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Anti-money laundering and Bribery

Treasury Approval has been granted to the Law Society's Anti-Money Laundering Practice Note, which means that a court must take account of it on any prosecution, and a new version published with minor amendments on 29 October 2009 -

www.lawsociety.org.uk/productsandservices/practicenotes/aml.page

HM Treasury has announced a call for evidence for a Review of The Money Laundering Regulations 2007. The Call for Evidence closes on Friday 11 December 2009.

See www.hm-treasury.gov.uk/fin_crime_review.htm

Margaret Cole, Director, Enforcement and Financial Crime Division, Financial Services Authority delivered a speech to the British Bankers Association on 19 November 2009 on the FSA's role in fighting financial crime. See www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/1119_mc.shtml. Ms Cole emphasised the issues of FSA supervision, Politically Exposed Persons and 'that supervisors may in the future be asking whether a firm's geographical reach, customer base, product lines, or sales channels make it vulnerable to the risk that staff pay or receive bribes. Firms that use go-betweens to generate new business in jurisdictions associated with systemic levels of corruption may receive particular attention.' There is an increased focus on money laundering prosecutions.

JSC BTA Bank v Abyazov & Ors [2009] EWCA Civ 1124 held that the Fraud Act 2006 s.13 had removed the privilege against self-incrimination in respect of an offence under section 328 of the Proceeds of Crime Act 2002. [\[case link >>\]](#)

SOCA v Pelekanos [2009] EWHC 2307 (QB) was a claim by the Serious Organised Crime Agency in which it was held that the court could make a recovery order under Part 5 of the Proceeds of Crime Act 2002 in relation to a false statement in a mortgage application form, albeit this particular application was unsuccessful. The court stressed that this should be more widely known, and that it would be desirable for mortgage-providers to spell out in their application forms the possible consequence of a misstatement. [\[case link >>\]](#)

The Queen's Speech on 18 November 2009 announced the Bribery Bill which is intended to modernise the law and is based on the recommendations of the Law Commission. The offences would cover the offering, promising or giving of a bribe and the requesting, agreeing to receive or accepting of a bribe either at home or abroad, in the public or private sectors. The website of the Prime Minister's Office explains that the Bill would create a discrete offence of bribery of a foreign public official in order to obtain or retain business.

Significantly, it would create a new offence in relation to commercial organisations which fail to prevent a bribe being paid by those who perform services for or on behalf of the organisation. It will be a defence if the organisation has adequate procedures in place to prevent bribery. For links to the draft Bill, the Law Commission Report and related documents see www.number10.gov.uk/Page21344.

The issues of bribery may be relevant to many areas of legal practice, but construction may be particularly vulnerable: in September 2009 bridge contractor Mabey & Johnson was fined £3.5m, and ordered to pay a £1.1m confiscation order and £350,000 in prosecution costs for corruption, after admitting overseas corruption and breaching United Nations sanctions in Iraq.

Ongoing monitoring, required by regulations 8, 14 and 20 of the Money Laundering Regulations 2007 is an area of weakness in many firms, even large ones in our experience, and where we expect there will be more enforcement action in the future. We have been testing a number of firms' compliance in this and other areas using Desktop, our web-based risk management diagnostic tool. [Contact Sue.Mawdsley@legalrisk.co.uk](mailto:Contact.Sue.Mawdsley@legalrisk.co.uk)

SOCA Suspicious Activity Reports Regime Annual Report 2009

SOCA's third annual report has just been published and can be viewed on www.soca.gov.uk/assessPublications/downloads/SARs_Annual_Report_2009.pdf

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Successor practice consultation

The SRA is consulting on a significant change to the Minimum Terms and Conditions of Professional Indemnity Insurance for Solicitors, see www.sra.org.uk/sra/consultations/successor-practice-definition.page#download. Currently, if Firm A ceases practice, any Firm B that acquires part of its practice or holds itself out as the successor, risks becoming responsible for insuring it. Firm A's claims history will be reflected in Firm B's premiums. Firm A's run-off cover is not activated if there is a 'successor practice' within the MT&C.

The current rules are designed to maximise the prospect of there being a 'successor practice', and run-off insurers fight vigorously against outcomes that avoid the finding of a 'successor'. The rule inhibits firms from merging with/acquiring other firms, typically smaller firms where the principal or partners want to retire. There are ways to stop the rule applying in some circumstances, on which we have successfully advised.

The SRA's proposal is that Firm A should be able to elect to trigger the run-off in its existing policy, within 30 days of it ceasing practice. It would have to pay the premium for the run-off cover (typically 3x annual premium) up front. This will facilitate mergers and acquisitions. The consultation will run until 12 February 2010.

We have advised many firms, including major international and smaller practices in many complex successor practice situations, both for insurance planning purposes and in relation to claims and other liabilities.

For advice on successor practice issues contact Frank.Maher@legalrisk.co.uk

The ARP consultation: no to zombie firms?

Even more dramatic, is the SRA's consultation on the Assigned Risks Pool (ARP), see www.sra.org.uk/sra/consultations/assigned-risks-pool-arp-review-november-2009.page

286 firms remain in the ARP for the current policy year, down from the c. 350 which initially applied. The prognosis for firms which find themselves in the ARP has proved to be poor: very few are able to secure insurance on the open market once they have been in the ARP for 12 months or more, so they cease practice. Often, if they are not already the living dead by the time they enter the ARP, they soon are, faced with the punitive premiums. The ARP is considered to be a drain on the insurance market – and indirectly the profession – which has to fund it (in some years, over 70% of premiums remain unpaid, and loss ratios run at 600%). There is a view that the ARP keeps alive failing firms which should be put out of their misery. The risk is, that in killing off the ARP, the SRA would kill off otherwise healthy firms which are denied cover on the open market for bad reasons.

The principal proposal is to scrap the ARP, preventing any firms from joining it as of 1 October 2010.

This proposal should be read with the Successor Practice consultation. One effect might be to make run-off cover more expensive in the future, certainly for firms on the sick-list. An insurer who takes them in, faces insuring them for 7 years if they die during the policy period.

The 2009 solicitors' renewal

We understand that the total premium pot for the compulsory primary layer cover has come out at £242 million, which is an increase of 7% on last year. The increases in premium have been weighted towards firms at the smaller end of the spectrum. Much ink has already been spilt on what is happening, and what will come of it. The ARP consultation and Successor Practice consultation are part of the process. The Law Society is pressing to do away with the single renewal date. There seems to be a consensus that we are only at the beginning of the claims spike which inevitably follows recession.

In the debate, there has been a curious silence on the issue of risk management. Insurance is a method of risk transfer, and if it becomes too expensive, the answer is to focus on managing the risks in the firm's hands. Firms which do not yet have a demonstrable risk management system in place, should put one in place in good time before the next renewal, not least to make the firm a good prospect for insurers. Because risk management is forward-looking, you need to have established a track record by next September, so now is the time to deal with it (though you should have dealt with it long before now, but probably have if you are reading this!)

And firms that already have a risk management system in place, should review it in the light of their emerging claims experience. We have come across a number of firms which have got into trouble by relying on "busy but easy" procedures they put in place, without the "difficult but leisurely" thinking that proper risk management also requires.

For advice on indemnity insurance issues, contact Francis.Dingwall@legalrisk.co.uk

Continued ...

The solicitors' renewal in Ireland

The renewal date for solicitors in Ireland is 1 December, and it is proving tough. The ARP has already been scrapped, because otherwise it might have been hard to find any insurers at all prepared to participate. Insurers were afraid that firms they rejected at the front door as bad risks, would get in the back door via the ARP. The scale of the recession, and a 'super-spike' of recession-related claims in the last 12 months for conveyancers in particular, has necessitated other restrictions on cover to entice insurers into the marketplace:

- If a partner is dishonest, the dishonesty exclusion applies to all the partners;
- Restricted cover for 'commercial' conveyancing, which is broadly anything beyond the purchase of a domestic property as your principal residence;
- 2 years' run-off cover.

These restrictions may be a taste of what is to come for England & Wales, if conditions deteriorate. The narrower the cover, the greater the importance of proactively managing the risks the firm faces, to prevent claims arising.

Contact Francis.Dingwall@legalrisk.co.uk

Rule 9 Referrals – amendment to guidance notes

The guidance to rule 9 of the Solicitors' Code of Conduct 2007 was amended on 13 November 2009. For the tracked change version, see www.sra.org.uk/solicitors/change-tracker/code-of-conduct/rule9.page#guidance-9

In particular see note 3 –

'If a client is entering into or has already entered into a scheme or arrangement with an introducer which is not in their best interests then you must advise the client accordingly. Schemes or arrangements which involve the client paying unnecessary or unreasonable fees will not normally be in the client's best interests.'

This addresses an issue raised in the mineworkers' investigations.

A new note 13 recommends that 'you check any standard letters or scripts which an introducer uses when providing this information and that you ask referred clients on a regular basis what information the introducer has provided about the referral arrangement.'

There are also reminders to comply with core duties. Helpfully, note 18 says, 'you would not be prevented from acting on your client's instructions to conduct their matter in accordance with the terms and conditions of a "before the event" insurance policy' and note 19 indicates that you are not prevented from 'using an introducer's preferred supplier of certain services but you should not enter into a binding agreement to use that supplier.'

Referral arrangements - online self audit tool

Compliance with referral rules has been a real problem for firms with several facing disciplinary action and huge fines. Until now even well-intentioned firms have struggled to comply. For example, they know they must not compromise their independence, but until they learn the sort of points the SRA are taking they don't realise they are in breach. It's not just about coalmining claims or high street conveyancing – the rules affect even large city firms too.

We have launched a self-assessment tool, using **Desktop**, our online risk diagnostic tool - to enable law firms to check their compliance and meet the SRA crackdown on practices breaching the referral rules.

The cost, including a written report, is £350 plus VAT. Terms apply. Contact info@legalrisk.co.uk

News from Australia - Legal Banana Skins

A survey of risk management and professional indemnity insurance in Australian law firms, entitled 'The Legal Banana Skins' is about to be published as we go to press, with responses from a wide cross-section of the profession.

A key finding is that fewer than 50% of respondents rated themselves 'well prepared' to manage the risks they identified. Yet in today's hardening global insurance market it is more important than ever to be and be seen to be a 'good risk' to obtain appropriate cover that represents value for money.

The Professional Risk and Insurance Report 2009 report aims to help firms benchmark their approach on risk and insurance against firms in their peer group.

The report is available for purchase in electronic format from www.legalbananaskins.com

Continued ...

Articles

Two new articles are available for download on our website covering supervision issues and the professional indemnity insurance renewal. For these and other articles see www.legalrisk.co.uk/Pages/Resources.aspx?id=237

Captives

Concern has been expressed by the Association of Insurance Risk Managers, AIRMIC, that capitalisation requirements for insurers in Solvency II may impact adversely on some captives. Although the European Commission accepted that the future regulation of captive insurance companies should be proportionate to their type of business, the principle of proportionality for captive regulation only applies to pure captives, in other words companies that write only the risks of their parent and only those within the EU.

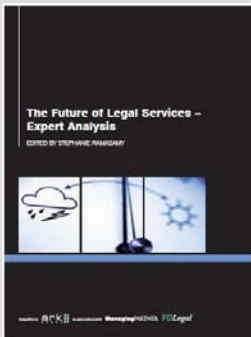
Bank collapse

The writer has commented previously that the risk of bank failure may not have evaporated, particularly in relation to non-UK banks. DSB Bank in the Netherlands has been allowed to collapse by the Dutch government. Those who are involved in transactions using overseas and offshore banks should give considerable thought to protecting their own position. Although the Law Society has published a Banking Crisis Practice Note, last revised on 8 January 2009, www.lawsociety.org.uk/productsandservices/practicenotes/bankingcrisis.page we do not believe it provides a sufficient answer to the issue, and have advised a number of city and other firms on alternative solutions.

Hedge fund misrepresentation

In the light of major recent scandals, those who act for hedge funds may be interested to know that research by the New York University's Stern School of Business suggests that one in five hedge fund managers misrepresents their fund or its performance to investors during formal due diligence investigations. See <http://ssrn.com/abstract=1456414>

Publication: Future of Legal Services report



Managing Partner's new report on The Future of Legal Services features a collection of views and predictions on how market trends and regulatory changes are shaping the future of legal services.

Contributors include **Lord Hunt** of Wirral, author of the Hunt review on the regulation of law firms, **Robert Heslett**, President of the Law Society, **Tony Williams** of Jomati Consultants LLP, **Sir Nigel Knowles** of DLA Piper and **Frank Maher** of Legal Risk LLP.

To order a copy from the publishers, Ark Group, click [here](#) for an on-line order form.

The pre-publication price is £195 until 31 December 2009 (link to discount form), and the full price £295 from 1 January 2010 is £295, each plus £7.50 postage and packing.

Conference: Risk Management for Law Firms

2 December 2009 - 3 December 2009 – London.

Defend your firm in a changing regulatory and economic landscape: Frank Maher chairs Managing Partner's 6th annual Risk Management conference for law firms. With speakers and delegates from leading UK firms and overseas this offers an opportunity to learn how other firms are tackling the problems you face. For details see www.ark-group.com/mp_introduction.asp?ac=782&nc=1&fc=167

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