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A fresh approach to accounting

MONEY LAUNDERING AND THE PROCEEDS OF CRIME

There are tough rules to crack down on money laundering and the proceeds of crime. These rules affect a wide range of people and we consider how your organisation may be affected.

Money laundering - a definition

Most of us imagine money launderers to be criminals involved in drug trafficking or terrorism or to be someone like Al Capone. However, legislation in the last two decades has expanded significantly the definition of what we might have traditionally considered as money laundering. While the general principles remain; money laundering involves turning the proceeds of crime into apparently 'innocent' funds with no obvious link to their criminal origins, what should be remembered is that the definition includes the proceeds of any criminal offence, regardless of the amount involved.

The rules

The key pieces of legislation are:

- the Proceeds of Crime Act 2002 (The Act) as amended by the Serious Organised Crime and Police Act 2005, and
- the Money Laundering,Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 as amended (The 2017 Regulations as amended).

The Act

When first issued the Act re-defined money laundering and the money laundering offences, to cover the proceeds of any crime (not just serious crime) and created mechanisms for investigating and recovering the proceeds of crime. The Act also revised and consolidated the requirement for those affected to report knowledge, suspicion or reasonable grounds to suspect money laundering. See the panel below for some of the more technical terms of the Act.

The 2017 Regulations (as amended)

The 2017 Regulations originally came into effect on 26 June 2017 and replaced the 2007 Regulations. They have subsequently been amended a number of times, most recently as a result of Brexit. The Regulations contain the detailed procedural requirements for those affected by the legislation, but have been updated in some areas, including beneficial owners and high risk third countries, compared to the previous version.

Proceeds of Crime Act - technical terms

Under the Act, someone is engaged in money laundering if they:

- conceal, disguise, convert, transfer or remove (from the United Kingdom) criminal property
- enter into, or become concerned in, an arrangement which they know or suspect facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person or
- acquire, use or have possession of criminal property.

Property is criminal property if it:

- constitutes a person's benefit in whole or in part (including pecuniary and proprietary benefit) from criminal conduct or
- represents such a benefit directly or indirectly, in whole or in part and
- the alleged offender knows or suspects that it constitutes or represents such a benefit.

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Who is caught by the legislation?

The regulated sector

The legislation relates to anyone in what is termed as the 'regulated sector', which includes but is not limited to:

- credit institutions
- financial institutions
- cryptoasset exchange and or custodian wallet providers
- auditors, insolvency practitioners, external accountants and tax advisers
- independent legal professionals
- trust or company service providers
- estate agents and letting agents
- high value dealers
- art market participants
- casinos.

The implications of being in the regulated sector

Those businesses that fall within the definition are required to establish procedures to:

- identify and assess the risks of money laundering and terrorist financing to which they are subject and manage that risk
- apply customer due diligence procedures (see below)
- keep appropriate records
- appoint a Money Laundering Nominated Officer (MLNO) to whom money laundering reports must be made
- appoint a member of the board or senior management as the officer responsible for compliance with the Regulations (this may be the same person as the MLNO)
- establish systems and procedures to forestall and prevent money laundering
- monitor and manage compliance with, and communication of, the policies and procedures and
- provide relevant individuals with training on money laundering and awareness of their procedures in relation to money laundering.

If your business is caught by the definition you may have received guidance from your professional or trade body on how the requirements affect you and your business. Those of you who are classified as High Value Dealers may be interested in our factsheet of the same name, which considers how the 2017 Regulations (as amended) affect those who make or receive high value cash payments.

The implications for customers of those in the regulated sector

As you can see from the list above, quite a wide range of professionals and other businesses are affected by the legislation. Those affected must comply with the laws or face the prospect of criminal liability (both fines and possible imprisonment) where they do not.

Customer Due Diligence (CDD)

Under The Regulations, if you operate in the regulated sector, you are required to undertake CDD procedures on your customers. These CDD procedures need to be undertaken for both new and existing customers.

CDD procedures involve:

- identifying your customer and verifying their identity. This is based on documents or information obtained from reliable sources independent of the customer
- identifying where there is a beneficial owner who is not the customer. It is necessary for you to take reasonable measures on a risk sensitive basis, to verify the beneficial owner's identity, so that you are satisfied that you know who the beneficial owner is. The objective here is to confirm who the beneficial owners are, so for example obtaining evidence that corroborates the entries in the PSC register (people with significant control – see separate factsheet which includes details of the requirement to report discrepancies in the PSC register) and not simply checking the ID of the persons listed. The beneficial owners of the business are those individuals who ultimately own or control the business or who benefit from the transaction.
- obtaining information on the customer's circumstances and business, including the intended nature of the business relationship.

You must apply CDD when you:

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- establish a business relationship (this now includes forming a company for the customer)
- carry out an occasional transaction that amounts to a transfer of funds exceeding €1,000
- carry out an occasional transaction outside a business relationship (for example a one off transaction valued at €15,000 or more) where not a casino or high value dealer
- carry out a cash transaction of €10,000 or more if a high value dealer
- by way of business let a property for a month or more at a monthly rent exceeding €10,000
- by way of business trade in, or act as an intermediary in the purchase or sale of art with a value exceeding €10,000
- carry out certain gambling transactions of €2,000 or more if a casino
- suspect money laundering or terrorist financing
- doubt the reliability or adequacy of documents or information previously obtained for identification.

CDD measures must also be applied on a risk sensitive basis at other times to existing customers. This could include when a customer requires a different service, or where there is a change in the customer's circumstances. Businesses must consider why the customer requires the service, the identities of any other parties involved and any potential for money laundering or terrorist financing.

The purpose of the CDD is to confirm the identity of the customer. For the customer's identity to be confirmed, independent and reliable information is required. Documents which give the strongest evidence are those issued by a government department or agency or a Court, including documents filed at Companies House. For individuals, documents from highly rated sources that contain photo identification, eg passports and photo driving licences, as well as written details, are a particularly strong source of verification. The 2017 Regulations (as amended) now explicitly state that electronic verification may be regarded as a reliable source of evidence.

The law requires the records obtained during the CDD to be maintained for five years after a customer relationship has ended. It also requires customers to be notified about how their personal data will be processed and who the data controller is (being the name of the entity/person registered under Data Protection rules).

Enhanced Due Diligence (EDD)

EDD and ongoing monitoring must be applied where:

- the risk of money laundering or terrorist financing is assessed as high
- the customer or a party to a transaction in which they are involved is established in a high-risk third country
- the client is a politically exposed person or a family member/known close associate of one (this now includes UK PEPs)
- false or stolen identification documents or information have been provided and there is still an intention to act for the customer
- a transaction is complex or unusually large or has an unusual pattern or there is no apparent legal or economic purpose
- by its nature there is a higher risk of money laundering or terrorist financing
- there is a 'correspondent relationship' with another credit or financial institution.

Additional procedures are required over and above those applied for normal due diligence in these circumstances.

The above list was changed in the 2017 Regulations (as amended) to define more clearly what is meant by established in a high risk third country and to extend the scope to include any other parties to a transaction. The wording in respect of transactions that trigger EDD was also amended to refer to complex or unusually large rather than complex and unusually large, and similarly unusual pattern and no apparent legal purpose was changed to or. In addition, with the increased use of internet or other remote transactions the requirement to apply EDD where not meeting the customer face to face has been removed provided electronic verification of identity is undertaken successfully.

Reporting

As mentioned above, the definition of money laundering includes the proceeds of any crime. Those in the regulated sector are required to report knowledge or suspicion (or where they have reasonable grounds for knowing or suspecting) that a person is engaged in money laundering, ie has committed a criminal offence and has benefited from the proceeds of that crime. These reports should be made in accordance with agreed internal procedures,

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firstly to the MLNO, who must decide whether or not to pass the report on to the National Crime Agency (NCA).

The defences for the MLNO are:

- reasonable excuse (reasons such as duress and threats to safety might be accepted although there is little case law in this area)
- they followed Treasury approved guidance.

The Courts must take such guidance into account.

National Crime Agency (NCA)

The NCA is the UK crime-fighting agency with national and international reach and the mandate and powers to work in partnership with other law enforcement organisations to bring the full weight of the law to bear in cutting serious and organised crime. Part of the role of the NCA is to analyse the suspicious activity reports (SARs) received from those in the regulated sector and to then disseminate this information to the relevant law enforcement agency.

The Regulations require those in the regulated sector to report all suspicions of money laundering to the NCA. By acting as a coordinating body, the NCA collates information from a number of different sources. This could potentially build up a picture of the criminal activities of a particular individual, which only become apparent when looked at as a whole. This information can then be passed on to the relevant authorities to take action. More detail on the activities of the NCA can be found on their website www.nationalcrimeagency.gov.uk/ .

Is your business vulnerable?

Criminals are constantly searching for new contacts to help them with their money laundering or terrorist financing. Certain types of business are more vulnerable than others. For example, any business that uses or receives significant amounts of cash can be particularly attractive. To counter this, the Regulations require businesses that deal in goods and accept cash equivalent to €10,000 or more to register with HMRC and implement anti-money laundering procedures. Such businesses are known as High Value Dealers (HVD).

You can imagine that if a drug dealer went along to a bank on Monday morning and tried to pay in the weekend's takings, the bank would notice it and report it unless the sum was relatively small. If criminals can find a legitimate business to help them by taking the cash and pretending that it is the business's money being paid in (in exchange for a proportion!), then that business can put the cash into the bank without any questions being asked.

Take, for example, the mobile telephone business that has had a fairly steady turnover of £10,000 per week for the last couple of years but suddenly begins to bank £100,000 in cash each week. Without a clear, rational and plausible explanation, this type of suspicious activity would clearly be reported to the NCA.

Perhaps a less obvious example of possible money laundering could be where an individual comes into an antiques shop and offers to buy a piece of furniture for £12,000 in cash. Not too many sellers would have insisted upon a cheque in the past! Now the HVD will need to consider the risk of money laundering and as a minimum carry out customer due diligence before accepting such a cash amount. This person may be a money launderer who then goes to another shop and sells the antique for say £8,000, being quite prepared to suffer the apparent loss. This time the criminal asks for a cheque that can then be paid innocently into a bank account, making the money look legitimate.

The legislation aims to put a stop to this type of activity. Those in the regulated sector are required to report any transactions that they have suspicions about. Also, it is not simply the more obvious examples of suspicious activities that have to be reported. For the majority of those regulated, the government has insisted upon there being no de minimis limits within the legislation. This means that very small proceeds of crime have to be reported to the NCA.

Tipping off

There is also an offence known as 'tipping off' under the Act. This is what would happen if a person in the regulated sector were to reveal that a suspicious activity report had been made, say for example about a customer, to that customer. Where this disclosure would be likely to prejudice any investigation by the authorities, an offence may be committed. A tipping off offence may also be committed where a person in the regulated sector discloses that an investigation into allegations that a money laundering offence has been committed is being contemplated or carried out, and again, that this disclosure would be likely to prejudice that investigation. As you can imagine therefore, if you were to ask an accountant or estate agent whether they had made any reports about you,

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they would not be able to discuss this with you at all. If they did, they could break the law and could face a fine or imprisonment, or both.

How we can help

The legislation brings a number of professions and businesses into the regulated sector. Complying with the requirements of both the Act and the 2017 Regulations (as amended) requires those affected to introduce a number of procedures to ensure that they meet their legal responsibilities. If you would like to discuss how the legislation could affect you and your organisation please do contact us.

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