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Anti Money Laundering

With days to go before the Money Laundering Regulations 2007 come into force on 15 December 2007 firms should be finalising their review of client engagement and 'Customer Due Diligence' ("CDD") as well as their Anti Money Laundering procedures generally – not forgetting Counter Terrorist Finance.

The requirement to adopt a 'risk-sensitive' approach means there is no 'one size fits all' and simply copying someone else's or a standard form will not work. The Regulations require a risk-sensitive approach to the following –

Regulation 5 – verifying the identity of a beneficial owner who is not the customer;

Regulation 7 (2) – application of CDD to existing customers;

Regulation 7 (3) – determining the extent of customer due diligence measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction;

Regulation 8 (2) – ongoing monitoring, which requires scrutiny during transactions, including source of funds, to ensure it is consistent with your knowledge of the customer, his business and risk profile;

Regulation 14 – application of enhanced due diligence where customer not present (particularly relevant to volume conveyancing) and Politically Exposed Persons (PEPs);

Regulation 20 – requirement for systems covering

- (a) customer due diligence measures and ongoing monitoring;
- (b) reporting;
- (c) record-keeping;
- (d) internal control;
- (e) risk assessment and management;
- (f) the monitoring and management of compliance with, and the internal communication of such policies and procedures,

in order to prevent activities related to money laundering and terrorist financing.

Readers should consider the Law Society's Practice Note carefully. Chapter 2 focuses on the risk-based approach. <http://www.lawsociety.org.uk/newsandevents/news/majorcampaigns/view=newsarticle.law?CAMPAIGNSID=217590>

Regulation 21 requires firms in the regulated sector to ensure all relevant staff are trained regularly (also covering terrorist finance, overlooked by many firms).

Legal Risk partner Sue Mawdsley, who has recently finished delivering the Law Society's series of AML roadshows around the country, has been advising many leading city firms and other practices on their procedures and training.

The Board of the Joint Money Laundering Steering Group (JMLSG) approved its guidance on 7 November 2007 (note that this is changed from the previous draft) and has applied for Treasury approval. Chapter 4 on the Risk-Based Approach is particularly worthy of note.

The JMLSG list of recognised stock exchanges has been withdrawn as it was very old, and had not been updated since the late 1990s. The Board does not intend to prepare such a list in future. The EU maintains a list of regulated markets under MiFID, which is available at ec.europa.eu/internal_market/securities/isd/mifid_en.htm

For advice on anti-money laundering policies, training and our helpline contact sue.mawdsley@legalrisk.co.uk

Legal Risk scoops leading Professional Indemnity Partner

Legal Risk has recruited leading professional indemnity solicitor Francis Dingwall as a partner.

Francis has acted for many of the leading insurers of solicitors and other professionals. He is recognised in both Chambers and Legal 500 as a leading practitioner in the field. He brings US lawyers and insurers as clients, helping fulfil the firm's aim to expand its existing north American client base.



Continued

OK, CHAPS

Or not – we warned in our October 2006 Risk Update that investigating accountants from the Law Society (now Solicitors Regulation Authority) were investigating many conveyancing firms who charge clients a larger amount for CHAPS fees (bank transfers) than the bank charges them, making a secret profit. A number of highly respected firms have been reported for disciplinary action.

In all these cases, the total bill paid by the client was the amount the client expected. But that is not enough. Solicitors cannot charge the client more than the bank charges them and call it a 'disbursement' or 'expense' when it in fact contains a hidden profit element. The fee quotation, client care letter and the bill must be clear as to any profit element.

The point was previously raised in the Gazette of 2 April 2007 but seems not to have been widely read.

Firms should also consider the position in relation to other charges which they may be incorrectly describing as 'disbursements' such as internal photocopying.

For advice on compliance and assistance on disciplinary and conduct issues contact frank.maher@legalrisk.co.uk.

What's new in mortgage fraud?

Nothing, would be the succinct answer. The same techniques are being employed as those in the 1990s which gave rise to the raft of managed litigation involving Bristol & West and Nationwide, and a series of other claims by lending institutions. In 1990 the Law Society first issued its Green card on mortgage fraud. Although it was later revised and updated (July 2002 'Warning – Property Fraud 2'), many of today's conveyancers seem completely unaware of it. They would do well to seek it out – either in the Law Society's Conveyancing Handbook or on the Law Society's website, www.lawsociety.org.uk.

Reports of falls in the property market and of significant reductions in the availability of buy-to-let mortgages increase of both the risk of borrowers concealing their true buy-to-let intentions from lenders, and of claims being made when lenders suffer shortfalls following repossession.

Solicitors and their staff should be on the look out for anything which may affect the price being paid for the property, or the value of the borrower's covenant to repay the lender. Examples of matters affecting the price include cash back, direct deposits which the buyers says they have paid to the seller, and sellers' guarantees of rental income. Examples of matters affecting the value of the borrower's covenant to repay include buy-to-let, if the lender believes the purchase is for owner-occupation. Buyers may be less concerned about losing possession of property which is not their home. In either case, the decision to lend is the lender's alone, and the solicitor must pass on the information – with the borrower's consent, or otherwise cease acting.

SRA investigations into firms which have unwittingly found themselves caught up in mortgage fraud have led to searching questions on the steps firms took to ensure compliance with the Green Card.

There have also been in-depth questions on how firms complied with their duties to supervise junior staff, as to which note the next item.

Fears of identity theft will doubtless increase with the recent loss of personal data by HM Revenue & Customs. Solicitors will need to remain vigilant. One recent example which came to our attention was of a client who produced a passport, the date of birth on which was for someone a generation younger.

For advice on insurance, anti-money laundering, conduct and disciplinary aspects of mortgage fraud contact info@legalrisk.co.uk

Code of Conduct

Rule 5.03(1) requires that 'If you are a principal in a firm, you must ensure that your firm has in place a system for supervising clients' matters.' Note the use of the word 'system'. It is unlikely that an open door policy alone will suffice. Principals will need to be able to demonstrate that they have a system which involves active supervision. Perhaps surprisingly this is the first time solicitors have been required to supervise by subordinate legislation. See also our comments on the new Lexcel requirement below.

The first reported case on the Code is **R v Ulcay [2007] EWCA Crim 2379** <http://www.bailii.org/ew/cases/EWCA/Crim/2007/2379.html> which held that rule 2.01 did not preclude solicitors from taking instructions in a criminal case where limited time meant they may be unable to achieve the normal standard of service.

US mergers

Lawyers thinking of merging with US firms should consider the insurance implications carefully when considering the proposed merger. We have advised in a number of cases where partners found that cover was narrower than that to which they were accustomed, despite their misplaced assumption that they would still benefit from the breadth of cover provided under the Law Society's Minimum Terms and Conditions. By way of example, cover for fraud is more restrictive – a point to be borne in mind if claims may be litigated in the United States where such allegations may be more common than here. There is no substitute for a detailed analysis of the policy against the background of a proper understanding of the cover and operation of the policy coverage enjoyed by UK firms.

Contact: frank.maher@legalrisk.co.uk

Continued ...

Limiting liability in litigation

We commented in our September 2007 Risk Update on the then imminent amendment to Section 60 (5) of the Solicitors Act 1974. The provision amending section 60 (5) is now in Schedule 16, paragraph 56. Section 211 (2) provides that '... the provisions of this Act come into force on such day as may be appointed by order of the Lord Chancellor'. It is not yet in force.

Frank Maher will be speaking on the subject of limiting liability at a conference on 5 December 2007. (See Events below.)

Legal Services Act

The SRA has published a consultation paper and invites responses – see <http://www.sra.org.uk/legal-services-act.page>

Costs

The Law Society's Practice Advice Service has updated its booklets on payment by results and non-contentious costs to reflect the changes in the Solicitors' Code of Conduct 2007. These booklets provide solicitors with information on a variety of issues, including conditional fee agreements, contingency fees, remuneration certificates, billing and assessment of solicitors' costs.

www.lawsociety.org.uk/practiceadvice

Client Care

The Law Society has updated its client care guidance, 'Your clients – your business' to deal with the implementation of the Code of Conduct. <http://www.lawsociety.org.uk/documents/downloads/yourclientsyourbusiness.pdf>

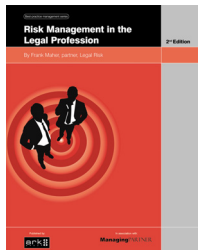
Lexcel Version 4

The new version of Lexcel of 2008 was launched on 23 October 2007. The standard provides a framework for managing risk and the guidance notes to rule 5 of the Code of Conduct indicate that the SRA will have regard to Lexcel and other quality standards as evidence of compliance.

The changes are relatively minor but note in particular the requirement for 'active supervision', particularly having regard to our comments above on mortgage fraud and on the Code of Conduct.

<http://www.lawsociety.org.uk/lexcel>

For advice on Lexcel contact info@legalrisk.co.uk



Publication: Risk Management in the Legal Profession

The second, expanded, edition of this book by Legal Risk partner Frank Maher is now available.

For further information contact info@legalrisk.co.uk

Events

Frank Maher will be chairing the Ark Group's 4th annual conference and speaking on managing client risk effectively, engagement terms and liability caps, 5-6 December 2007.

THIS NEWSLETTER IS A GENERAL GUIDE. IT IS NOT A SUBSTITUTE FOR PROFESSIONAL ADVICE WHICH TAKES ACCOUNT OF YOUR SPECIFIC CIRCUMSTANCES AND ANY CHANGES IN THE LAW AND PRACTICE. SUBJECTS COVERED CHANGE CONSTANTLY AND DEVELOP. NO RESPONSIBILITY CAN BE ACCEPTED BY THE FIRM OR THE AUTHOR FOR ANY LOSS OCCASIONED BY ANY PERSON ACTING OR REFRAINING FROM ACTING ON THE BASIS OF THIS.

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Our Practice Areas

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- Audit
- Strategic planning
- Implementation
- Limiting liability
- Protection of partner assets
- 'Desktop' online testing

Regulatory Compliance

- Professional Conduct issues
- Conflicts
- Anti Money Laundering
- Disciplinary

Partnership

- Agreements
- Disputes

Professional Indemnity

- Defending claims
- Coverage
- Strategies
- Successor Practice, mergers, acquisitions

Training

- Risk management
- Anti-money laundering
- Professional conduct

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