FURTHER INPUT PROVIDED BY NATIONAL PROSECUTING AUTHORITY RELATING TO SPECIFIC ISSUES IDENTIFIED BY PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT

A. Meaning of expression "or suspected a fact" as proposed in NPA's clause 1(3)

1.1 For purposes of the interpretation and application of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001), ***Guidance Note 4 on Suspicious Transaction Reporting*** was published. Part 3 of the Guidance Note reads as follows:

"Part 3

WHAT IS THE NATURE OF A SUSPICION?

3.1 In addition to circumstances where a person has actual knowledge, the reporting obligation under section 29 of the FIC Act also applies in circumstances where a mere suspicion may exist. The FIC Act does not define what constitutes a suspicion. The ordinary meaning of this term includes the state of mind of someone who has an impression of the existence or presence of something or who believes something without adequate proof, or the notion of a feeling that something is possible or probable. This implies an absence of proof that a fact exists.

*3.2 This interpretation of the term "suspicion" was also applied in South African case law: In **Powell NO and others v Van der Merwe NO and Others** 2005 (5) South Africa 62 (SCA) the Supreme Court of Appeal confirmed that South African courts have endorsed the following interpretation of the term used by Lord Develin in the English case of **Shabaan Bin Hussein and Others v Chong Fook Kam and Another** [1970] AC 942 (PC) ([1969] 3 All ER 1627) at 948B:*

'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove'.

3.3 *With this in mind the starting point to considering whether circumstances give rise to a suspicion would be when those circumstances raise questions or gives rise to discomfort, apprehension or mistrust.*

3.4 *A suspicious state of mind is subjective, which means that a court would have to draw inferences concerning a person's state of mind in relation to a particular set of circumstances from the evidence at its disposal concerning those circumstances. However, the FIC Act adds an element of objectivity to this with the phrase "ought reasonably to have known or suspected" in section 29(1). The application of this phrase is explained in section 1(3) of the FIC Act. Section 1(3) of the POCA provides that a person ought reasonably to have known or suspected a fact if a reasonably diligent and vigilant person with the same knowledge, skill, training and experience, as well as the knowledge, skill, training and experience that may reasonably be expected of a person in the same position, would have known or suspected that fact. This expands the scope of the obligation to identify circumstances which may indicate that a set of circumstances concerning a business, or the transactions involving the business, is of a suspicious nature.*

3.5 *When considering whether there is reason to be suspicious of a particular situation one should assess all the known circumstances relating to that situation. This includes the normal business practices and systems within the industry where the situation arises.*

3.6 *A suspicious situation may involve several factors that may on their own seem insignificant, but, taken together, may raise suspicion concerning that situation. The context, in which a situation arises, therefore, is a significant factor in assessing suspicion. This will vary from business to business and from one customer to another.*

3.7 *A person to whom section 29 of the FIC Act applies, should evaluate matters concerning the business in question and transactions involving the business, in relation to what seems appropriate and is within normal practices in the particular line of business of that person, and bring to bear on these factors such as the knowledge the person may have of the customer. This should involve an*

application of a person's knowledge of the customer's business, financial history, background and behaviour.

3.8 *A particular category of transactions that are reportable under section 29(1) of the FIC Act are transactions which a person knows or suspects to have no apparent business or lawful purpose. This refers to situations where customers enter into transactions that appear unusual in a business context or where it is not clear that purpose of the transaction(s) is lawful. In order to identify situations where customers wish to engage in these unusual transactions a person would have to have some background information as to the purpose of a transaction and evaluate this against several factors such as the size and complexity of the transaction as well as the person's knowledge of the customer's business, financial history, background and behaviour.*

3.9 *In Part 4 of this Guidance Note more information is given as to factors that may indicate that a transaction is suspicious in a money laundering and terrorist financing context, respectively. These are indicators as to circumstances that may give rise to a suspicious state of mind or may be indicative of the fact that a reasonably diligent and vigilant person may have become suspicious of a particular transaction or series of transactions."*. (Emphasis added)

1.2 In ***Mazibuko & another v NDPP*** [2009] JOL 23657 (SCA), the Supreme Court of Appeal held that the trial court's conclusion that the first appellant was either complicit in the illegal activities occurring on his property **or that he deliberately turned a blind eye to them was justified.** The SCA stated that property owners are expected to be vigilant about what goes on their property. The forfeiture order against the first appellant was confirmed as correct.

1.3 In ***Bogaards & another v S*** [2010] JOL 25554 (GNP), and with reference to the same provision appearing in the Terrorism legislation, the Court remarked as follows at paragraphs 15 and 16:

"[15] *The practical consequence of these provisions is that when the State is called upon to prove that the accused knew that the persons they harboured or concealed had already committed or were likely to commit terrorism, whether it be to establish the*

actus reus or dolus, it can rely on evidence of actual knowledge, or, alternatively a belief on the part of the accused that there was a reasonable possibility of the commission or likely commission of terrorism and despite that belief the accused failed to obtain confirmation. The State is further aided by section 17(2) of the Act which provides that the offence under section 11 is committed whether the terrorist activity occurs or not. Harbouring a person with the belief that there is a reasonable possibility that he may be a terrorist even if he is not, is consequently an offence. Similarly, where the State wishes to establish the offence on one of the further alternative bases that the accused ought reasonably to have known or suspected that the harboured or concealed person was a person who had committed, or was likely to commit, terrorism, it will be sufficient to show that a reasonably diligent and vigilant person with the intellectual capital and experience of a person in the position of the accused (the reasonable person similarly situated to the accused) would have so known or suspected. It would therefore seem that the mental element of culpa or negligence might be sufficient in regard to what the accused knew or should have known. But the harbouring or concealment must nonetheless have been intentional in the conative sense. Acts of harbouring and concealment by their nature involve deliberate conduct. They presuppose intentional conduct. It is hard to imagine conduct which might be described as negligent harbouring and concealment.".

[16] *To recap somewhat: the knowledge element of the offence in section 11 therefore requires the State to prove that the accused knew, ought reasonably to have known or suspected that the harboured person had committed or was likely to commit terrorism. The fact of which the accused must have knowledge is that the harboured person had already committed or was likely to commit terrorism. In terms of section 1(6), however, the element will be established either if the accused had actual knowledge that terrorism had been or was likely to be committed (section 1(6)(a)), or if the court is satisfied that the accused believed there was a reasonable possibility that the harboured person had done or was likely to do so and did not confirm or discount that belief (section 1(6)(b)). The latter is a form of deemed or constructive knowledge, which in practical terms is akin to a suspicion. A person who entertains an unconfirmed belief that there is the reasonable possibility of the existence of a fact, suspects that such a fact exists. Similarly, section 1(7) introduces an objective standard for the determination of whether an accused ought reasonably to have known or have*

suspected the existence of the fact that terrorism had been or was likely to be committed. This provision, unlike section 1(6)(b), does not lessen the burden on the State to prove the prior commission or likely commission of terrorism. Rather it lessens the burden in respect of what the accused knew or suspected. The accused will be deemed to have known or suspected the commission or likely commission of terrorism if a reasonable person similarly situated to the accused would have done so. And furthermore, when section 1(7) is read together with section 1(6), an accused will contravene section 11 if he ought reasonably to have known or suspected that the harboured person had committed or was likely to commit terrorism if a similarly situated reasonable person would know it, or would have believed (suspected) there was a reasonable possibility of that fact and would have acted to confirm or discount it.".

B. WHETHER MENS REA IS REQUIRED OR NOT

1.1 The following interesting explanation regarding the question of mens rea in the South African Law was found in Lexis Nexis:

"112 Form of *mens rea* when required

Once it has been determined by way of interpretation that *mens rea* is an element of a statutory offence, the question arises as to what degree (form) of *mens rea* is required.1 Is intentional wrongdoing (*dolus*) required or is negligence (*culpa*) sufficient?

Two conflicting approaches are discernible in the case law. The first is that there is no general rule in regard to the form of *mens rea* required and the court must approach the question without any preconceived leaning towards *dolus* or *culpa*.2 The other approach holds that the form of *mens rea* the legislature had in mind will usually be *dolus* and that it is only in exceptional cases that *culpa* will suffice.3 According to this approach, the point of departure in interpreting the section is that *dolus* alone will supply the necessary *mens rea* and that there must be clear indications that *culpa* was intended before this form of *mens rea* will be sufficient. The basis of this approach is two-fold. *Dolus* is generally the form of *mens rea* required in common-law crimes and statutory provisions must be interpreted to deviate as little as possible from the common law. If *culpa* should suffice, this would greatly extend criminal liability and even lead

to unjust results as a result of the objective nature of the test for *culpa*. This result would offend against the rule that criminal statutes must, in the case of ambiguity, be benevolently interpreted.4 The second approach seems to be the one that is in accordance with principle, but it is clear that the vast majority of cases following this approach do not elevate it to a firm rule. At most it implies that the court will initially assume that *dolus* is the requisite form of *mens rea* and that *culpa* will only suffice where there are indications which point to a legislative intention that *culpa* is sufficient.5

In determining the legislative intention, the basic test the courts apply is that the form of *mens rea* depends on the foresight or care which the statute in the circumstances demands. If a high degree of care or circumspection is demanded, *culpa* is sufficient to constitute *mens rea*.6 Although the considerations which the courts take into account in determining what degree of care the legislature demanded are seldom specifically listed,7 it is evident that the same factors which determine legislative intention as to whether *mens rea* is required, constitute the relevant considerations.8 These are the language and context of the prohibition, the object and scope of the statute, the nature and extent of the penalty imposed, the ease with which the provision can be evaded if only *dolus* constitutes the necessary *mens rea*, and the reasonableness or otherwise of holding that *culpa* suffices. The weight that has to be attached to these various considerations when determining which form of *mens rea* is required, differs from the weight attached to the individual considerations when determining whether *mens rea* is an ingredient of the offence in question.9

The degree of circumspection which the legislature demands must in the first place be sought in the language and context of the prohibition.10 This is regarded as a very important indication of the degree of blameworthiness required and often proves to be the decisive consideration. Words, which in their ordinary grammatical sense imply an awareness of the nature of the prohibited conduct, indicate *dolus* as the requisite form of *mens rea*. The presence of such words as, for example, "wilfully",11 "intentionally",12 "knowingly",13 "maliciously",14 "wittingly",15 and "cruelly",16 excludes *culpa* as the requisite form of *mens rea*. Verbs such as "leave"17 or "fail"18 that are not qualified by an adverb of the nature of the above, connote blameworthiness and thus indicate that *culpa* is sufficient. Certain verbs, which bear some implication of

awareness of the nature of the prohibited conduct, such as "allow"19 or "permit"20 are not per se strongly indicative of a specific form of *mens rea* and other considerations play the decisive role in determining the form of *mens rea* required. Even in cases where the *prima facie* connotation of the terminology employed clearly indicates a specific form of *mens rea,* this may not be decisive if there are other compelling considerations indicating a different form of *mens rea.* Thus "false", which may indicate *dolus*, has been interpreted not to be so decisive so as to exclude *culpa*.21

The absence in the statutory description of the *actus reus* of the stock terms indicating *dolus*, namely "knowingly", "wilfully", "intentionally", "wittingly", is a pointer to *culpa* being sufficient to constitute *mens rea*, but there is some difference of judicial opinion as to the weight that must be attached to this absence.22 The effect of the absence of these words is greatly enhanced by their presence in other sections of the same statute, creating similar offences. **The courts readily reason along *unius inclusio est alterius exclusio* lines, holding that the legislative intention was to draw a distinction between the sections in question and thus indicating, by the omission of these words, that *culpa* suffices.**23 This interpretation is readily adhered to where the contrasting wording appears in sections which follow closely on one another and even more so where subsections of the same section are involved.24 Where such a contrast in language appears in immediately successive subsections which have the same object and the same manner of implementation, for example a sanction aimed at the same person, the inference that the legislature intentionally refrained from using terms suggesting *dolus*, thereby indicating that *culpa* suffices, is almost irresistible.25 If such a difference in wording is a long-standing one in that it was also embodied in the forerunners of the sections under consideration, the inference that the legislature intended a difference in the form of *mens rea* required, is further strengthened.26

The context of the statute may also in other respects give guidance to the form of *mens rea* required. It has been held that where similar offences created by the same statute have been judicially interpreted as requiring a certain form of *mens rea,* the same form of *mens rea* must, in the absence of indications to the contrary, have been intended in another section of that statute.27 Likewise, if other sections of the same statute punish negligent conduct severely and the offences created in these sections are clearly more serious than the offence created by the section being construed, it would be anomalous

to hold that *dolus* alone would constitute *mens rea* in the case of the less serious offence.28

The object and scope of the statute also often affords guidance as to the form of *mens rea* required. The fact that the legislation is aimed at a grave social evil which has taken on alarming proportions, indicates that *culpa* suffices.29 Whenever the object of the legislation under consideration is manifestly to promote public welfare or the safety of the state and social order itself, the courts regard it as a pointer to *culpa* constituting sufficient *mens rea*, albeit not usually a decisive indication.30 The object and scope of the statute may in other cases play a clearer and more decisive role in indicating the required form of *mens rea*. Where the harm which the statute seeks to combat is usually caused by negligent, in contrast to intentional, conduct, for example in the case of legislation aimed at road accidents, *culpa* constitutes the necessary *mens rea*.31 Similarly, the fact that the prohibited *actus reus* is very seldom committed intentionally, leads to the conclusion that, since the legislature did not intend to deal with only such a small percentage of harmful conduct, negligent conduct also falls within the scope of the statute.32 If a high degree of care is thus necessary to achieve the object of a statute, *culpa* constitutes sufficient *mens rea*.33

It has been stated on occasion that a severe prescribed penalty militates against liability based on *culpa*,34 but the overwhelming weight of case law authority is that this is a strong indication that the legislature demanded great care to ensure compliance and thus *culpa* suffices.35 While the severity of a penalty may then, on the one hand, strongly indicate that *mens rea* is an element of the offence in question, it may equally, on the other hand, strongly indicate that *culpa* is sufficient to constitute the required *mens rea*.36

The ease with which liability can be evaded if *dolus* alone would constitute the necessary *mens rea*, is a very important factor in determining the form of *mens rea* required. If an accused can easily evade liability based on *dolus* because it is very difficult for the state to prove intention and consciousness of unlawfulness, or very easy for an accused to falsely demonstrate lack of *dolus*, *culpa* constitutes sufficient *mens rea*.37 Should an insistence on *dolus* alone then enable an accused, who actually had *dolus*,38 to evade liability with ease and in this manner frustrate the object of the legislation, proof of *culpa* would be adequate.

The reasonableness or otherwise of holding that *culpa* constitutes the necessary *mens rea* has also been considered in determining the legislative intention as to the form of *mens rea*. In this regard the nature of the offence in question is frequently of crucial importance. A wide-ranging prohibition applicable to all citizens indicates *dolus* alone as the required form of *mens rea*, if the application of the objective standard of *culpa* will result in great hardship to the various groups of persons who may contravene the section in question through mere carelessness or thoughtlessness.39 Where the offence, however, consists in a failure to comply with a specific duty which had indeed been brought to the notice of the accused, a negligent failure to comply with that duty incurs criminal liability.40

The cumulative effect of the above considerations determines whether *dolus* alone or whether *dolus* or *culpa* constitutes the necessary *mens rea* for a contravention of the statutory prohibition in question.41 Once the required form of *mens rea* is established, the rule is that it must extend to all the elements of the offence in question.42 Liability thus cannot be strict with reference to certain elements of a statutory offence while dependent on proof of *mens rea* with regard to the other elements thereof.43 On the other hand, the possibility that the required *mens rea* may in some statutory offences consist of *dolus* in regard to certain elements of the offence and *culpa* in regard to other elements of the offence, has been judicially mentioned,44 but, in light of the paucity of case law espousing this construction,45 the existence of this hybrid form of *mens rea* cannot be regarded as established law.

1 *S v Naidoo* 1974 2 All SA 545 (N); 1974 4 SA 574 (N) 596; *S v Sayed* 1981 1 All SA 310 (C); 1981 1 SA 982 (C) 987.

2 See eg *S v Arenstein* 1964 1 SA 361 (A) 366; *S v Fernandes* 1974 2 SA 627 (RA) 629; *S v Sayed* supra 987.

3 But see eg *S v Naidoo* supra 575; *S v Erasmus* 1973 4 All SA 499 (T); 1973 4 SA 481 (T) 483; *S v Cowley* 1976 1 All SA 231 (E); 1976 1 SA 376 (E) 376; *S v Ngwenya* 1979 1 All SA 466 (A); 1979 2 SA 96 (A) 100; *S v Lombard* 1980 4 All SA 490 (T); 1980 3 SA 948 (T) 951; *S v Ndlovu* 1986 1 All SA 184 (N);

1986 1 SA 510 (N); *S v Ohlenschlager* 1992 1 SACR 695 (T); *S v Claasens* 1992 2 SACR 434 (T).

4 See the cases cited in fn 3 supra and especially *S v Naidoo* supra 575.

5 Compare *S v Ngwenya* supra 100, where it is merely stated that "usually" *dolus* is the requisite form of *mens rea*.

6 *S v Arenstein* supra 366; *S v Botes* 1967 2 All SA 404 (N); 1967 2 SA 533 (N) 535; *S v Naidoo* supra 597; *S v Jadwat Bros (Pty) Ltd* 1977 4 All SA 664 (D); 1977 4 SA 815 (D) 826; *S v Sayed* supra 987.

7 But see eg *S v Fernandes* supra 629.

8 See eg *S v Arenstein* supra 366; *S v Wandrag* 1970 3 All SA 257 (O); 1970 3 SA 151 (O); *S v Wood* 1971 2 All SA 44 (RA); 1971 1 SA 494 (RA) 496; *S v Oberholzer* 1971 4 All SA 520 (A); 1971 4 SA 602 (A) 611.

9 Cf par 111 ante.

10 *S v Oberholzer* supra 611; *S v Naidoo* supra 596; *S v Hanekom* 1979 2 SA 1130 (C) 1132; *S v Sayed* supra 987.

11 *S v Botes* supra 535; *S v Quinta* 1974 1 All SA 101 (T); 1974 1 SA 544 (T) 545; *S v Sayed* supra 987.

12 *S v Oberholzer* supra 611; *S v Jadwat Bros (Pty) Ltd* supra 826.

13 *S v Bezuidenhout* 1979 3 SA 1325 (T) 1326; *S v Breytenbach* 1979 4 All SA 69 (T); 1979 3 SA 256 (T) 257.

14 *S v Oberholzer* supra 611.

15 *S v Goncalves* 1974 2 All SA 211 (NC); 1974 2 SA 122 (NC) 124.

16 *S v Gerwe* 1977 3 SA 1078 (T) 1079.

17 *S v Kasselman* 1977 3 SA 1064 (T) 1064.

18 *S v Kasselman* supra. Compare *S v Nel* 1975 2 PH H96 (T).

19 *R v Jack* 1953 3 All SA 74 (A); 1953 2 SA 624 (A) 626–627; *S v Naicker* 1967 2 All SA 90 (N); 1967 4 SA 214 (N) 225; *S v Swanepoel* 1970 3 All SA 19 (O); 1970 2 SA 515 (O) 518.

20 *S v Kritzinger* 1973 1 All SA 579 (C); 1973 1 SA 596 (C) 602.

21 *S v Fernandes* supra 630; *S v Nel* supra 97.

22 *S v Fernandes* supra 629.

23 *S v Botes* supra 535; *S v Goncalves* supra 124; *S v Oberholzer* supra 611; *S v Willemse* 1975 1 All SA 413 (C); 1975 1 SA 84 (C) 91; *S v Jadwat Bros (Pty) Ltd* supra 826.

24 See eg *S v Oberholzer* supra 611; *S v Fernandes* supra 629.

25 *S v Willemse* supra 91.

26 *S v Willemse* supra 91.

27 *S v Lombard* supra 951. See also *S v Qumbella* 1966 4 All SA 381 (A); 1966 4 SA 356 (A) 364.

28 *S v Wood* supra 495.

29 *S v Naidoo* supra 598–599; *S v Sayed* supra 987.

30 *S v Fernandes* supra 629; *S v Sayed* supra 987.

31 *S v Wood* supra 495.

32 *S v Fouché* 1973 3 All SA 191 (NC); 1973 3 SA 308 (NC) 313.

33 *S v Oberholzer* supra 611; *S v Jadwat Bros (Pty) Ltd* supra 826.

34 See eg *S v Naidoo* supra 598–599.

35 See *S v Arenstein* supra 366; *S v Wood* supra 496; *S v Fernandes* supra 630; *S v Jadwat Bros (Pty) Ltd* supra 826.

36 *S v Sayed* supra 987–988.

37 *S v Botes* supra 535; *S v Bailey* 1968 3 All SA 311 (N); 1968 3 SA 267 (N) 268; *S v Wood* supra 496; *S v Henwood* 1971 4 All SA 403 (R); 1971 4 SA 383 (R) 392; *S v Fernandes* supra 630; *S v Jadwat Bros (Pty) Ltd* supra 826.

38 The case law on this point is somewhat confused in that the fact that a person may easily contravene the section in question through carelessness without having *dolus* is seen as an indication that *culpa* is necessary to prevent evasion of liability. This relates to the degree to which the object of the section would be frustrated and not the degree of evasion should *dolus* alone constitute the necessary *mens rea*; cf *S v Botes* supra 535 and par 111 fn 84 ante.

39 *S v Naidoo* supra 575 596; *S v Cowley* supra 376; *S v Lombard* supra 951.

40 *S v Jassat* 1965 3 All SA 478 (A); 1965 3 SA 423 (A) 427 429; *S v Qumbella* supra 359; *S v Duma* 1970 1 All SA 63 (N); 1970 1 SA 70 (N) 76; *S v Naidoo* supra 602–603; *S v Van Staden* 1976 3 All SA 130 (N); 1976 2 SA 685 (N) 695.

41 *S v Gampel Bros & Barnett (Pty) Ltd* 1978 4 All SA 318 (A); 1978 3 SA 772 (A) 785.

42 *S v Ngwenya* supra 100.

43 In *R v Thornton* 1960 3 All SA 427 (A); 1960 3 SA 600 (A) 612 the court apparently recognised liability which was *pro parte* strict, *pro parte* dependent on *mens rea*. It seems, however, as if this was merely an application of the now defunct *ignorantia iuris non excusat* rule.

44 *S v Ngwenya* supra 100.

45 Compare *R v Breingan* 1966 3 All SA 432 (RA); 1966 3 SA 410 (RA). In *S v Mcelu* 1975 2 All SA 314 (Tk); 1975 2 SA 103 (Tk) and *S v Deysel* 1977 2 All SA 620 (E); 1977 3 SA 110 (E) the decision in *R v Breingan* supra was considered without any criticism of this aspect.'.