



NCA

National Crime Agency

SARs Regime Good Practice

Frequently Asked Questions

Defence Against Money Laundering (DAML)

This is a United Kingdom Financial Intelligence Unit (UKFIU) Guidance Note. It is produced in line with the National Crime Agency (NCA) commitment to share perspectives on the Suspicious Activity Reports (SARs) regime.

May 2019
V2.0

Content description and disclaimer

This product draws together the good practice provided by experienced Money Laundering Reporting Officers (MLROs) from across the UK Suspicious Activity Reports (SARs) regime. It is intended to help SAR reporters provide good quality Defence Against Money Laundering (DAML) SARs.

Collaborative answers are provided to the most frequently asked questions (FAQ) concerning the DAML process. The ambition of these core answers is therefore to help a large cross section of the SAR reporting community. The aim will be to regularly review the content, as it is anticipated that this product will evolve with the introduction of new legislation, regulations and crime trends.

The answers provided to the questions are intended to provide good practice GUIDANCE ONLY. The answers are not intended to, nor should they be construed as, providing any form of legal advice.

More tailored industry-specific advice regarding DAML requests, submitting SARs to the NCA or more general anti-money laundering (AML) compliance should be sought from regulators, supervisors or trade bodies. Alternatively consult independent legal opinion from a lawyer.

The following product is produced by the UK Financial Intelligence Unit (UKFIU) NCA as part of its ongoing commitment to engage with reporting sector colleagues and to maximise the potential of SARs-derived intelligence.

Contents

Part 1 – DAML definitions

Part 1 focuses on defining some of the frequently misunderstood terms associated with the DAML regime.

Part 2 – DAML dilemmas

Part 2 presents a variety of scenarios commonly faced by members of the reporting sector. Such situations may arise before, during or after you have submitted a DAML disclosure.

- A. Prior to disclosing**
- B. During the Notice Period**
- C. Following receipt of decision**

Part 3 – Signpost for further guidance

Part 3 provides sector-specific further information sources.

Part 1: DAML definitions

Q.1: What is a "DAML"?

A Defence Against Money Laundering (DAML) can be requested from the NCA where a reporter has a suspicion that property they intend to deal with is in some way criminal, and that by dealing with it they risk committing one of the principal money laundering offences under the Proceeds of Crime Act 2002 (POCA).

A person does not commit one of those offences if they have received 'appropriate consent' (aka a "DAML") from the NCA. The NCA is empowered to provide these criminal defences in law under s335 of POCA.

These requests for a defence are the primary task of the UKFIU's DAML Team.

Q.2: What are the principal money laundering offences?

The principal money laundering offences are:

- Concealing, disguising, converting, transferring or removing criminal property from England and Wales, or from Scotland, or from Northern Ireland.
- Arranging: where someone involves him/herself in an arrangement to assist in money laundering.
- Becoming concerned in an arrangement in which someone knowingly suspects or facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person.
- Acquiring, using or possessing criminal property

The elements of each are defined in sections 327 to 329 of POCA.

Q.3: What is the process once a DAML is submitted?

The NCA will assess the information and decide whether to consult with partner law enforcement agencies (either in the UK or abroad) to assess whether action can be taken. For this reason it is crucial that reporters include all the information they have (such as dates of birth and addresses of suspects) to allow intelligence databases to be searched. The NCA may request additional information from the reporter in order to make an informed decision. This will usually happen via email.

The NCA may then liaise with law enforcement partners on a decision. Based on the response received the DAML Team will then make its decision applying the balancing exercise set out in Home Office Circular 029/2008: effectiveness (maximising impact on the criminal threat); proportionality (ensuring that the approach is balanced as far as possible in respect of the costs and benefits) and engagement (collaborative working amongst regime participants to ensure success). The result of such a balancing of interests is that, in the majority of

cases, consent should only be refused when a criminal investigation with a view to bringing restraint proceedings is likely to follow or is already underway.

The NCA has a statutory seven working day period to consider all DAML requests. The day that the SAR is submitted is considered to be Day 0.

Q.4: How does a DAML differ to the 'consent' I used to receive from the NCA?

A DAML **does not** differ legally from the 'consent' that was previously notified, other than in the wording; the meanings are one and the same. The term 'consent' previously gave rise to misinterpretation and confusion among some reporters in terms of its legal effect – for instance some interpreted (incorrectly) that the NCA was providing clearance or tacit permission to reporters, when in fact the legal effect is (and always was) solely a defence to a money laundering offence under POCA.

It was a desire to address this misunderstanding which played a role in the NCA's change of wording.

Q.5: What information is normally required by the NCA in order to make an informed decision on my DAML request?

The NCA requires certain information to be disclosed in a SAR in order to make an informed decision on requests for a defence.

Currently the three criteria required are:

- I. the information or other matter which gives the grounds for your knowledge, suspicion or belief (see Q6 – suspicion)
- II. a description of the property that you know, suspect or believe is criminal property (see Q7 – criminal property)
- III. a description of the prohibited act for which you seek a defence. (By prohibited act, the NCA means the proposed activity that you, the reporter, are seeking a defence to undertake) (See Q8 – prohibited act)

Explicitly explaining the above three criteria is crucial because the NCA is unable to *interpret, assume, imply or infer* anything from disclosures.

If a DAML SAR is particularly deficient in the above areas then it may be closed without further notice. In the case of more minor omissions, the NCA will make contact (usually via email) to obtain the relevant information. A response to such 'Clarification requests for Information' is usually required within 48 hours. If a response is not received within the stated timeframe that case may be closed down.

The following three questions address these crucial requirements.

Q.6: What constitutes 'suspicion' under POCA?

Suspicion is not defined in legislation. The Court of Appeal (*R v Da Silva*) defined suspicion of money laundering as a possibility, which is more than fanciful, that the other person was or had been engaged in, or benefited from criminal conduct and that the suspicion formed was of a settled nature. There does not need to be anything amounting to evidence of the suspected money laundering. The threshold for suspicion under POCA is generally considered to be low.

It is a matter for the reporter to decide at what point the 'threshold' is crossed and a disclosure to the NCA is necessary. It is not for the NCA to comment upon what circumstances should or should not be deemed suspicious – red flags for suspicious activity should have been discussed during your firm's AML training. More tailored advice over industry specific guidance is available from your sector's trade body and/or regulator.

Q.7: What is meant by the term 'criminal property'?

This is any property which derives from a criminal act if the alleged offender knows or suspects that it constitutes or represents such a benefit. Criminal conduct is conduct which constitutes an offence in any part of the UK, or would constitute an offence in the UK if it occurred there.

Criminal property must already be in existence at the time of your disclosure in order for a DAML to be considered (see Q12). It is also important to understand the legal concept of fungibility, which may result in a relatively small amount of criminal property tainting the whole of the asset.

Here, the wide definition of criminal property may result in a relatively small amount of criminal property tainting a significantly larger asset or assets. For example, in cases of tax evasion, failure to declare turnover upon which tax should be paid generally renders the entire turnover criminal property, not just the tax evaded. If necessary, consideration ought to be given to seeking legal or regulatory advice on such matters.

Q.8: What is meant by the term 'prohibited act'?

The 'prohibited act' is the most poorly understood of the elements required by the NCA to make an informed decision on your disclosure. When discussing a 'prohibited act', the NCA refers to the proposed activity that **YOU**, the reporter, are seeking a defence to undertake. The NCA can ordinarily only consider prohibited acts which are to the **FUTURE** and **SPECIFIED**. Some examples of common prohibited acts include:

- "I seek a defence to transfer the closing balance of £5000 of the client's account to their alternative account at High Street Bank Sort Code 11-11-11 Account 1111111111"

- I seek a defence to exchange contracts, complete the property purchase and transfer the sale proceeds to the client's account at High Street Bank Sort Code 11-11-11 Account 111111111"
- "I seek a defence to act in the liquidation of the disclosed company, and distribute the assets to creditors in line with the court order"
- "I seek a defence by acting for the executor of an estate in obtaining probate and distributing estate assets"(where in this case a legal adviser suspects that part of the estate is criminal property).

In requesting details of the prohibited act the NCA does **NOT** mean:

- the suspected criminality being undertaken by the subject (sometimes referred to as the "predicate offence")
- the particular section under POCA for which the reporter is seeking a defence (e.g. s.328 POCA)
- a general statement that "the prohibited act for which we seek a defence is money laundering" or similar.

Q.9: What is the 'Notice Period' and the 'Moratorium Period'?

The Notice Period is the statutory seven **working** day period in which the NCA has time to make a decision. The day the disclosure is submitted is considered Day 0. The NCA will analyse the DAML request, consulting with UK and international law enforcement partners as necessary. During this period the activity that is the subject of the request should not be carried out, otherwise you risk committing a money laundering offence. However, this will not prevent you taking other actions on the file, such as writing letters, conducting searches etc.

Should your request for a DAML be refused, the NCA will notify you via phone call and email. The Moratorium Period then begins, with the day of notification of refusal being issued becoming Day 1 of the Moratorium Period. The Moratorium Period extends to 31 **calendar** days following notice of refusal. During this time law enforcement will be working to take positive enforcement action against the criminal property you have identified. Changes included in the Criminal Finances Act 2017 allow law enforcement to apply to a Crown Court for an extension of the Moratorium Period beyond 31 days. Please consult industry-specific guidance on CFA 2017 for full details.

Q.10: Does a DAML constitute 'clearance'/'permission' to continue acting or to 'proceed' in general?

No. It solely provides a defence to a principal money laundering offence should you decide to carry out the planned activity. Other factors, such as wider legal, regulatory and ethical obligations should be considered when deciding whether to continue with the activity. A DAML does not provide any form of 'clearance', 'permission' or 'authority' to undertake the specified activity. Furthermore, a DAML being granted does not oblige/mandate the reporter to proceed with the proposed activity or imply legitimacy of the funds in question. It is not for the NCA to advise whether a reporter should continue acting for a client; this is a business decision for a reporter to make based on their own risk appetite.

Part 2: DAML dilemmas

This part will focus on:

- A) Prior to disclosure
- B) During the Notice Period, and
- C) Following receipt of a decision

A. Prior to disclosing

Q.11: Can I seek a DAML where I do not suspect that the funds/asset/property represent the proceeds of crime?

No – a money laundering offence would not be committed by carrying out the activity and a defence under POCA therefore cannot be given. The submission of a DAML request requires a fundamental admission that the property in question is criminal or at least suspected of being so.

For the purposes of POCA, there can be no DEFENCE without a potential OFFENCE.

Q.12: Can I seek a DAML for activity where I believe that the property will become criminal once the activity that I am requesting a defence for has taken place?

No, technically it is not criminal property at the time of disclosure – so this would be seeking a defence to carrying out criminal conduct. There is no provision to permit this under POCA. Any such conduct would, of its nature, likely be criminal and a reporter should refuse to act.

Case law such as *R v Geary* has confirmed the position that criminal property must exist at the time of the disclosure in order for the NCA to consider a decision. The NCA will therefore be unable to make a decision on cases where there is not currently existing criminal property for the purposes of POCA. The reporter should seek independent legal advice if they are unsure on this point of law.

Q.13: Can I seek a DAML for an act I have already undertaken? /Can I seek a DAML retrospectively?

No. The NCA is only able to consider a decision on specified activity which is yet to occur. Retrospective defences cannot be given. Please consult your AML supervisor.

Q.14: I am concerned that I will be committing an offence other than a primary money laundering offence under POCA. Can I obtain protection/clearance by seeking a DAML?

No. "Appropriate Consent" (a DAML) under POCA provides a defence in law only to the 'principal' money laundering offences under s.327, 328, 329. The NCA cannot provide a defence under any other part of POCA, other legislation or other instruments such as the Money Laundering Regulations 2017.

Please also note that the NCA has no ability to provide a defence against the separate offence of "tipping off" found under s333A of POCA.

Q.15: Can I have a DAML to commence/maintain a business relationship?

A request to commence or maintain a business relationship will not be considered, as the request is too broad. Whether or not to take on/maintain client relationships is a business decision for reporters to make based upon their own risk appetite.

The NCA may consider requests relating to a more specified or time-limited activity:

- e.g. advising in a corporate takeover or providing legal advice in a matrimonial dispute
- e.g. acting for executors in obtaining a grant, collecting assets and distributing an estate or making payments in relation to insolvency where such activity is time limited.

It will be a decision for the reporter whether they wish to continue to act for a client subject to any professional obligations

Q.16: Can I seek a DAML to cover me for an activity affected by a freezing order/other court order?

Yes, as in law only the NCA can provide a defence to a principal money laundering offence. That said, a DAML cannot and will not override any current court order. Therefore the NCA cannot consider a request to undertake an act which breaches or contravenes any existing court order in the UK or abroad.

It is incumbent on the reporter to satisfy themselves that the proposed activity will not breach a court order and the NCA may request a response in writing clarifying that this is the case.

Q.17: I have not yet decided what action to take. Can I seek a DAML to help guide my decision?

No. In order for the NCA to make an informed decision, a DAML can only be considered for activity that is future and specified. The DAML regime is not to be used to seek an NCA opinion on what action a reporter should take or as a step in a

reporter's customer due diligence (CDD) procedure. This conversation is best had with your trade body, regulator or lawyer.

For the same reason hypothetical activity will not be considered.

Q.18: Can I request a DAML to accept monthly payments from a subject on an ongoing basis?

Yes, subject to these being time-limited. Best practice would suggest a period of no longer than 12 months. The full monthly transaction details must also be disclosed.

Q.19: Can I have a DAML to retain funds?

Requests to retain funds are considered on a case by case basis. A DAML requesting a defence to hold funds indefinitely is unlikely to be able to be considered. However, more time-limited requests where there are reasonable grounds for the retention of funds will be considered on their own merits.

Q.20: Should I submit a DAML to report a crime or potential vulnerable people?

The NCA is not a crime reporting agency.

The SARs database constitutes an extremely useful intelligence tool for law enforcement. However, it should be noted that SARs do not constitute formal crime reports. Crimes should be reported via more appropriate channels:

- Action Fraud as appropriate.
- Areas such as exploitation of children, modern slavery/human trafficking and vulnerable people have further online methods of reporting. For more information see www.nationalcrimeagency.gov.uk

Once these steps have been taken, and if you still suspect that you require a DAML under POCA for the activity, then you should submit a disclosure as normal. Relevant crime reference numbers and SAR glossary codes should be included as appropriate.

B. During the Notice Period

Q.21: Can my case be expedited?

The DAML Team typically operates with a very high caseload and must deal with cases in date order. The NCA has a statutory seven working day period to consider all DAML requests; therefore, requests for updates should be avoided. Requests for progress updates cause unnecessary and additional workloads adversely impacting on NCA efficiency.

That said, the NCA will consider requests for DAML cases to be prioritised under very extreme circumstances. Home Office Circular 29/2008 sets out the criteria on which the UKFIU must make DAML decisions: this includes taking into account the impact on the reporter in terms of risk of significant financial loss; that a legitimate business might cease trading; or there are severe financial or personal consequences to an individual.

Good examples could include where there is a threat to life or where harm to a vulnerable person could be prevented.

Please contact DAML@nca.gov.uk including the SAR unique reference number (URN) setting out the circumstances and this will be considered.

Q.22: The circumstances of my disclosure have changed during the Notice Period; should I submit a new DAML SAR?

This will depend on the significance of the change. As a general rule, information relevant to the suspicion you have should be reported, though it may not have a bearing on the DAML request.

If the DAML is currently within the Notice Period then a new report is not usually required – an email update to DAML@nca.gov.uk will be sufficient. Please provide the update in good time to allow the NCA to make an informed decision on the updated circumstances.

Q.23: Can I withdraw a DAML request?

Yes, only within the notice period where the funds subject to the disclosure remain under the control of the reporter and prior to any decision being communicated by the NCA. For instance if the planned activity is no longer to go ahead. However, the SAR itself will not be removed from the system.

If a reporter no longer wishes the NCA to consider its request for a DAML, then a request can be withdrawn in writing by email to DAML@nca.gov.uk The NCA will retain the information disclosed for intelligence purposes.

Q.24: Can I discuss the submission of my SAR with anyone?

You should not discuss the fact of making a SAR with anyone if this risks prejudicing an investigation. Once a SAR has been submitted, all reporters should be mindful of the offences under s333A and s342 POCA relating to “tipping off” and “prejudicing an investigation.” There are few exceptions to this rule. Further advice on these exceptions should be sought from trade bodies, regulators or via legal advice (see s333B or s333C, or s333d or s333d2.)

Q.25: Why have I been asked for additional information that is not mandated by POCA?

The DAML Team may on occasion require additional information in order to make an *informed* decision on the disclosed activity. This is particularly true where the activity proposed is complex or high value. Reporters should always consider their regulatory and legal obligations, in particular relating to confidentiality, in deciding whether to provide the further information, and may wish to seek advice from trade bodies, regulators or lawyers.

Whilst the NCA cannot compel reporters to provide such information (other than by production order etc.) the lack of a response may affect the NCA’s ability to make an informed decision on that case.

Q.26: I’m under pressure from the subject? What should I tell them to avoid ‘tipping off’?

All reporters should remain mindful of ‘tipping off’ once a SAR is submitted. The NCA is unable to give general advice or guidance on specific methods to answer client queries/awkward questions as these will vary by reporting sector. For this reason this discussion is again best had with trade bodies, regulators or lawyers.

If a subject is behaving in a threatening/intimidating manner then consideration should be given to contacting local police on 999 or 101 as deemed appropriate.

C. Following receipt of a decision

Q.27: I have received a DAML from the NCA; can I proceed?

It is a matter for each reporter to determine whether they should proceed, taking into account their ethical, legal and regulatory obligations, as well as commercial considerations.

You should consider your next steps carefully and should not take the NCA's granted letter as 'permission to proceed'. You have a defence to specific offences in POCA but not to other criminal offences (e.g. those in the Money Laundering Regulations 2017, Bribery Act 2010, Fraud Act 2006 etc.).

Q.28: A DAML has been refused; what do I do now?

The Moratorium Period now starts and during this period (as with the Notice Period) you should not carry out the act that is the subject of your DAML request. It is likely that you will be contacted by a law enforcement investigation team who may wish to obtain further information to inform any action they may take. Please keep the NCA informed if refusal to provide a DAML causes serious issues, such as threat of litigation or significant financial loss.

Q.29: How can I update my contact details?

It is important that the NCA has up-to-date contact details for firms disclosing SARs. If a simple contact update is required then the SAR Online Team is able to assist on 0207 238 3431.

A full change in MLRO details will require the reporter to re-register via the SAR Online system. A link to this can be found on the NCA website.

Q.30: Can I talk to police or other law enforcement regarding my disclosure?

The NCA may refer your SAR to police or other law enforcement bodies as part of the DAML process. Such law enforcement agencies may contact you for further information or to discuss the circumstances of your disclosure in more detail.

If you are contacted by the police or other law enforcement we recommend that you verify they are who they say they are, for instance by ringing them back via the force/agency switchboard. SAR intelligence can only be shared with certain accredited individuals within law enforcement (financial investigators or financial intelligence officers) and so the individuals contacting you should hold one of these accreditations. You should not assume that all law enforcement officers should be privy to SAR information.

Part 3 – Signpost for guidance

The UK Financial Intelligence Unit (UKFIU)

Information about the UKFIU, the SARs regime and guidance notes can be found on the NCA website www.nationalcrimeagency.gov.uk

The UKFIU section of the website can be found by a link on the home page or by going to: About us/What we do/Economic Crime Command/UK Financial Intelligence Unit.

Hyperlinks to UKFIU guidance notes can be found on the UKFIU's pages.

Documents can also be found by using the 'search' box in the top right hand corner of each web page.

A link to SAR Online is also available in the top right hand corner of each page of the NCA website.

Useful reference documents

- SARs Annual Report 2018
- Guidance on Submitting Better Quality SARs v3.0 (May 2019)
- SAR Glossary Codes and Reporting Routes v3.0 (January 2017)
- Requesting a Defence under POCA and TACT v2.0 (May 2019)
- Vulnerable Persons Reporting Routes v1.0 (November 2016)
- SARs Reporter Booklet (December 2018)

Useful contacts

Defence Against Money Laundering (DAML)

All contact with the DAML Team is via email: DAML@nca.gov.uk

Queries regarding SAR Online/general enquiries

Telephone 0207 238 8282 – option 2 or 3

Email: ukfiusars@nca.gov.uk

All queries related to disclosures concerning terrorist financing can be made to: UKFIUTFT@nca.gov.uk

Her Majesty's Revenue & Customs (money service businesses, estate agents, high value dealers etc.)

Website guidance:

<https://www.gov.uk/guidance/money-laundering-regulations-report-suspicious-activities>

Email: MLRCIT@hmrc.gov.uk

Financial Conduct Authority

Website guidance:

<https://www.fca.org.uk/firms/financial-crime/money-laundering-terrorist-financing>

Joint Money Laundering Steering Group

Website: <http://www.jmlsg.org.uk/>

Legal sector

The Law Society Website:

<http://www.lawsociety.org.uk/support-services/risk-compliance/anti-money-laundering/>

Legal Sector AML guidance:

<http://www.lawsociety.org.uk/policy-campaigns/articles/draft-anti-money-laundering-guidance/>

AML helpline (free and confidential): 020 7320 9544

Email: AML@lawsociety.org.uk

Solicitors Regulation Authority Website: <http://www.sra.org.uk/aml>

Ethics and guidance: 0370 606 2577

Accountancy sector

Institute of Chartered Accountants in England and Wales

Website guidance:

<https://www.icaew.com/en/technical/legal-and-regulatory/money-laundering/anti-money-laundering-supervision>

For ICAEW members only Email: moneylaundering@icaew.com

Gambling Sector

Gambling Commission website AML Guidance page:

<http://www.gamblingcommission.gov.uk/search/search-results.aspx?searchKeywords=AML&categories=&page=0#main>

intelligencereports@gamblingcommission.gov.uk

Confidential reporting line 0121 230 6655
(Please ask to speak to a Financial Intelligence Officer at the Gambling Commission)