LEGAL RISK LLP
SOLICITORS

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HM Treasury

Articles

A rogue in your midst (Pt 3)
Frank Maher's last article in the series on rogue partners & employees. First Published in New Law Journal January 2017.

Events

Liverpool Law Society – Cyber Conference 2017
Partner Frank Maher will be speaking at Liverpool Law Society's Cyber Conference. See here for more information.

Restructuring Solicitors Firms – Leeds
Partner Frank Maher will be speaking at Restructuring Solicitors Firms. See here for more information.

For further information on any of the above, please Contact info@legalrisk.co.uk

Anti-money laundering: a seismic shift

HM Treasury published draft The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017) on 15 March 2017. These are intended to implement the provisions of the Fourth EU Anti-Money Laundering Directive with effect from 26 June 2017.

The Regulations will introduce significant changes for any firm doing business in the regulated sector. All firms will have to undertake a thorough review of their anti-money laundering and counter-terrorist finance policies and procedures to ensure they are truly aligned to their own individual risk profiles. The changes are extensive and the draft runs to 106 pages, hence our reference in the heading to a seismic shift.

These include the following, though reference should be made to the full document for detail -

- Each firm will have to produce a written risk assessment taking account of a number factors prescribed in regulation 18, including its clients, countries where it operates and services – which the Solicitors Regulation Authority (SRA) will be required to check;
- There are extensive requirements for policies and procedures in regulation 19;
- Firms must appoint a board level (or equivalent) officer responsible for compliance (regulation 21 (1) (a)) – as well as a nominated officer, or Money Laundering Reporting Officer (MLRO);
- Screening of relevant employees and agents is required (regulation 21 (1) (b));
- An independent audit function is required to examine and evaluate the adequacy and effectiveness of the policies, controls and procedures (regulation 21 (1) (c));
- Firms will need to undertake risk profiling on client/matter engagement (and evidence it!) and apply customer due diligence not only to all new customers but also at appropriate times to existing customers on a risk-sensitive basis, or when the relevant circumstances of a customer change and in certain other circumstances specified in regulation 27;
- Politically Exposed Persons (PEPs) will now include domestic PEPs and the requirements for Enhanced Due Diligence are set out in regulation 35;
- Clients must be given information under the Data Protection Act 1998 before entering a client relationship (regulation 40);
- Training will be required in money laundering, terrorist financing and data protection;
- International firms will need to ensure that equivalent procedures are in place in their branch offices and subsidiaries which are located outside the EEA (Regulation 20 (1) (a)).

Nobody should think they can escape under the radar: the SRA itself will be subject to review through a new Office for Professional Body AML Supervision, to be hosted by the Financial Conduct Authority (FCA). We have advised firms on SRA investigations into alleged failures to carry out adequate due diligence and investigation of source of funds, and there have been a number of cases in the Solicitors Disciplinary Tribunal and SRA sanctions.

Changes to the Simplified Due Diligence regime mean that banks will have to do their own risk assessment in considering whether to provide facilities for pooled client accounts.

The Criminal Finances Bill, mentioned in our January 2017 Risk Update, is expected to be in force by October. The key changes proposed are

- Extension of moratorium period;
- Information Notices/Orders;
- Information sharing;
- Unexplained wealth orders;
- Facilitating tax evasion offences.

The fallout continues from the Panama Papers, which we have mentioned in previous Risk Updates, and we understand that nine so-called 'professional enablers' are subject to criminal investigation in connection with tax evasion. 64 firms (not all solicitors) have been asked for further information for investigation, and a major FCA insider trading investigation is under way.

We are already advising firms, including international, City and regional practices on implementing the new compliance requirements and training, and have advised hundreds of firms since the profession became subject to anti-money laundering regulation in 2004.

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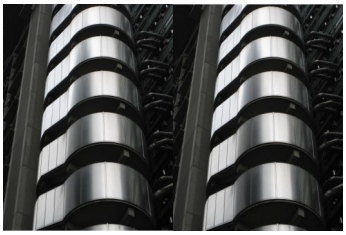
Note

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.



Aggregation: One claim or more?

Data Protection

The £1,000 monetary penalty imposed by the Information Commissioner's Office (ICO) on an unnamed barrister who allowed unencrypted copies of confidential client documents stored on her home computer to be uploaded to the internet is a salutary reminder of the importance of data protection compliance.

The ICO is consulting on its guidance on consent under the General Data Protection Regulation (GDPR), which will be more onerous than at present. The consultation closes on 31 March 2017.

We see an increasing number of data protection issues in practice, including subject access requests by former clients and third parties. The decision in **Dawson-Damer v Taylor Wessing LLP** [2017] EWCA Civ 74 shows that it is not permissible to take a broad-brush approach to relying on legal professional privilege.

Maximilian Schrems is reported to be challenging the efficacy of the model contract clauses as a permissible means for exporting personal data outside the EU in the Irish courts, following his successful challenge to Safe Harbor.

SRA Accounts Rules

We understand that following the consultation on simplifying the rules, any changes will be the result of further consultation and will not take place until November 2018, rather than May 2017 as originally intended.

Professional indemnity insurance review

The SRA's intention to reduce the cover provided under the compulsory Minimum Terms and Conditions has also been subject to delay. We understand that the consultation paper, expected in the spring, will not be published before October 2017, with any changes taking place in October 2018 at the earliest.

Claims: Dreamvar v Mishcon de Reya

The hot topic is **Dreamvar v Mishcon de Reya** [2016] EWHC 3316 (Ch). Mishcon de Reya acted for Dreamvar, the buyer of property which was purportedly sold by a fraudster. The judge found that they had not been negligent, but were technically in breach of trust in paying over the purchase money in circumstances where it was not possible to complete the purchase. He refused to exercise his discretion under section 61, Trustee Act 1925 to relieve them from this breach of trust, on the basis that they were insured and (with or without insurance) were far better able to meet or absorb the loss than Dreamvar.

An appeal is pending (currently expected to be heard in the autumn) and the Law Society is intervening. We have been advising firms on measures they should take in the meantime, though there is no silver bullet.

Aggregation in professional indemnity insurance

The Supreme Court delivered judgment on 22 March 2017 in **AIG Europe Limited v Woodman** [2017] UKSC 18 on the meaning of the aggregation clause in the Minimum Terms and Conditions, under which multiple claims from similar or related causes may be subject to one policy limit, removing the layers of complexity which had been introduced in the courts below. Firms must take account of these provisions when deciding how much cover to buy. We are currently advising one firm facing multiple claims where the effect of the decision may leave £40-50m uninsured.

Cyber

Cyber risk is never far from the headlines, particularly after Mossack Fonseca's loss of 11.5 million documents, and claims continue to mount, resulting in millions of pounds of claims. One firm has been subject to disciplinary action for allowing itself to be subject to a scam; the firm paid away over £330,000 to a fraudster's bank account without verifying the account details contained in a hacked email. One American insurer's claims experience shows that over half of claims involve a human element, such as loss of laptops, rogue employees and human error. We provide low cost online training.

Who owns the file?

This is a question on which we are often asked to advise. The Law Society has published a practice note, the first guidance since the Guide to Professional Conduct 1999 was repealed in 2007. It is helpful, but still leaves areas of difficulty, such as the status of attendance notes, but offers little on joint instructions; this is an area which can usefully be addressed in terms of business. We have advised many firms on their terms (including limitation of liability).