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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.

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Anti-money laundering (AML)

Developments since our March 2023 Risk Update, including legislation, further guidance, reports and a Court of Appeal decision, demonstrate – if anyone might have been in doubt - the ramping up of the burdens of AML compliance on the legal profession.

Guidance includes the Legal Sector Affinity Group (LSAG) Guidance, updated in March 2023 to cover the now mandatory consideration of proliferation financing in Practice Wide Risk Assessments, and changes to the duty to report discrepancies to company registries.

The SRA is increasing its focus on AML

Trust or Company Service Provider (TCSP) services

TCSP services have been addressed in updated guidance from HM Revenue & Customs and a publication by the Office for Professional Body AML Supervision (OPBAS) setting out their findings from a review of Professional Body Supervisors' (PBS) approach to TCSP risks.

OBPAS reported that most PBSs have assessed the TCSP risk within their own supervised populations as being relatively low and that this is contrary to the National Risk Assessment 2020 (NRA) which categorised TCSPs as higher risk. This may be surprising to our readers. While the report refers to the Panama and Pandora papers, which showed that TCSPs can be abused for illicit purposes, our findings on audit of firms under regulation 21 of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017) are consistent with an assessment of risk as low in practice.

The definition of TCSP in regulation 12 of the MLR 2017 was extended by The Money Laundering and Terrorist Financing (Amendment) (No. 2) Regulations 2022 to include the formation of all forms of business arrangement, not just companies and other legal persons. Discrepancy checks with the Trust Registration Service are required as part of ongoing monitoring.

OPBAS supervision report

OPBAS has also published a report on supervision of PBSs, including the Solicitors Regulation Authority (SRA). The report noted that 'the average fine across both sectors remains low (just under £3,000), raising the question as to whether it is a credible deterrent to AML non-compliance'. One could be forgiven for thinking that success is measured by statistics on regulatory action, fines and revocation of practice rights, when a key role of a regulator is to educate and inform, ensuring compliance and preventing breaches. Enforcement action often relates to past failings so may be misleading as an indicator of current status on prevention of economic crime: by way of example, we are currently advising on an alleged breach ten years ago.

Rather ominously, the report noted that some PBSs tended to give their supervised population too much time to rectify their AML deficiencies before deciding whether to take a more robust action. 21.74% of legal sector visits resulted in informal action, and 6.93% resulted in formal action. Although these figures do not relate solely to the SRA, the SRA regulates the largest proportion of the legal sector.

The SRA is continuing to visit firms and has updated its guidance on firm inspections. The Ministry of Justice has published an impact assessment on a proposed new proactive information request power for the SRA to use in relation to economic crime contained in the Economic Crime and Corporate Transparency Bill. We remain unconvinced of the need for this, given the SRA's existing statutory powers.

Defence Against Money Laundering (DAML)

The OPBAS report also comments that a much higher proportion of DAML (consent) Suspicious Activity Reports (SARs) submitted by the legal sector require a request for further information before a decision can be reached, compared with DAMLs submitted by all sectors. While that might imply this is down to poor reporting, we can but speculate from our own experience of advising firms on SARS and DAML issues whether it may in part be because they are more complex.

We have been advising law firms and other professional practices on anti-money laundering since the start of the compliance regime in 2004 and have throughout cautioned against proceeding with a transaction in reliance on DAMLs (as they have since become known) when they only provide a defence under sections 327-329 of the Proceeds of Crime Act 2002. In particular, having reported knowledge and suspicion in a SAR, firms may be exposed to accessory liability for knowing receipt or even dishonest assistance in a breach of trust.

The decision in *Tradition Financial Services Ltd v Bilta (UK) Ltd* [2023] EWCA Civ 112 may add to that exposure. The Court of Appeal held that liquidators can claim against third parties who were party to a fraud even where they were not involved in the management or control of the insolvent company under section 213 of the Insolvency Act 1986. (A similar provision in section 246ZA applies in the case of an administration.) Crucially, this does not require proof of dishonesty, and it may effectively bypass the six year limitation period for a dishonest assistance claim.

Links to documents referred to above are on www.legalrisk.co.uk/News.

Conflicts of interest

Cutlers Holdings Ltd (formerly Sheffield United Ltd) [2023] EWHC 720 (Ch) is the latest in a (very) long list of football-related claims against law firms, addressing the point at which solicitors are under a duty to advise on own interest conflicts where the solicitor has been negligent. The requirements of the SRA Code of Conduct 2011, applicable at the time, while not determinative of the duties at common law, were held to be a guide to the standard of conduct expected. Negligent failure to inform the client of a breach did not give rise to a separate cause of action in the absence of conscious disloyalty to the client.

Personal liability of LLP members

The Sheffield United case (above) is also of interest as claims against two individual LLP members were dismissed as there was no evidence that either had assumed personal responsibility; *Williams v Natural Health Foods* [1998] UKHL 17 applied. So far as we are aware, this is the first time the case has been applied to an LLP member, though its application seems to have been common ground between the parties.

We are often asked to advise on large firms' terms of business and this is an issue which always attracts attention. Note our article *A case of over-zealous prosecution: Solicitors fined for limiting liability in line with SRA guidance* on a decision of the Solicitors Disciplinary Tribunal; we reported further on this in our January 2022 Risk Update.

Sanctions

The SRA has sent a mandatory questionnaire on compliance with the UK sanctions regime to all firms who were not covered in last year's survey of those within the regulated sector for AML purposes.

Speakers in a recent SRA webinar indicated that the SRA expect all firms to have a written risk assessment and to check the Office of Financial Sanctions Implementation sanctions list on every new instruction and at a number of key points during the retainer, for example on exchange of contracts. We fully appreciate that unlike AML compliance, the sanctions regime does not involve a risk-based approach.

However, it may only take a moment for a regulator to issue such an edict, but for firms which do not deploy continuous electronic monitoring systems, undertaking an online check in cases which self-evidently will not be subject to sanctions is not good use of time and may impede other compliance tasks.

If the SRA's approach is right - and it is inconsistent with the Law Society's guidance - it would be necessary to undertake a sanctions check on any new instruction from, for example, HM the King, any government department including HM Treasury – and even the SRA itself. For those who act for prominent firms in the law and accountancy, which may have hundreds of partners or members and where it would be headline news if sanctions were imposed, it is also quite unrealistic, particularly given the need to identify beneficial owners.

Finally, when searching, note the poor data integrity in the sanctions list, for example listing some entries under 'United Kingdom' and others under 'UK'.