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Dear MLAC member,

TREASURY APPROVAL OF INDUSTRY GUIDANCE

At its November meeting, MLAC discussed the issue of creating a new mechanism for approval of industry guidance under Sec 330 of the Proceeds of Crime Act 2002 (POCA) and Regulation 3(3) of the Money Laundering Regulations 2003 (the Regulations). A paper on the subject was presented and discussed at that meeting, and MLAC's views were sought on how this work should be taken forward. No agreement was reached at the meeting, and we invited views from MLAC members subsequently.

There appears to be no agreement in the responses that we have received, except clear lack of support for an industry-led working group. So we propose to revert to the process used previously, for dealing with the JMLSG guidance submitted for MLAC and Treasury approval. This would initially be run as a pilot scheme, with a view to reviewing and refining the system once a few sets of guidance have been worked on.

For now, therefore, the process and criteria will remain largely as described in the November MLAC paper; we have attempted to present this in a one-page process map for clarity (attached). **It would be helpful to have your views on the proposed timings indicated in the paper by 29th March 2004.**

We appreciate that the overall process takes some time, and would particularly welcome any thoughts on how this could be cut down. However, we are anxious to allow MLAC members enough time to consider the draft guidance on which we are likely to seek their views.

JMLSG Guidance Notes

Please find enclosed drafts of the JMLSG Guidance Notes 2003.

We propose that, on this occasion, approval for the JMLSG Guidance Notes take place on a more compressed timetable than that proposed in the "process map", not least since the Notes have been open to public consultation during which MLAC members have been able to make any



comments. **We propose that MLAC members send any comments to Paul Lloyd (paul.lloyd@hm-treasury.gsi.gov.uk) by 29th March 2004**, ie within two weeks. We further propose that Treasury collate MLAC responses and circulate to all MLAC members one week later by 5 April. A week should then be allowed for the JMLSG to respond to any issues raised and to consider whether approval will then formally be sought from MLAC, taking the process to 12 April.

We suggest that this process is probably better conducted by email, but please let Paul Lloyd know quickly if you are not happy with this approach.

Other guidance notes

On other guidance, we are awaiting an electronic copy of guidance prepared by the Notary Scriveners, for which MLAC and Treasury approval has been requested. We have also asked for a written explanation of how this draft guidance meets the MLAC criteria. As soon as we receive these documents (and are satisfied with the explanations), we will forward them to MLAC members.

We propose that this be the first set of guidance to follow the new approval process on the timetable as outlined in the draft process map (as attached). For this set of guidance we will therefore be asking for responses from MLAC members within four weeks.

Legal position

At the November meeting and subsequently MLAC members have sought clarity of exactly what assurance Treasury approval actually gives. I will therefore recap the legal position:

- The only obligation imposed by legislation (POCA and the Regulations) concerning industry guidance is on the courts. For instance, if someone is prosecuted under section 330 of POCA, the courts must - when deciding whether the person committed an offence - take into account whether that person followed any relevant guidance issued by a supervisory body or any other appropriate body (which means, in relation to the alleged offender, any body which regulates or is representative of any trade, profession, business or employment carried on by that person). This is also referred to in regulation 3(3) of the Regulations.
- However, although there is no legal obligation on Government to approve industry guidance, both POCA and the Regulations refer to the concept of "HMT approved" industry guidance. Further, the Government is eager to help industry confront money laundering, including, if desired, by approving guidance on specific aspects of the Regulations.

- Given that a large number of industry organisations may seek Treasury approval for guidance notes, we should be clear about the legal limitations to that approval. **It will be important that the guidance notes state that the Treasury is not in a position to approve another's interpretation of the law, as this is a matter solely for the judiciary.**
- **The Treasury is keen to endorse industry good practice.** However, the Treasury is also keen to ensure that best practice guidance recognises that different approaches may be appropriate in achieving particular outcomes. We do not envisage that one solution will fit all circumstances.
- **A court would still be able to take account of industry guidance even if the Treasury did not approve it** (although this would be entirely discretionary on the court's part).

Work ahead

We expect that MLAC will, as a result of the Regulations coming into force, receive more requests for approval of guidance in the near future. We may need to be flexible about the timing of approval, to ensure that errors or inconsistencies do not slip through, given the potential load on MLAC members if there is a large number of simultaneous requests. In the meantime, as discussed at the last meeting, we are directing those writing guidance notes to the criteria for approving guidance, which were used for the approval of the JMLSG Guidance Notes (December 2001 version).

I enclose a version of the criteria with suggestions for changes both to exclude interpretation of the law from the approval process and to ensure that where such interpretation is included it is clearly marked as such; and to recommend that guidance be subjected to legal advice before being submitted to MLAC. **We would be grateful to receive MLAC members' comments on this suggested revision to the criteria for considering approval by 29th March 2004** (again, please could comments be sent to paul.lloyd@hm-treasury.gov.uk).

Yours sincerely,



**Phil Wynn Owen
Director, Financial Services
Chair of MLAC**

Suggested criteria for MLAC to recognise guidance notes

Recognition of responsible body

- Written terms of reference
- Representative of relevant industry or sector
- In a regulated industry or sector, the responsible regulator agrees to the body's recognition

Consultation

- Public consultation on draft guidance, accessible to all interested parties, including government, law enforcement, regulators, industry and consumer interests.
- Copies of responses to consultation publicly available unless confidentiality requested.
- Consultation to invite comments on cost / benefit of the measures recommended in the notes.
- Analysis of consultation responses and feedback available to respondents and MLAC.

Approval procedures

- Document approval procedures (including how dissenting views are handled).
- To have regard to cost / benefit of the measures recommended in the notes.
- To have regard to existing UK guidance, standards and practice.
- To have regard where appropriate to EU legislation, international practice and impact on UK competitiveness.
- To indicate clearly where content represents interpretations of the law rather than best practice guidance.
- **(Recommended)** To have been submitted for legal advice on content.

Guidance

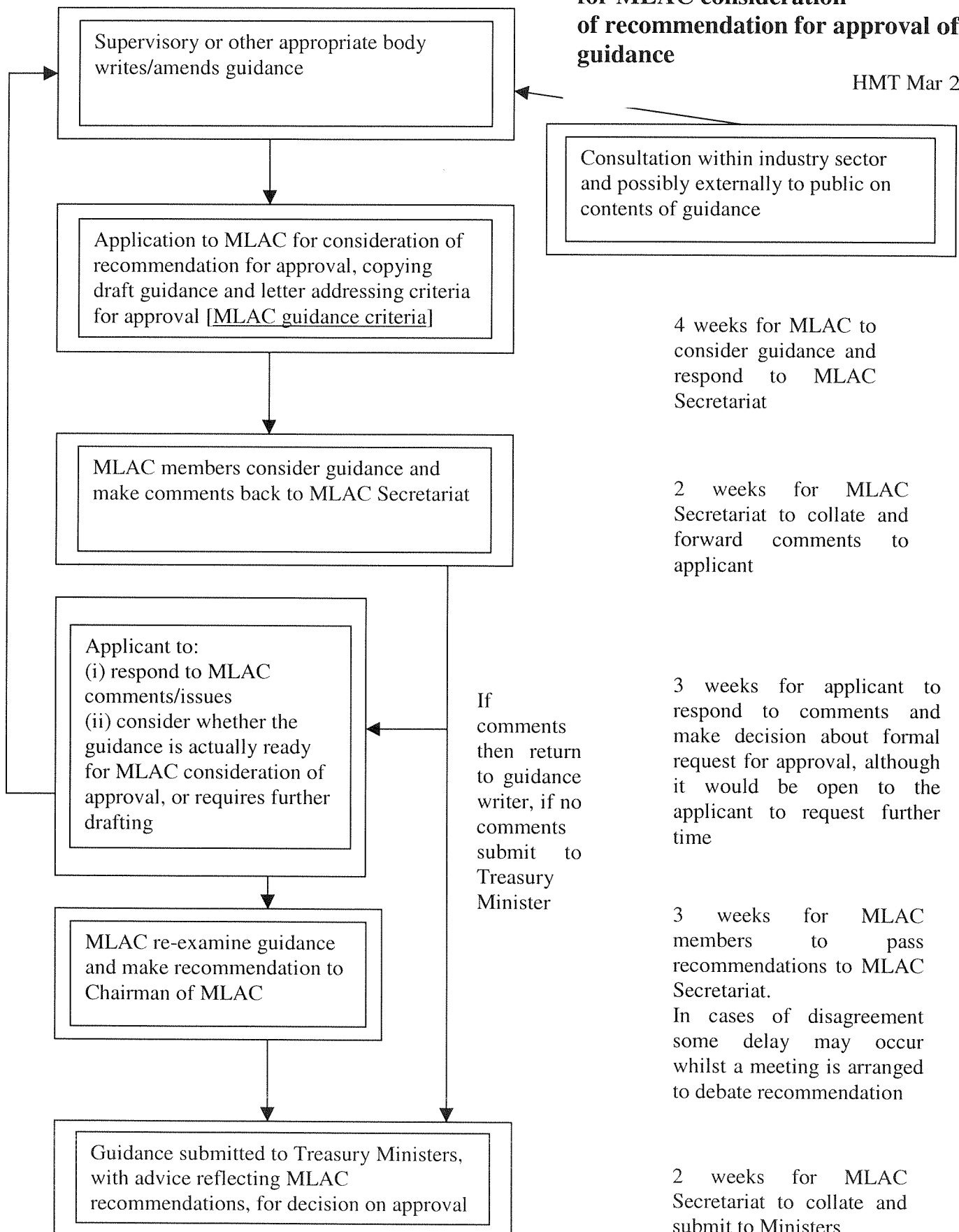
- Readily available to all at minimal cost (e.g. on internet)

MLAC approval

- Responsible body to demonstrate to MLAC how criteria are met
- MLAC to make clear whether any material in the guidance notes submitted to it cannot be considered for approval, for example because it contains an interpretation of the law.

Suggested mechanism and timetable for MLAC consideration of recommendation for approval of guidance

HMT Mar 2004



4 weeks for MLAC to consider guidance and respond to MLAC Secretariat

2 weeks for MLAC Secretariat to collate and forward comments to applicant

3 weeks for applicant to respond to comments and make decision about formal request for approval, although it would be open to the applicant to request further time

3 weeks for MLAC members to pass recommendations to MLAC Secretariat.

In cases of disagreement some delay may occur whilst a meeting is arranged to debate recommendation

2 weeks for MLAC Secretariat to collate and submit to Ministers

Approximately 14 weeks in total