RESPONSE TO THE CONSULTATION:
ANTI-MONEY LAUNDERING SUPERVISORY REVIEW
BY MICHELLE BUTLER

About Me

This response reflects my own views as a self-employed consultant to insolvency practitioners, who assists them to comply with insolvency and related legislation, including the MLRs, and regulatory standards.

My clients are typically insolvency practices headed up by one or two insolvency practitioners with a staff complement of between one and 30 employees, although I have also been engaged by practices larger than this. In some cases, the insolvency practice is a standalone business, but some insolvency practices work in, or alongside, traditional accountancy practices. Therefore, from an MLRs perspective, the insolvency practitioners with whom I work are often the ones primarily responsible in their practice for compliance with the MLRs, but in some cases they collaborate to some extent with their accountancy practice partners.

Until mid-2012, I worked as Head of Regulatory Standards & Monitoring at the IPA and was heavily involved in the AML Supervisors' Forum and in assisting members to comply with the MLRs. Now, I am a member of R3's General Technical Committee and Small Practices Group Committee, which enables me to contribute to a number of R3's responses to government consultations.

Summary

As a consultant to insolvency practitioners, I gain an overview of the work necessitated by the MLRs by a variety of insolvency practices. In particular, I see the tremendous amount of work involved in adjusting to new legislation and regulatory guidance. As I am often called upon to assist with technical and systems-based queries, I also have first-hand experience in attempting to interpret and apply the AML guidance and MLRs in insolvency practices.

I accept that insolvency practitioners represent a small fraction of the whole population of MLR-regulated businesses. However, as my answers below illustrate, I believe that the needs of insolvency practitioners are not being met by the current AML guidance, as the tendency has been to view them as a sub-set of accountancy practices. This is not practical, as insolvency practitioners' work shares few characteristics with traditional accountancy work. It concerns me greatly that the plan is for OPBAS to ensure that "a single piece of user-friendly guidance for [each] sector" is produced.

I believe that consistency between PBSs that are responsible for insolvency practitioners is not aided by the lack of clear and authoritative insolvency-specific AML guidance. Therefore, whilst I welcome attempts to produce helpful insolvency-specific AML guidance, in view of the risk presented by insolvency practitioners, I consider the creation of OPBAS to be a sledgehammer to crack a nut. I do not believe that any such inconsistencies present an opportunity that money launderers might seek to exploit, because any different interpretations and expectations are usually around the minutiae of legislation and regulatory standards. I would be very surprised if the insolvency-relevant PBSs could not collaborate to resolve any material inconsistencies: they certainly do collaborate to address material differences of opinion in insolvency matters. It is therefore disappointing that the

government has resorted to the construction of OPBAS, which undoubtedly will increase financial burdens on insolvency practitioners with seemingly little benefit to them.

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Question 1:	**Do the draft regulations deliver the government's intention that OPBAS help, and ensure, PBSs comply with their obligations in the MLRs? In particular, are further legislative amendments required to ensure legal PBSs can raise funding for the OPBAS fee?**

The Regulations merely set out a framework for OPBAS to take action to investigate and sanction any PBS that does not comply with the MLRs and therefore the Regulations on their own will not deliver the government's intention.

I do not believe that the Regulations and the creation of OPBAS will deliver the government's wider intention as regards the MLRs themselves, which was "to make the financial system a hostile environment for illicit finance while minimising the burden on legitimate businesses" (explanatory memorandum to the 2017 MLRs).

There is no evidence that an apparent inconsistency between supervisors is a weakness that criminals are exploiting; the National Risk Assessment merely points out the existence of such a risk. The consultation document notes previous consultation respondents' concern that focusing on OPBAS' efforts with the PBSs may increase the inconsistency between standards of practice of the PBSs and those of statutory supervisors, especially HMRC. The consultation's statement that HMRC "intends to adopt OPBAS standards" would be a start, but I remain of the view that investing significantly in improving consistency between the PBSs will not address this relatively significant weakness in the AML regime.

Whilst I agree that there are inconsistent approaches of the PBSs who supervise insolvency practitioners, I consider that these inconsistencies do not create gaps that criminals are likely to exploit. Rather, the inconsistencies are around the finer points of interpretation and application of the MLRs and these inconsistencies have no material practical effect on the interaction of insolvency practitioners with their "customers". However, they do increase the burden on legitimate businesses as described below – but I find it hard to believe that the unnecessary burden on businesses is the c.£500m estimated by the Better Regulation Executive – and therefore steps to address these inconsistencies may help. The National Risk Assessment describes supervisors' acknowledgement of the need to "share more information and best practice procedures to overcome the inconsistencies" and I am surprised that these steps could not have been taken without the creation of an expensive new body and regulatory infrastructure.

There is no doubt that OPBAS will increase the cost burden for legitimate businesses and I believe by a far greater sum than the c.£10 per regulated entity estimated by the FCA. One only has to look at the significant costs borne by insolvency practitioners to support the Insolvency Service in its role as regulator-of-regulators for a realistic comparator: the Insolvency Service levies charges on the Recognised Professional Bodies ("RPBs") who pass this on to their licensed insolvency practitioners at a cost at present in the region of £500 each year, not to mention that part of the additional licence fee levied by the RPBs incorporates their own costs in dealing with the Insolvency Service.

Question 2:	**On average, how many hours do staff in your business currently spend interpreting and applying different pieces of AML guidance per year? Please round your answer to the closest 10 hours.**

I act as a consultant to insolvency practitioners and provide technical support. My clients usually only seek my assistance after they have explored an issue themselves and therefore I am unable to provide a reliable estimate.

Far from having "different pieces of AML guidance" to consider, insolvency practitioners have only four paragraphs of insolvency-specific HM Treasury-approved guidance to consider: in the CCAB Guidance (issued August 2008). There is some other guidance written with insolvency practitioners in mind, most notably by the Insolvency Service and R3, but neither of these have HM Treasury approval and they have not been revised since they were issued shortly after the 2007 MLRs came into force, when the application of the 2007 MLRs for insolvency practitioners was still fairly unclear.

It is generally difficult and very often impractical for insolvency practitioners to attempt to interpret and apply AML guidance written in the context of a professional providing an ongoing service to a customer. Insolvency appointments share very few characteristics in common with the usual customer relationships encountered by other professional regulated entities. For example, a number of insolvency appointments are instigated by creditors, rather than the debtor (who is understood to be the "customer" as far as the MLRs are concerned), sometimes in hostile circumstances. Setting aside Individual Voluntary Arrangements, in the majority of cases the insolvency practitioner is appointed over a business that has already ceased to trade. In some cases, an insolvency practitioner is appointed to replace an Official Receiver, who has been in office e.g. as Trustee in Bankruptcy for months, if not years, previously and in some of these cases the criminal activity of the debtor has been widely known and thoroughly investigated. In addition, as an insolvency practitioner takes control of the "customer's" affairs – in all but Voluntary Arrangements, complete control – and as the "customer" is usually insolvent, the traditional "beneficial owners" seem of little relevance to the insolvency going forward.

Therefore, for insolvency practitioners the issue is not so much the *time spent* in considering different AML guidance, but rather the futility of doing so. Often, there is no helpful guidance to shed light on insolvency AML queries and we are left making a best guess or seeking further independent advice. In some situations, I refer to the MLRs themselves, rather than any AML guidance. Whilst it is equally difficult to interpret and apply the MLRs to an insolvency context, at least it is easier to discern what actions are statutorily required.

The absence of insolvency-specific AML guidance generates other costs for my clients and myself when it comes to my clients' interactions with their supervisory authorities. Inspection visits from

the PBS sometimes reveal contrary views on the application of the MLRs. This can lead to many hours' work in adjusting systems and training staff about the changes in order to comply with the PBS's interpretation of what is required. I estimate that the time taken in adjusting to an unexpected PBS's interpretation would be at least 10 times that incurred in considering AML guidance for one year's insolvency queries. It is most frustrating and very inefficient for PBSs' interpretations to be revealed on this one-to-one basis, rather than being published for all insolvency practitioners to read upfront.

Question 3:	**Considering your answer to question 2 above, what proportion of the time your staff currently spend interpreting and applying AML guidance could be saved if the guidance were easier to understand? Please provide your answer as an estimated percentage of the total.**

As explained above, the lack of helpful and authoritative insolvency-specific AML guidance means that far more time is spent adjusting to a PBS's interpretation of the MLRs when this is revealed at a PBS inspection visit than the time spent considering AML guidance in the ordinary course of business. If clear insolvency-specific AML guidance endorsed by the relevant PBSs and approved by HM Treasury were published, in theory this should remove 100% of the time spent reacting to PBSs' interpretations revealed on visits. Of course, there will always remain the need to consult AML guidance when unusual scenarios are encountered. However, in view of the fact that there is currently little useful guidance for insolvency practitioners, I suggest that the time that will be spent consulting new insolvency-specific AML guidance if this becomes available will be little different and perhaps more time-consuming.

In addition, in my experience the costs of familiarising oneself with new requirements, training staff and adapting procedures and systems to accommodate new requirements are wildly under-estimated in government impact assessments. In my view, these costs in absorbing new AML guidance will far outweigh for many years any savings achieved by having ongoing access to such guidance to help with day-to-day matters.

However, I believe that of far more value would be the peace of mind that helpful and authoritative insolvency-specific AML guidance should bring. It is unfair to insolvency practitioners that they are largely left on their own to interpret the MLRs. Insolvency practitioners are exposed to the risk of reputation- and business-damaging disciplinary action by their PBS for failing to comply with the MLRs. Whilst it is always hoped that a PBS would be sympathetic to an insolvency practitioner's explanation that they sensibly applied what little guidance was available, much time and anxiety is incurred by insolvency practitioners in responding to PBSs' investigations and enquiries.

I am concerned that the government's intention is for OPBAS to drive through the creation of "a single piece of user-friendly guidance for their sector" (OPBAS Impact Assessment). As explained above, the relationships that insolvency practitioners have with their "customers" are far removed from the usual accountant-customer relationships and therefore it makes no sense to me to have a single piece of AML guidance that attempts to cover both professions.

I am aware that last week the CCAB issued draft guidance on the application of the new MLRs "for the accountancy sector", although at the moment the promised insolvency appendix is not available. No doubt when this is produced, a great deal of time will be spent in familiarisation with, training on

and adaptation to, this new guidance, which is frustrating in view of the time and costs already incurred by insolvency practitioners having to adapt to the new MLRs themselves without the assistance of any guidance. The prospect of OPBAS forcing through another version of new guidance for the sector, which will require a revisit of processes for a third time, is extremely troubling.

Question 4:	**Putting the cost of staff aside, does your business incur additional costs to help your staff understand AML guidance, for example expenditure on consultants? If so, how much does this cost a year on average? Please round your answer to the closest £100.**

My clients incur costs ensuring that all relevant staff members receive annual AML training. This usually takes the form of webinars on AML matters. However, this off-the-shelf training is usually targeted at accountants or providers of financial products or services. As it is not specifically insolvency related, I am sometimes employed to assist with staff training and specific queries. I also provide technical support to clients not only in relation to AML matters. If I were to pro rata the costs between AML and other technical support, I would estimate that my clients incur c.£200 pa in consultant costs in understanding the AML guidance.

As mentioned above, if a PBS's interpretation causes a client to adjust their systems and retrain staff, this generates far more costs. If I am instructed to assist, depending on how extensive the systems change, my client could incur additional costs of £200 to £1,000 for my time.

Also as mentioned above, insolvency practitioners sometimes instruct consultants to assist them in adapting to new guidance, which usually includes adjusting internal processes and systems and training staff. The costs are highly variable as they depend on the extent of changes required and on the contributions to this exercise made by the insolvency practitioners' own staff, but the costs are likely to be in the £,000s.

Question 5:	**Do you expect your collaboration with other businesses to increase once AML supervisors' expectations are aligned? If so, how much might this save your business a year, on average? Please round your answer to the closest £100.**

No.

It is not AML supervisors' expectations that form a barrier to useful collaboration with other businesses, but rather it is the MLRs themselves. The changes to the reliance provisions introduced by the 2017 MLRs have greatly reduced the ability for regulated entities to collaborate with other businesses. If a regulated entity is looking to rely on another party, Regulation 39(2)(a) requires the regulated entity to obtain immediately from the third party all the information needed to satisfy the customer due diligence requirements in relation to the customer, customer's beneficial owner, or any person acting on behalf of the customer. Therefore, there is little point in choosing to rely on another party; the regulated entity may as well conduct their own due diligence, which is far less risky and usually only a little more time-consuming.