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Enterprise Risk Services

Criminal Justice (Money Laundering and Terrorist Financing) Act 2010

Getting to the core of the issue

In terms of knowledge and experience of anti money laundering, no firm is closer to the core of what is happening in Ireland than Deloitte. We are ready. Are you?

The President of Ireland signed the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 into legislation on 5 May 2010, with the legislation becoming effective from 15 July 2010. This Act does not change the definition of money laundering; it broadens it to include the proceeds of criminal conduct. It also introduces new obligations on 'designated persons' under the Act and revolutionises the approach to money laundering verification checking in Ireland. The importance of a team of specialists to assist with this implementation and ongoing performance reviews thereafter cannot be over estimated. We are ready. Are you?

The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 places less of an emphasis on the collection of utility bills and passports and more of an emphasis on the judgement and policy an organisation has taken in relation to anti money laundering. It is certainly more challenging for designated persons than the previous legislation and the 'one size fits all approach' will no longer be an acceptable approach for designated persons to use. It is fair to say that there are some significant issues and challenges to be overcome at industry and individual entry level for the implementation of the Act.

Deloitte have a team of anti money laundering specialists. This team is focused both on Irish and international developments. The following is a summary of the main provisions of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

Internal risk assessment

Section 54 of the Act requires designated persons to conduct an assessment of the risks of money laundering and terrorist financing on their business. The risk assessment should take the form of a written document and should be a general assessment of what risks a company faces in terms of money laundering and terrorist financing. It is recommended that this risk assessment be a joint collaboration of both the business function and compliance/risk function, to guarantee that all risks are captured.

The risk assessment paper should assess the risks presented by:

- Customers – types and behaviours
- Delivery channels - wire transfer, and electronic cheque
- Product type and services
- Geographical areas of operation of your business

Once the risks are identified, controls need to be considered and implemented to mitigate against these assessed risks. It is important that you record what you have done and why you have taken this particular action at this time.

This risk assessment paper should be dated and signed off by senior management and this assessment should form the basis of your policy and procedures. This assessment should also be reviewed on a periodic basis thereafter, on a frequency of no less than a yearly basis.

Customer due diligence (CDD)

The term 'customer due diligence' or 'CDD' replaces the previous familiar phrase of 'know your customer' or 'KYC'.

Section 33 (2) and Section 35 specify when the customer due diligence should be carried out. This includes where a 'business relationship' is established; transactions over €15,000 (previously €13,000) or a series of linked transactions totaling €15,000; where there is a suspicion of money laundering or terrorist financing; or where there are any doubts as to the veracity or adequacy of previously obtained customer identification documentation. While there are some exemptions to these requirements, it is important to note that the Act specifies that customer due diligence must take place "prior to" the establishment of the business relationship or carrying out a transaction. This escalates the timing of completion of customer due diligence.

Therefore, a designated person must take four steps to completing CDD, as follows:

- Verify the customer's identity by means of document collection
- Identify any beneficial owner
- Obtain information on the purpose and nature of the business relationship
- Carry out ongoing monitoring of the business relationship

Finally, Section 33 (4) of the Act specifies that additional verification requirements should be in place for customers who do not present themselves to the designated person for verification in person (non face-to-face business). These additional requirements are set out in the Act.

Foreign Account Tax Compliance Act (FACTA)

FACTA was enacted into US law on 18 March 2010 and is due to come into force in 2013. While the details are still being finalised, in essence it will mean that all Irish financial institutions may be required to obtain specific information from its clients to establish whether they are US persons and if so, requires that specific information on that person to be reported to the IRS. This is a new

regime and differs significantly from the existing requirements currently imposed on Irish financial institutions in respect of US investors. While the requirements will not apply until 2013, it may be prudent to start obtaining this information now as part of the customer due diligence process to avoid a significant repapering exercise in 2013.

Simplified due diligence

Section 34 sets out when simplified due diligence may be applied to a 'specified customer' or 'specified product'. Under simplified due diligence, the following is not required:

- Verification of the customer's identity by means of document collection
- Identification of any beneficial owner
- Obtainment of information on the purpose and nature of the business relationship

However, the requirement to conduct ongoing monitoring of a business relationship continues to apply.

A specified customer is defined as a credit institution or a financial institution that carries on business in Ireland or is situated in another EU member state that has adopted the Third AML Directive, or is in a prescribed third country which has requirements equivalent to the Third AML Directive; a listed company admitted to trading on a regulated market; a public body; and certain other EU public bodies. A specified product has also been defined in the Act and includes pension products amongst others.

Enhanced due diligence

Enhanced due diligence can be described as the opposite to simplified due diligence. Section 37 of the Act specifies that enhanced due diligence is required for the following categories of customers:

- For correspondent banking relationships
- In respect of non domestic Politically Exposed Persons (PEPs)

Section 39 of the Act also includes a catch all phrase as follows: "Nothing in this chapter, prevents a designated person from applying measures in relation to a customer or beneficial owner that are additional to those specified in this Chapter for the purposes of preventing or detecting money laundering or terrorist financing." Therefore if you believe that a situation/client/investor warrants enhanced due diligence, then you are guided to apply enhanced due diligence in that case.

Identification of any politically exposed persons (PEPs)

Section 37 of the Act requires designated persons to identify non resident politically exposed persons, their immediate family member, or a close associate of a politically exposed person. Many industries, such as the fund business, or international banking operations with foreign investors will have exposure to politically exposed persons through their business and will need to have an expert system in place to deal with the monitoring and evaluation of the information on its PEP business.

Deloitte have partnered with Dow Jones and Sword FircoSoft to present to the market, an automated, reliable and competitive sanction and PEP filtering service for small and medium size entities. This system is called UComply. This is a very competitively priced solution. For a demonstration and or full details on how Ucomply can work for your company, please contact Deloitte in Dublin.

Identification of beneficial owner

Sections 26 to 30 of the Act deal with the identification of the 'beneficial owner' of an investment. This element of the Act deals with who actually owns or controls the investment. Details of beneficial ownership are provided in relation to a corporate, a partnership, a trust structure and to the executor of an estate. An important point to note is that the wording in the Act differs in relation to percentage which is required to be verified and wording such as 'more than 25%' and 'at least 25%' are used interchangeably in these sections. Designated persons should ensure that their internal procedures adequately reflect the correct percentage as an error of this nature would be quite simple to make.

Reliance on third parties

Section 40 of the Act allows for a designated person to rely on a 'relevant third party' to carry out customer due diligence on their behalf. The term 'relevant third party' must meet the criteria as defined in Section 40. However, reliance on a relevant third party does not include the obligation to carry out ongoing monitoring. The Act requires an 'arrangement' to be in place and whilst this word is not defined in the Act, it is taken to be a written agreement between both parties.

Before relying on a relevant third party, written confirmation/agreement between both parties should state the following, as a minimum:

- That the relevant third party meets the criteria as defined in the Act
- That they consent to their identification and verification data being relied upon
- That they will hold the documentation for the specified time period as defined in the Act (5 years after the date of the last transaction with a customer or when the designated person ceases to provide a service to the customer)
- That they will forward the documentation, as soon as practicable after a request, information relating to the customer that has been obtained by the relevant third party

Document retention

Section 55 of the Act requires designated persons to retain their documents and other records in 'an office or other premises' in the State for a period of not less than 5 years. Records may be kept in electronic, mechanical or non written form but must be capable of being reproduced in written form.

Guidance notes

Section 107 of the Act recognises guidance notes and allows that a court may have regard to any guidance notes that have been approved by the Minister for Finance, the Minister for Justice and Law Reform.

Sectoral guidance notes have been drafted by Deloitte and various industry bodies. To date, Deloitte have been involved in the drafting of nine sets of guidance notes, including Core Guidance Notes, Stockbroking, Investment Funds, Banking, Insurance, Credit Unions, Payment Institutions, Bureau de Change business and Property Service Providers.

Increase in Financial Regulator powers

It is also worthy to note that any breaches of anti money laundering and terrorist financing

legislation will now fall under the administrative sanction regime of the Financial Regulator. The administrative sanction regime ranges from a caution, reprimand, disqualification and/or a fine not exceeding €5 million (in the case of corporate or incorporated body), and €500,000 in the case of individuals. Also, as a matter of policy, all decisions which the Financial Regulator makes are published.

Conclusion

This Act sees not only compliance officers and managers dealing with anti money laundering and terrorist financing issues, but requires senior management, if not board, approval of a risk based approach to manage the exposure of money laundering and terrorist financing for the first time.

With the Financial Regulation enforcement team gaining momentum both in terms of personnel and profile, and their outward pledge to conduct detailed anti money laundering inspection visits, designated persons needs to ensure that they have implemented this new approach, assessed their risks, and applied the necessary measures to meet the new requirements.

As the Financial Regulator will publish details of all fines in the future, perhaps the reputational damage may be more punitive than the monetary costs for firms not in compliance with this Act going forward.

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