REVISED MONEY LAUNDERING REGULATIONS IN FORCE

Matt Moore

infolegal
law firm compliance advice and training
www.infolegal.co.uk

As all conveyancers will be aware, the topic of money laundering has been very much in focus again of late, not least because the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 ('the Amendment Regulations') took effect on Friday 10th January. The new provisions implement the Fifth EU Directive on Money Laundering (5MLD) and in so doing add to the provisions already in place from the Fourth Directive (4MLD), which became law in the UK through the Money Laundering Regulations 2017.

The new provisions will have greater impact on certain other sectors than law firms, especially the banks and those concerns that have dealings with crypto-currencies. Even within firms it is likely that commercial fee earners will be affected to a greater degree than most conveyancers, but it would be a surprise if property lawyers were completely exempt from changes to anti-money laundering provisions and this is indeed the case again.

The good news is also that those firms that have well developed AML policies in place will find that they comply with some, but not all, of the key new requirements in any event. The new requirements are addressed as amendments to the MLR 2017 rather than new legislation as such and in this article references are to the MLR 2017 unless otherwise stated.

The background to the 5MLD is that its provisions were being discussed as part of 4MLD but were held over as a result of the delays that were being experienced in its passage through the EU Commission. The decision was therefore made to proceed with the greater part of 4MLD and postpone the implementation of what was holding up the process. This in turn became 5MLD, and so it is that we are now dealing with what is in effect a postscript to 4MLD and therefore amendment regulations only.

RELEVANT PERSONS

The main changes for law firms will be found at regulation 5 of the Amendment Regulations and rather predictably continue the theme of increasing emphasis on the need for effective risk management. One rather cosmetic but welcome change made is to replace the description of those organisations that are subject to the regulations from the rather ugly 'obliged entities' to 'relevant persons'. According to HM Treasury there are about 100,000 such concerns in the UK which includes law firms that are regulated by any of the main legal supervisory bodies including the CLC, the SRA and also the law societies of Scotland and Northern Island.

Some relatively minor changes are the need to train not just relevant employees in AML awareness as r.24 originally required but now agents as well if their involvement in the firm's work is sufficient to merit it. In so doing the Amendment Regulations reverse of the changes made in 2017 between the original draft MLR and how they appeared in their final format. The legal supervisory bodies will also have to have better evidence that a 'BOOM' (beneficial owner, officer or manager) does not have a criminal record. Having to possess a valid DBS check is therefore likely to become essential.

In relation to the 'policies, controls and procedures' required there is a new r.19(4)(c) requiring a risk assessment for new products or business practices. For law firms this would mean the formation of new teams or departments and, since this extends to 'delivery channels' as well, new ways of providing existing services (such as new remote on-line services). A record should be kept for possible future inspection of any such risk assessment.

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PERSONS OF SIGNIFICANT CONTROL

In relation to the main customer due diligence requirements there is a new specific duty when forming a business relationship with a company or other such entity to understand its ownership and control structure. This has long been regarded as best practice in any event and is one of the areas where firms may well be compliant already. This will clearly be relevant in most commercial property transactions or where a residential transaction involves a company client rather than individuals.

It had been thought that the use of e-verification would become mandatoy in these reforms wherever it is available but instead, and for the time being at least, there is merely greater encouragement to commission on-line checking. A new r.28(19) states that e-verification can be regarded as being a sufficiently reliable source assuming that the provider complies with suitable standards. This much already applies through the Legal Sector Affinity Group AML Guidance (LSAG) in relation to individual clients at 4.9. There remains a widely held belief that the use of such services will become mandatory at some stage, however, quite possibly during 2020 in the revised version of LSAG which will appear shortly before being submitted to HM Treasury for formal approval.

One of the more significant changes is that a new r.30(A) provides that before forming a business relationship with a company or limited liability partnership a firm will have to obtain proof of registration from Companies House and consult the register of Persons of Significant Interest in particular. The MLR 2017 require that 'reasonable measures' must be taken to identify beneficial owners and for these purposes the definitions of PSCs and beneficial owners as having more than a 25% holding are the same. The reliability of this part of the register has come in for frequent criticism and this was largely confirmed in a review conducted of it by the Department for Business, Energy and Industrial Strategy last year. The net result is that advisers will be under an obligation to inform Companies House of any discrepancies that emerge in relation to 'information relating to the beneficial ownership' of the client.

Any such anomalies should already be apparent when they do arise as firms are already obliged not to rely on the PSC register alone when seeking to establish issues of beneficial ownership under r.28(9). In effect this means that lawyers are required to check on beneficial ownership with their client and they will now have to report on to Companies House when discrepancies are identified via a new reporting mechanism which has been made available at Companies House for this purpose. For the time being at least, however, the adviser should obtain the client's consent to make such a report since the obligation is stated to be subject to legal professional privilege which will probably arise when taking instructions.

ENHANCED DUE DILIGENCE (EDD)

The other area where there are developments of note is in relation to enhanced due diligence (EDD) where more checking than the norm is required. There is an apparently minor but potentially significant change of wording here in that whereas the MLR 2017 required EDD where a transaction was 'complex and unusually large' this is now changed to 'complex or unusually large'. Quite what is required to trigger this requirement must inevitably be judged on a firm by firm basis, rather than on some form of objective basis for the legal profession as a whole: what amounts to a complex or unusually large transaction for a small conveyancing team operating on the high street will inevitably be very different to what it would be for a large commercial property department in a major City practice. In similar vein the same need for EDD will arise where is now an unusual pattern of transactions or transactions where there is no apparent purpose (formerly both elements were required rather than either one of them).

By way of an example of what this might mean in practice we might take a conveyancing department in a provincial town used to dealing with mostly local instructions at or about the average value of property in that area. It then receives instructions from a local and very wealthy individual who wishes to purchase a multi-million pounds property in London. The transaction may be no more complex than usual but by value it should be judged to be unusually large. That transaction would now be caught under the need for EDD whereas previously it would not have been.

The most effective way to address this changed requirement will be to assess what the partners or directors of the firm view as being the standard level of transaction for their level of practice and so state what they would regard as being complex or unusually large for them. This assessment should then be added to the firm's AML policy and any guidelines in place to address money laundering risks. Within the area of EDD there is also more emphasis on dealings with what are regarded as high risk territories. The degree of involvement with any such territory is also explained through the client needing to be 'established' in that state. This will require an individual to resident in that country rather than merely having family links there and being incorporated or having its principal place of business there rather than merely business dealings. Where clients are based overseas, therefore, and who are investing in London properties most obviously, steps should be taken to assess whether further measures are needed to check on dealings with that client. For the record the list of high risk EU territories is shown in the panel below.

Still on the issue of EDD an increasing problem experienced by many firms is that as their general level of CDD checking increases it becomes more difficult for firms to identify what further action they may take to satisfy the need to enhance what they are doing in any event. On this a revised r.33(3A) now sets out a list of the EDD measures that must be undertaken. This includes obtaining additional information on the client and any beneficial owners, the source of funds and the reasons for the transaction, and the approval of 'senior management' will then be required - the MLRO or MLCO, for example. In essence a wider degree of checking is required as to all of surrounding circumstances of the matter as well as more on the client and the source of funding.

Finally on this issue, the Government will now be required to produce a list of functions that will count as having politically exposed persons status, which will be helpful. The intention is that there should eventually be one composite list of the roles that amount to PEP status throughout the EU. Whether the UK will be part of that eventual list, and whether it will adopt the future AML directives that are already waiting in the wings, will be the main story that we all follow with interest (or otherwise) as the year progresses.

The high risk EU listed third countries are Afghanistan; Bosnia and Herzogovina; Guyana; Lao PDR; Syria; Uganda; Ethiopia; Vanuatu; Yemen; Sri Lanka; Trinidad and Tobago; Tunisia; Pakistan; Iran; Iraq and North Korea.