

Defence Against Money Laundering

GUIDANCE FOR INSOLVENCY PRACTITIONERS

Defence Against Money Laundering requests

Guidance about Defence Against Money Laundering ('DAML') requests and their relevance to an Insolvency Practitioner (IP)¹ can be found in section F6 of [Appendix F \(Supplementary Anti Money Laundering Guidance for Insolvency Practitioners\)](#) to the CCAB Anti-Money Laundering and Counter Terrorist Financing Guidance for the Accountancy sector. Please refer to this material in the first instance if a more general overview of DAMLs is required.

When can this guidance be used?

This guidance relates to DAML requests on truly urgent insolvency matters where there is an intrinsic urgency for an IP to fulfil their duties towards creditors. This guidance also addresses situations where multiple DAML requests are necessary. As a matter of goodwill, the National Crime Agency ('NCA') have agreed to prioritise DAMLs in certain truly urgent insolvency cases, but it is important that this escalation process is reserved for only the most urgent of DAML requests and it does not represent an overall change in the statutory timescales to which the NCA operate.

Problem areas requiring additional guidance

We have identified that there are a number of situations where there are practical challenges for DAML requests for insolvency work. The accountancy sector together with the NCA propose to issue the following guidance to clarify how these problem areas can be addressed.

1. DAML on Appointment

Experience shows that companies which are experiencing cashflow difficulties may sometimes engage in behaviour which is fraudulent in order to preserve or generate cash. This may include tax or VAT fraud or, where there is an invoice discounting facility in place, fraud against the financial institution which has granted the facility (e.g. through "fresh air

¹ IP means any individual licensed as an IP, whether trading as a sole practitioner, in partnership with others or in an incorporated business. This term includes persons acting as an Insolvency Practitioner (IP) within the meaning of section 388 of the Insolvency Act 1986 (IA86) or article 3 of the Insolvency (Northern Ireland) Order 1989 (IO89). The term IP is used in this paper for both corporate and personal insolvencies for the purposes of simplicity.

invoicing”, which is invoicing for goods which have not been supplied). This can be the same with individuals although sometimes the facts are more complex.

Insolvency appointments are also taken in respect of companies that are then found to be engaged in investment fraud, money laundering, and other illicit activity.

If the IP is aware or suspects that the entity or individual he/she will be appointed over may be in possession of proceeds of crime or terrorist property (Criminal Property), a DAML request should be made prior to accepting the appointment, unless this is not possible because of the urgent requirement to preserve assets or other similar reasons. In this case a report and DAML request should be made as soon as practicable after appointment. This is because on appointment the IP takes control of the assets for the benefit of the creditors, and if some of the assets comprise Criminal Property, the IP could be committing an offence under S328 or S329 of the Proceeds of Crime Act 2002 ('POCA').

Common scenarios include where an appointment is made in instances where HMRC are a creditor and there is a suspicion of tax fraud, or where a bank or financial institution believes they may have been defrauded. The timescale to obtain a DAML is 7 working days following the day of submission of the DAML request.

This timescale will generally conflict with the urgency required to make the appointment to allow the IP to take control of assets to protect the interests of legitimate creditors.

Proposed solution

The NCA has proposed that in the case of truly urgent appointments, IPs can make use of a fast track application process. This allows a DAML request to be escalated and prioritised, and the NCA would aim to provide a response within **24 hours** for cases where the appointment is truly urgent.

Following submission of the DAML request, an email should be sent to the DAML inbox DAML@nca.gov.uk with the following text:

FAO of the G3 DAML Manager urgent appointment decision required.

On DD/MM/YY, a DAML request (Ref number) was submitted from (reporting entities name) regarding (Company's or debtor's name)

(Reporting Entity's name) is aware or suspects that the entity or individual he/she is proposed to be appointed over may be in possession of proceeds of crime or terrorist property and so a DAML has been submitted to enable the appointment to be accepted and to address our potential involvement in:

S328 POCA – the arrangement offence

S329 POCA – acquiring/ using possession of criminal; property.

The purpose of this DAML request is to notify the UKFIU of our proposed appointment in this matter and we require an urgent response to enable us to accept the appointment, take control of all the assets from the above detailed company/ individual as part of the provisions of our appointment and to prevent their dissipation.

No further action will be taken for distribution of the assets without the submission of a further separate DAML request.

In most cases, the NCA will only consider granting a DAML where the IP knows that they are to be appointed over the entity in question. However, if it is not definite but substantially certain that the IP is going to be appointed, then a DAML can be made at that point and will be considered in line with this process.

2. DAML required for urgent payments upon appointment

The appointment of an IP occurs when the company is insolvent, but it may be possible to salvage parts or all of the business. This may involve continuing the trading activities pending a sale of all or parts of the business as a going concern. In these cases, the IP will have the responsibility to trade the business pending sale of all or part of the business; or where this is not possible, a liquidation of the assets.

In order to continue to trade, it will be necessary to make payments to staff and legitimate suppliers within a very short time of taking the appointment. In many cases suppliers, who are already owed money they may not stand to recover their debt in full, will only accept “payment on delivery” terms. This can cause issues where Criminal Property is suspected or identified before accepting an appointment.

In many cases the IP may have no prior knowledge of essential payments required, especially in situations where there has been wrongdoing and the IP does not receive cooperation from management.

There may be other cases where there is a period before the appointment which could allow payments like this to be identified and may permit an application for a DAML to allow such payments to be made in the normal course of business. However, there has been experience of such conditional applications being declined because the IP cannot state definitively that the appointment will take place or cannot provide exact details of the amounts to be paid. In other cases, the appointment takes place rapidly without time for a prior application.

Since payments often have to be made within a few days of an appointment, there is very little time to obtain a DAML. If the payments are not made, this creates a tension with the provisions and obligations governing insolvencies and IPs. Additionally, the opportunity to save the business may be lost, with resulting loss of employment and detrimental effect on legitimate creditors of the company.

Solution

The NCA has proposed that in the situation where payments need to be made urgently after appointment, IPs should make use of the NCA's fast track process (as for urgent appointments above). This allows a DAML request to be escalated and prioritised, and the NCA would aim to provide a response within **48 hours** for cases involving urgent payments. Following submission of the DAML request, an email should be sent to the DAML inbox at the NCA DAML@nca.gov.uk with the following text:

FAO of the G3 DAML Manager urgent payment decision required.

On DD/MM/YY, a DAML request (Ref number) was submitted from (reporting entities name) regarding (Company's or debtor's name).

This DAML concerns the use of funds which we suspect or believe to be criminal property, and we require an urgent response to enable us to provide payments to suppliers and/or other creditors who may be financially disadvantaged or who would not continue to supply the company if these payments are not urgently progressed.

Details of the specific payments and the recipients/payees are contained in the DAML request along with the value of the criminal property; or if this is unknown, an upper limit of the value of the total proposed payments; but we confirm that we do not propose to

make any payments to the suspected wrongdoer that has given rise to the criminal proceeds and/or their close associate at this stage.

Reporters should note that if the case has already been allocated to a Law Enforcement Agency, then it may not be possible for the NCA to provide a response within 48 hours and the DAML request may be returned to the reporter.

In the longer term, the government will be considering potential changes to the law relating to fungibility of funds. This could allow the IP to ringfence any funds which were suspected of being Criminal Property and make payments out of the rest of the funds that are clean. This would remove the need for a DAML request to be made in relation to any payments that were out of the non-ringfenced funds.

The government may also consider whether the role of a court in appointing an IP could remove the need for a DAML request in certain circumstances. This would however require a change to the law so is an issue to be examined further in the long term.

3. The need for multiple DAML applications

Due to the complexity of insolvency cases, there have occasionally been different approaches taken by the NCA to the provision of DAMLs. Whereas, in some cases, an application to deal with the assets in accordance with the duties of, and law applicable to, an IP has been successful and a DAML granted for a 12 month period, in other cases, this has been refused and a detailed description of the potential prohibited acts along with amounts has been required. An IP may be able to identify and quantify creditors at an early stage, but in some cases this can take longer whilst other parties prove their claims or suppliers are identified.

Where details of each of the various entities and/or individuals to whom a payment is to be made are ascertained over a period of time, this will invariably result in multiple DAML requests. There will also be additional requests for each asset disposal (e.g. plant and machinery).

Solution

To address these challenges, the NCA is supportive of a blanket DAML request that would cover all assets, expenses and liabilities of an entity and therefore allow the IP to make any payments or distributions that were required during the course of the insolvency (subject to a 12 month period as detailed below).

A blanket request can be made using the form of words “deal with the assets to meet the liabilities of the [company/individual] and relevant professional fees and expenses of the insolvency in accordance with the duties of, and laws applicable to [insolvency practitioners]”² The request would also need to specify that this DAML request is only in respect of unconnected parties who do not appear to be connected to the wrongdoing which gave rise to the proceeds of crime.

In cases where the IP does not yet have full details of all assets and liabilities, they should provide such information they do have in the DAML request, including the broad classes of assets and liabilities they believe to exist, and a best estimate of the values thereof. These details should be set out in schedules accompanying the DAML request, or attached in an email to DAML@nca.gov.uk.

Where an insolvency appointment is expected to last more than 12 months, it remains the case that more than one DAML request is required as the NCA's policy is to only grant a DAML for a maximum period of 12 months. The Suspicious Activity Report IT system is in the process of being upgraded and it may be that the additional functionality of a new system would allow resubmission of a DAML in a less labour-intensive way than is currently the case. While this wouldn't remove the requirement for another DAML request after the expiry of the 12 month period, it should make it a simpler task for the IP to resubmit the request.

It is recommended that firms maintain some form of internal system to prompt a reminder of when a DAML may be nearing its 12 month expiration date. This is especially important where there is an internal team dealing with the DAML process who are separate from the mainstream insolvency casework team.

² This includes equivalent appointments for individuals and in Scotland

Guidance on when a DAML can or cannot be provided

The NCA has issued the below guidance to clarify the circumstances in which they are able to provide a DAML, and when this is not possible or appropriate.

Requirements/ considerations for insolvency DAMLs:

- the NCA CANNOT provide a defence under POCA for IPs to identify or trace assets. This is because the IP as the “reporter” has no control of criminal property at this stage, which is necessary for the NCA to provide a defence.
- the NCA CAN provide a defence under POCA for IPs to take control of the estate assets, realise those assets, accept and pay fees and expenses and distribute to creditors.

The NCA would expect to see the following information in a DAML request:

- the value of the criminal property / fees / expenses or an upper limit or the total value of the insolvency estate / officeholder’s expected fees / expenses, if the reporter doesn’t know.
- although the DAML request does not need to contain details of all parties to whom payments are to be made, the reporter must confirm that the subject (i.e. the suspected wrong doer that has given rise to the criminal proceeds) is not included in the proposed list of payment recipients nor any associated entity which may be linked to the subject, as far as can be ascertained.
- if the reporter intends to make a payment to the subject, then a separate DAML request should be made for this proposed payment. The NCA cannot partially grant or refuse a DAML request so if the subject is included in the overall DAML request, it is likely that such a request would be refused for all proposed payments.
- whether there is an existing Law Enforcement Agency criminal investigation

- whether the reporter already knows that one of the creditors will be the subject of a criminal investigation (or a company owned/run by them);
- where if there are no current or previous investigations linked with the case, but the IP in the bankruptcy / insolvency has, through their own investigations, identified criminal conduct that has not already been reported to a Law Enforcement Agency.

Further guidance on [submitting a DAML application](#) and [Frequently Asked Questions](#) are also available.

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