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# Suspicion of money laundering reporting obligations: Auditor compliance, or sceptical failure to engage?

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ABSTRACT

Money laundering has become of increasing concern to law makers in recent years, principally because of its associations with terrorism. Recent legislative changes in the United Kingdom mean that auditors risk becoming state law enforcement agents in the private sector. We examine this legislation from the perspective of the changing nature of the relationship between auditors and the state, and the surveillant assemblage within which this is located. Auditors are statutorily obliged to file Suspicious Activity Reports (SARs) into an online database, ELMER, but without much guidance regarding how suspicion is determined. Criminal rather than civil or regulatory sanctions apply to auditors' instances of non-compliance. This paper evaluates the surveillance implications of the legislation for auditors through lenses developed in the accounting and sociological literature by Brivot and Gendron, Neu and Heincke, Deleuze and Guattari, and Haggerty and Ericson. It finds that auditors are generating information flows which are subsequently reassembled into discrete and virtual 'data doubles' to be captured and utilised by authorised third parties for unknown purposes. The paper proposes that the surveillant assemblage has extended into the space of the auditor-client relationship, but this extension remains inhibited as a result of auditors' relatively weak level of engagement in providing SARs, thereby pointing to a degree of resistance in professional service firms regarding the deployment of regulation that compromises the foundations of this relationship.


## 1. Introduction

The state deploys numerous technologies to regulate and oversee the behaviours of individuals, populations, and professions, some of which are direct and transparent while others are concealed (McKinlay & Starkey, 1998; Rose and Miller, 1992). The concealed technologies include the gathering of information by individuals such as auditors and solicitors, institutions such as health authorities and welfare agencies, and its reporting to the state in fulfilment of legal obligations. The provider of the information may not know the precise purpose for which it will be used; this may be for statistical analysis, the allocation of tax resources (Miller & O'Leary, 1987), or, when criminality is suspected, to trigger further covert surveillance by other state actors. Neu and Heincke (2004, p.181) observe that:

> 'Technologies such as accounting, administration, and law serve to structure the conditions of possibility within a particular institutional field. These techniques not only frame potential problems within the field, but also construct possible solutions (Neu, 2000; Preston, Chua, & Neu, 1997). By mobilizing distant knowledges and by transmitting this

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knowledge to centers of calculation, technologies of government facilitate the *efficient* exercise of government from a distance'.

Neu and Hencke suggested that historically, as the state became more remote from those it governed because of the increased complexity of economic affairs, its reliance upon constant flows of information increased. The direct punishment of offenders no longer sufficed, as those who facilitated criminality, directly or indirectly, also had to be sanctioned. The traditional 'touchstone' in the auditor-client relationship, the duty of confidentiality, also became subject to statutory incursion as the state extended its reporting obligations regarding known or suspected criminal behaviour. The difference between these two states of mind – knowledge and suspicion – challenges auditors when interacting with the on-line reporting system. The main applicable legislation, the Proceeds of Crime Act 2002 (POCA 2002 hereafter), imposes a reporting obligation when there is 'reasonable suspicion' of criminality, but without providing a statutory definition of what that means. Is suspicion to be determined objectively in relation to how an auditor's peers would view a client's series of transactions, or subjectively, by reference to the facts as directly perceived or interpreted? This dichotomy is embedded in the nomenclature of the reporting mechanism: the Suspicious Activity Report (SAR hereafter). POCA 2002 is principally aimed at the financial services sector where 'suspicion' tends to be triggered by single, specific transactions rather than by a 'piecing together' of a series of transactions which would be undertaken by a forensic accountant. For example, the transfer of a large sum of money from an overseas jurisdiction where bribery and corruption are prevalent will, *ceteris paribus*, trigger suspicion and the filing of a report. Similarly, multiple small deposits made by numerous individuals which accumu

late in one account (known as 'smurfing') will also generate suspicion. These so-called red flags, amongst others, were described in a report issued by the United Kingdom Financial Conduct Authority in July 2013. However, an accountant may witness or be party to a series of ostensibly innocent transactions by a client which, with the benefit of hindsight, can be viewed as suspicious, thereby leading to a questioning of the accountant not having originally filed a suspicious report.

The present paper extends the line of reasoning found in work by Brivot and Gendron (2011),Haggerty and Ericson (2000), and Giddens (1985), that surveillance in some aspects of the auditor-state relationship has evolved into a diverse, rhizoid structure (Hoskin, 1994). The networks of state agencies which have access to the database in which SARs are held, ELMER, have diverse purposes for which the information may be used, and reflect this evolving assemblage (the database was so named in honour of Elmer Lincoln Irey, the Director of the United States' Internal Revenue Service's lead investigation unit during the federal tax evasion prosecution of Al Capone in 1931).

The paper addresses three questions. First, how has the traditional auditor-client relationship been affected by the new statute-based surveillant assemblage? Second, what are the implications of the transformation of the traditional nexuses between auditor, client, and state into what Benjamin (1983), and later, Haggerty and Ericson (2000) identify as a 'multitude of organized surveillance systems'? Third, to what extent are auditors engaged with the new reporting regime? The paper's methodology is principally theoretical, evaluating the implications for auditors of evolving state surveillance as manifested in relevant provisions of POCA 2002. Its empirical dimension critiques the relevant sections of United Kingdom (UK hereafter) anti-money laundering law to comprehend the implications of reporting obligations placed upon auditors, and its apparent lack of clarity in how 'reasonable suspicion' is defined. Statistical data produced by the National Crime Agency (NCA hereafter) is utilised to explain the degree of reporting compliance by auditors.

The paper is organised as follows. The next section addresses a dichotomy: does the accounting profession facilitate criminality such as money laundering, or assist in its prevention or detection? Section 3 describes how information technologies create 'data doubles' of persons to be subsequently exchanged between and scrutinised by state agencies. The section draws upon theoretical work by Brivot and Gendron (2011) to demonstrate how Foucault's model of centralised surveillance as described in *Discipline and Punish: The birth of the prison* (1977) has been displaced by a more diverse, rhizoid surveillant assemblage, as discussed in the sociological work of Jessop (2007) and Deleuze and Guattari (1987). Section 4 critiques auditor reporting obligations under POCA 2002, describing technological failings and database inadequacies currently holding back development of the surveillant assemblage. Statistical data provided by the NCA is drawn upon to demonstrate how auditors have consistently and significantly underperformed, year on year, most other reporting sectors in terms of quantity of SARs filed. Section 5 provides the paper's conclusions.

## 2. Money laundering and the accounting profession: prevention or participation?

Money laundering may be defined as the attempt to disguise the origin and nature of income derived from illegal purposes and its subsequent integration into the financial system without attracting the attention of law enforcement or tax collection authorities (Compin, 2008; Lehman & Okcabol, 2005). The academic literature is rich regarding the interrelationship between the state and the accounting profession, and the reporting obligations imposed on the latter by the former (Gendron, 2002; Guenin-Paracini & Gendron, 2010; Hines, 1989; Humphrey & Owen, 2000; Power, 1997). The dichotomy in the auditor-state relationship relates to whether accounting is a means of detecting, preventing or deterring money laundering, or if it participates in the crime, enabling and hiding it. The dichotomy is important because if auditors facilitate the commission of a crime, then the ever-encroaching surveillance structures – the rhizoid assemblage – may be justifiable, even at the cost of undermining the traditional notion of client confidentiality. If, instead, auditors deter crime,