TO WHAT EXTENT DO WE NEED TO CHECK THE CLIENT'S IDENTITY?

Checking client identities has become a standard part of everyday practice in most firms in recent years. This may have been primarily in response to the requirements in the successive versions of the Money Laundering Regulations and their obligation to undertake 'customer due diligence' but being clear on who, precisely, the client is and assessing whether the instructions are from a valid source is a more general professional consideration in any event. Likewise it is good practice, at least, to ensure that the representative of any entity has authority to instruct the firm. Now the forthcoming SRA Standards and Regulations will extend the need to establish who the client is through two of the few new requirements that will be found in the Codes of Conduct. writes Matthew Moore.

Customer Due Diligence

First, the obligations in the Money Laundering Regulations 2017 ('MLR') from regulations 27-39 require that whenever a 'business relationship' is to be formed, or an 'occasional transaction' to the value of 15,000 euros or more is to be entered into, CDD must be undertaken. These terms have caused a good deal of confusion over the years and have never really been clarified within the legal sector, the problem being that they are essentially banking terms. Within banks, therefore, opening an account will amount to a business relationship and making an investment an occasional transaction. The view has therefore been taken in most firms that it is, very simply, a requirement to obtain or already possess formal proof of the client's identity in all new matters.

Although applying CDD to all new clients, and to a more limited degree new matters for new clients, has now become standard practice exceptions can be drawn in certain circumstances if required. Most importantly, not every category of work that most firms undertake will be subject to the MLR, and the CDD requirements only arise where the regulations apply. Rather than defining the types of professional concerns to which the MLR apply they instead define the activities by the professions that will trigger the need to comply with them. Within the legal profession this definition will be mainly found at r.12 which lists transactional and financial work for the most part, including the area of 'trust and company service provision' which featured in a widely reported SRA thematic review earlier this year.

Further guidance on what types of work are included and, more importantly, excluded from the regulatory definitions will be found in the Legal Sector Affinity Group AML Guidance – the official and Treasury approved guidelines on the application of the anti-money laundering regime to the legal sector. Section 1.4.5 provides that litigation, mere advice of a non-transactional kind, will writing (assuming that no tax advice will be provided) and legal aid work are all outside the scope of the regulations. Most firms will nonetheless take the view that having one set procedure for the work of all departments will be preferable and is more likely to achieve a better level of compliance with these important requirements, though even on this basis the work of the crime department is likely to form an exception. The firm might also therefore choose to exclude from the AML regime fixed fee or free advice sessions.

The Code of Conduct for Individuals

A further consideration now arises in the very simply worded new provision at rule 8.1 of the new Code of Conduct for Individuals to the effect that "You identify who you are acting for in relation to any matter". Where instructions are received from a third party rule 3.1 (in line with the current Indicative Behaviour 1(25)) will require that the solicitor ensures that the instructions do indeed represent the client's wishes. The SRA first started to expect this wider level of client checking arising from a thematic review of personal injury litigation which was reported in December 2017. One of the key findings of this report was that there was evidence of an increase in fraudulent and frivolous claims, and to counter this a warning notice was issued to the effect that claimant firms would be expected to check more thoroughly the identity of the client and the validity of their instructions. That will now be expected across the board when the new regime takes effect.

In summary, therefore, full CDD will be expected when the MLR apply and the new SRA requirements will be met by firms that apply such measures across the board. In areas not covered by the regulations, however, some level of checking will need to be part of the firm's processes even if not to the same exacting level required where the MLR are in place.

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