringing to light irregularities and faults. Audit Standard RS 240 provides guidance on auditors' duties in this connection. Annex 1 and 3 to the Standard give an account of circumstances entailing risk of faulty information due to dishonest financial reporting etc. Kredittilsynet's premise in cases where irregularities as mentioned in the annexes are present is that the auditor must consider conducting further investigations and in the event filing a report when the criteria of section 7 of the Money Laundering Act are present.

4.6 Circumstances coming under the Penal Code section 147a or section 147b – terrorist financing

The reference to the Penal Code section 147a or section 174b entails that entities with a reporting obligation are required to investigate and report transactions which may be connected with terrorist acts, or with the financing of terrorist activity.

It should be noted that in these cases there is no requirement as to “proceeds” in connection with these criminal acts.

4.7 What investigations can be undertaken?

Under section 7, first paragraph, of the Money Laundering Act entities with a reporting obligation shall undertake independent investigations, but the provision does not specify what kind of investigations must be undertaken.

In most cases it will be sufficient to make a closer assessment of the material available in the case. If the customer is known from previous cases, documents and data gathered in that connection can also be investigated. Open sources, for example publicly available registers, the internet, newspapers etc can also be utilised. Moreover, questions may be put to the customer if this can be done without the risk of the customer understanding the context. Questions can also be asked of third parties if this can be done without breaching confidentiality requirements. If, for example, suspicion arises in the course of a conversation with a customer or third-party, follow-up questions can be asked for the purpose of clarifying the suspicion, so long as this can be done without the customer or third party “putting two and two together”.

Attention is also drawn to 5.1 and 5.3 regarding auditors' and accountants' duty to investigate under, respectively, the auditing and Auditors Act and the Accountants Act and how this obligation should be understood in relation to the obligations under the money laundering legislation.

4.8 Requirement on retention of data obtained in investigations

4.8.1 General notes

According to section 8 of the Act and section 15 of the Regulations, data from investigations must be retained five years after the transaction was carried out. Such documents and data shall be destroyed within one year of the expiry of the retention period. A longer retention period may be set in other provisions of law or regulations.

4.8.2 Auditors

In its letter of the 17 January 2005 to the Norwegian Institute of Public Accountants, the Ministry of Finance writes that the retention periods under section 5-5 of the Auditors Act rank ahead of the Money Laundering Act in relation to documentation prepared against the background of the Auditors Act's duty to investigate. According to this provision, the auditor shall retain specified documentation for at least 10 years. The ministry states:

"In the ministry's view, an auditor may retain data coming under the retention requirements of the Auditors Act for 10 years in conformity with that Act, even if portions of the data come under the retention requirements of the money laundering rules. An auditor may however not retain documentation/data obtained and processed under the money laundering rules which are not necessary for the purpose of meeting the retention requirements of the Auditors Act for a longer period than that required by the money laundering rules. This means that an auditor can retain the documentation/data which the Auditors Act requires to be retained for 10 years, even if the Money Laundering Act requires earlier deletion."

4.8.3 Accountants

Section 2, second paragraph, of the Accountants Act requires accountants to perform their assignments in accordance with generally accepted accounting practices as well as with law and regulations. Section 3-2 of the Accountants Regulations contains a provision on documentation requirements and a 10-year retention obligation in respect of assignments carried out for each individual principal as well as of letters and other correspondence in which the accountant has drawn attention to faults and deficiencies.

The industry standard "Generally accepted accounting practice" requires 10 years' retention of assignment documentation. Retention requirements are also included in Kredittilsynet's supervisory guide for accountants (Circular No. 12/2002).

The above provisions of law and regulations mean that accountants may be required to retain documentation for a longer period than the retention period set out in the Money Laundering Act section 8 and in the Money Laundering Regulations section 15. Accountants must in such case comply with the longer of the two periods.

Chapter 5: Special investigation rules for auditors and accountants

5.1 Special rules for auditors when auditing annual accounts

In contrast to other entities with a reporting obligation under the Money Laundering Act, auditors are subject to a comprehensive body of rules as regards investigations and documentation. The Auditors Act requires auditors to diligently investigate and document irregularities on the part of an entity with an audit obligation, even though the main purpose of the annual accounts and audit is not to bring to light criminal offences. Section 5-1, third paragraph, of the Auditors Act states that *“the auditor shall by way of audits help to prevent and bring to light irregularities and errors”*.

The auditor shall, as part of the performance of his duties and the Auditors Act section 5-1, conduct investigations of the reporting entity's financial circumstances. Indirect requirements as to such investigations are also set forth in section 5-3 of the Auditors Act which deals with documentation of the auditor's investigations.

The auditor shall, in his working papers, document circumstances which may appear to involve financial crime, as well as action taken by the auditor in that connection. This applies regardless of whether the criminal act is perpetrated by the firm, is directed at the firm, or takes place through the firm. The provision is further explained in Audit Standard RS 240.

Documentation requirements also apply to the provision of advice and other services, cf section 5-3, third paragraph, first sentence, of the Auditors Act and section 1-1, third paragraph, first and second sentence of the Act.

The circumstances entailing an obligation to undertake investigations under the money laundering rules may also be circumstances which the auditor has already investigated based on his obligations under the Auditors Act and RS 240. The auditor can in that case build on the result of the investigations already carried out.

5.2 Capital verification statements

The auditor shall confirm capital contributions both upon incorporation and upon increases of capital. The investigations required of the auditor in such cases may reveal whether contributions are being made using money obtained by means of a criminal act.

5.3 Special rules for accountants when performing accountancy assignments

The Accountants Act contains no provisions specifically dealing with accountants' obligation to undertake and document investigations. However, an authorised accountant is charged with attending to the accounting entity's obligations and has to organise this activity in such a way as to enable correct presentation of the accounts and ensure the accuracy of reports filed with the public authorities.

Under section 2 of the Accountants Act, accountants are required to perform their assignments in compliance with the industry standard "Generally accepted accounting practices". This standard requires the accountant, together with the principal, to review the principal's internal routines with a bearing on the assignment and to

organise them in such a way as to ensure proper accounting. The accountant shall see to it that there are no breaches of relevant provisions when preparing the basic accounting material. Any breaches shall be taken up with the principal, and this shall be done in writing if the breaches are significant or repeated. When presenting periodical financial reports the accountant shall take up unclear points and questions with the principal. Breaches of accounting, bookkeeping and tax legislation must invariably be taken up in writing.

As mentioned, an accountant is required to ensure that financial statements and reports comply with laws and rules.

According to the Accountants Regulations section 3-2, first paragraph, the accountant shall document assignments carried out for each individual principal as well as letters and other correspondence in which the accountant has drawn attention to errors and deficiencies. "Generally accepted accounting practices" also contains provisions on documenting the performance of assignments.

Hence, the rules regulating the accountancy profession require accountants to carry out and document investigations. This obligation is wider ranging than the corresponding obligations set out in the money laundering rules. Accountants are therefore likely in the course of such investigations to come across suspicious transactions which need to be assessed under the money laundering rules.

Chapter 6: Obligation to report to ØKOKRIM

The Money Laundering Act section 7, second paragraph, reads:

"If the investigations failed to disprove the suspicion, the entity with a reporting obligation shall on its own initiative submit data concerning the transaction in question and the matters that have given rise to suspicion to the National Authority for Investigation and Prosecution of Economic and Environmental Crime in Norway (ØKOKRIM). The entity with a reporting obligation and its employees shall, if so required, provide ØKOKRIM with all essential data concerning the transaction and the suspicion."

Chapter 4 gives an account of terms employed in section 7 of the Act which are of significance for the duty to investigate. The question of the obligation to report arises where investigations have not disproved a suspicion, in other words where suspicion still exists that a particular transaction is connected with the proceeds of a criminal offence, terrorist act or financing of terrorism.

In a letter of 17 January 2005 to The Norwegian Institute of Public Accountants, the Ministry of Finance states:

"The condition requiring the presence of suspicion that a transaction is connected with the proceeds of a criminal act means that suspicion that a criminal act has been committed, or the suspected presence of the proceeds of a criminal act, is not in itself sufficient to trigger the obligation to investigate and in the event to report. The obligation to investigate and report under the Money Laundering Act has to be triggered by a suspicion of transactions which are associated with the proceeds of a

criminal act. In the ministry's view an auditor, for instance, or a lawyer, will not be obliged to investigate and report simply on the basis of suspicion that the client has committed criminal offences."

Hence, in any assessment of whether a report should be made, a distinction must be drawn between offences resulting in proceeds, and the ensuing (possibly preparatory) actions to secure the proceeds – the money laundering actions. The fact that the auditor or accountant discovers a crime does not in itself trigger the obligation to report to ØKOKRIM. A related act (ensuing or preparatory) intended to convert the proceeds to apparently legal assets must take place. It should be stressed that an act which appears to be a primary crime of this nature may in actual fact be part of a money laundering process. Furthermore the purpose of the act must be taken into account when considering whether or not there is an obligation to report. The Act is designed to prevent and combat the laundering of proceeds of criminal acts. It is clear from the travaux préparatoires that *the rules are not intended to bring to light or prevent unlawful circumstances which cannot be said to have some connection with the laundering of proceeds or the financing of terrorism.*

The transaction must have the consequence that the illicit proceeds appear or may appear to be lawful and freely utilisable assets in order for the reporting obligation to come into play.

For example, where the auditor or accountant discovers that funds have been embezzled, this will not automatically trigger a reporting obligation. A money laundering process must take place or have been initiated which the reporting entity is aware of or suspects in order for the reporting obligation to come into play.

Also where future transactions are concerned, for example preparations for a money laundering process involving the setting up of a company abroad to which the criminal proceeds can be sent, it must be suspected that this is an act (transaction) whose purpose is to launder the proceeds of criminal acts.

It is not possible to specify what cases are subject to the reporting obligation. Nor, based on the jigsaw-puzzle idea, cf point 1.2, third paragraph, is it possible to delimit the reporting obligation to certain types of offences classified by nature, range of punishment or other criteria. The question of whether a reporting obligation applies must therefore be considered and decided by the auditor and the accountant in each individual case.

Kredittilsynet recommends entities with a reporting obligation to contact ØKOKRIM and ask for guidance if there is any doubt about the reporting obligation in a specific case. Approaches should be made to the money laundering team at ØKOKRIM.

Chapter 7: The carrying out of suspicious transactions, duty of confidentiality in connection with reporting etc.

7.1 Confidentiality with regard to investigations and reporting

Under the Money Laundering Regulations section 10, second paragraph, and the Money Laundering Act section 7, third paragraph, neither customers nor third parties

shall be made aware that investigations are being carried out or that a report has been sent to ØKOKRIM.

7.2 Relationship to other duties of auditors and accountants under special legislation

7.2.1 Auditors

The obligations to carry out investigations under the auditing legislation mean that an auditor must be in contact with the customer and carry out audit procedures such as examining internal and external documents, carrying out testing and putting questions to the customer's employees and managers. Some of these audit procedures may be of type that an auditor usually carries out only if circumstances related to the customer arouse the auditor's suspicion. When an auditor undertakes such examinations he may inadvertently arouse the customer's suspicion that the auditor is onto something.

The money laundering rules' confidentiality provisions may appear to conflict with a number of provisions in the Auditors Act that impose on auditors an obligation to inform, in the first instance the management of the firm, but also in some cases the forthcoming auditor and also the general public.

In Kredittilsynet's view the auditor is obliged to act in compliance with the Auditors Act's provisions on investigations and numbered letters, also in regard to circumstances that he is duty bound to report to ØKOKRIM. The auditor is obliged to do this even in cases where it is likely that the customer will understand or could understand that the auditor has witnessed circumstances which he is obliged to report to ØKOKRIM. What the auditor may not do, however, is to explain his actions when asked to do so by the customer, or in any other way. The auditor must remain silent on this count.

7.2.2 Accountants

No equivalent provisions apply to the conduct required of accountants when bringing to light errors and deficiencies of entities with an accounting obligation. According to the Accountants Regulations section 3-1, third paragraph, an accountant shall relinquish an assignment if *"the principal is in significant breach of his obligations under the assignment contract, such that the accountant is unable to produce or to provide a basis for the agreed statutory reporting, ..."*. According to the industry standard "Generally accepted accounting practices", the accountant is required to take up with the customer the issue of breaches of relevant provisions when preparing the basic accounting material. In the event of significant breaches or repetitions, such notification shall be given in writing. When presenting periodical financial reports the auditor shall take up unclear points and questions with the principal. Breaches of the accounting, bookkeeping and tax legislation must invariably be taken up in writing.

Like auditors, accountants must also act in compliance with the provisions regulating the profession, and must do so even if the customer may be led to suspect that a report has been sent to ØKOKRIM. However, the accountant may not state or confirm, when asked or in any other way, that such a report has been made.

7.3 Obligation to provide information to a new auditor/accountant

The Auditors Act section 6-1 contains confidentiality provisions. The Accountants Act contains equivalent provisions in section 10.

Under section 11, second paragraph, of the Money Laundering Act, reporting entities mentioned in section 4, first paragraph, no. 1 may, notwithstanding the confidentiality requirement, exchange necessary client information among themselves when deemed necessary as a step in investigating suspicion that a transaction is related to the proceeds of a criminal act or that it comes under the Penal Code section 147a or 147b. Section 4, first paragraph, no. 1, applies to financial institutions but not to auditors and accountants mentioned in paragraph 4, second paragraph. Hence the exception in section 11, second paragraph, does not apply to auditors or accountants. In a comment to the provision in Proposition no. 72 to the Odelsting (2002-2003) the ministry states that one should await developments before extending such an exception to other entities with a reporting obligation.

In the case of a change of auditor, the new auditor is required by the Auditors Act section 7-2, first paragraph, to request a statement from the previous auditor on whether circumstances exist indicating that a new auditor should not accept the assignment. The previous auditor must without undue delay state the reasons for his withdrawal in writing. In practice the previous auditor will refer to numbered letters, in which circumstances which might provide a basis for such withdrawal should have been taken up with the audited entity, cf Auditors Act section 5-4, cf section 5-2, fourth paragraph. The fact that the new and the previous auditor are required by law to communicate in the event of a change of auditor means that there is nothing to prevent the previous auditor from communicating any suspicion of money laundering, any investigations and any report made to ØKOKRIM if these circumstances have had a bearing on the auditor's withdrawal.

Under section 10, third paragraph, of the Accountants Act, an accountant may, notwithstanding the confidentiality requirement, provide information and documentation to a new accountant when the latter so requests, and where this is of significance for the accountant's assignment. According to section 3-1, second paragraph, of the Accountants Regulations, the accountant is obliged to provide information to the new accountant on circumstances indicating that a new accountant should not take on the assignment if the latter asks about this. Kredittilsynet's position is that the accountant can, notwithstanding the confidentiality requirement, also provide information to a new accountant on any suspicion of money laundering, any investigations and any report made to ØKOKRIM if these factors have had a bearing on the his withdrawal.

A new auditor or new accountant who receives information from the previous auditor/accountant on investigations and reports made to ØKOKRIM will be required to keep such information confidential pursuant to the Money Laundering Act section 7, third paragraph, and the Money Laundering Regulations section 10, second paragraph. This applies regardless of whether the new auditor/accountant takes on or declines the assignment.

Chapter 8: Requirement as to proper internal control and communication procedures

Proper internal control and communication procedures must be established to ensure fulfilment of the obligations incumbent on entities with a reporting obligation. Control and communication procedures must be in writing and must be established at the highest management level of such entities. A person in the management shall be assigned special responsibility for following up the procedures. Training programmes and follow-up shall be implemented for employees and other persons who perform tasks in fulfilment of obligations pursuant to the act, cf section 13 of the Act. Training must be maintained and training programmes shall inter alia coach employees, and others who perform tasks in fulfilment of the regulations, in recognising transactions which may be associated with the proceeds of criminal acts, cf section 16 of the regulations.

Where it is clear that control and communication procedures must be established at the highest level, it means that they must be established by the management board, in the event the partners' meeting.

These obligations receive fuller mention under point 2.16 in Circular No. 9/2004.

Chapter 9: Exception to legal assistants' duty to report

The Money Laundering Act section 12, first paragraph, imposes special limits on the reporting obligation of lawyers and others who provide legal assistance on a professional or regular basis under licence granted under section 218 of the Courts of Justice Act.

Auditors and other advisers with a reporting obligation are also encompassed by this exception when assisting "a lawyer or other person who provides legal assistance on a professional or regular basis", cf the Money Laundering Act section 12, second paragraph.

The Courts of Justice Act section 218, second paragraph, no. 2, provides a limited right for auditors to "*assist in the completion of income-tax forms, business returns, tax appeals, and other applications to the income-tax authorities.*" Thus auditors have no general right to provide legal assistance.

Accountants have no explicit right to provide independent legal assistance on a limited basis. However, the travaux préparatoires to the Accountants Act permit an accountant to provide assistance which is naturally related to his main business as authorised accountant, including the completion of income-tax forms, business returns and appeals to the income-tax authorities, cf section 218, fifth paragraph, of the Courts of Justice Act.

When engaged in work as mentioned in the Courts of Justice Act section 218, second paragraph, no. 2, auditors will accordingly not be required to report suspicion of transactions related to the proceeds of criminal acts etc., so long as they have become aware of this in the course of their work on determining the customer's legal status.

The same applies to authorised auditors' work pursuant to the Courts of Justice Act section 18, fifth paragraph. In regard to what is to be regarded as "work on determining the customer's legal status", the travaux préparatoires to this provision (Proposition no. 72 to the Odelsting (2002-2003) point 6.3.4) state the following:

"The core content of the term will accordingly in the first place encompass lawyers' work on interpreting applicable law. Second, the term will encompass the lawyer's consideration of what rules of law are applicable to the particular circumstances in a given case. These are two elements which need to be considered in order to determine clients' legal status. Lawyers' work in other contexts will in the ministry's view not be encompassed by the exception, regardless of whether it does, or does not, come under "legal aid work" in section 218 of the Courts of Justice Act. Lawyers will in a number of cases provide services which fall within and/or outside the scope of the exception. Lawyers will in such case be obliged to report suspicious transactions that come to their knowledge in connection with provision of services falling outside the exception, regardless of whether such services constitute the bulk of assignments for the client concerned or not."

For auditors and accountants the crucial point will be whether it is in connection with the audit procedure, in the event the accounting procedure, or whether it is in connection with determining the customer's legal status, or directly in connection with the litigation, that the person concerned has become aware of the circumstances.

Chapter 10: How to report to ØKOKRIM?

Reports can be filed electronically via the internet portal, Altinn. ØKOKRIM encourages reporting entities to use this portal.

Attention is also drawn to the guidance given in the annex to Circular No. 9/2004 on alternative reporting, including the use of postal services and telefax.

Chapter 11: Possible criminal liability etc.

Entities with a reporting obligation who wilfully, in other words against their better judgment, contravene or are accessory to any contravention of the Money Laundering Act or the Money Laundering Regulations may be liable for fines. In the case of particularly aggravating circumstances, imprisonment for a term not exceeding one year may be imposed. See section 16 of the Money Laundering Act.

Reporting to ØKOKRIM must be done in good faith, cf Section 11 of the Money Laundering Act. Reporting not done in good faith may attract punishment and/or liability for damages.

It should also be noted that accountants and auditors may also be liable to punishment and in the Courts of Justice Act section 317 (receiving stolen goods) if in the course of their business they can be said to have provided assistance as mentioned in that provision.

Chapter 12: Auditor's obligations when auditing customers who are themselves subject to the money laundering rules

As a step in planning the audit procedure and identifying the management's knowledge and understanding of laws and regulations of key significance to the firm's business, the auditor will need to ask the management about their familiarity with the money laundering rules. It will also be natural in this context to enquire whether the firm has drawn up guidelines and put in place the routines required by the legislation.

Should significant deficiencies in compliance with the money laundering legislation be brought to light at a firm subject to Kredittilsynet's oversight, this could have consequences for the firm's licence. In such cases the auditor therefore needs to consider filing a report with Kredittilsynet in conformity with section 3a of the Financial Supervision Act.

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