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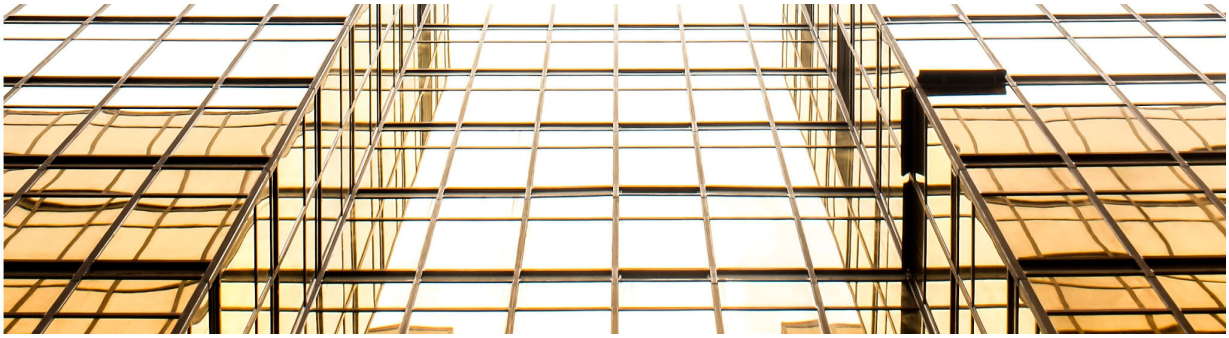

AML and Brexit: golden opportunity or time to close the vault?

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What Suspicious Activity Looks Like for AML Purposes?

In the wake of Brexit, the UK clearly wants to attract investment with the dual aim of stabilising the post-pandemic economy. However, there is concern that businesses strapped for cash will take a more desperate approach to accepting previously "undesirable" investors. The UK is therefore in a catch 22 situation. If it hopes to secure vital investment in emerging markets, financial services and infrastructure it needs to be more open to investors, but this might inadvertently encourage companies and public bodies to turn a blind eye to suspicious capital. This article will examine the regulatory framework operating in the UK and take a closer look at what constitutes suspicious activity.

The Anti-Money Laundering Framework

In 2015, Transparency International published a damning report on investment visas and corrupt capital flow into the UK. In response, on 12 May 2016, the UK hosted a trail blazing international Anti-Corruption summit in London. During the summit, the Government made several firm commitments to anti-corruption, leading to the Anti-Corruption Strategy, published in December 2017. This document sets out the UK objectives and strategies in becoming a global leader in anti-corruption standards, including corporate integrity and money laundering.

With these commitments in mind, on 7 March 2019 the Home Office laid a Statement of Changes to the Immigration Rules before Parliament, amending the ‘Tier 1’ investor visa scheme. The previously lenient ‘Golden Visa’, allowed visitors to stay in the country for 40 months if they invested more than £2m in the economy. After reviewing the risks associated with this route, the new scheme requires applicants to, among other things, have held their investment funds for at least 2 years prior to the date of their application, as opposed to the former 90 days, or provide specified evidence of the source of funds as an alternative. In addition, applicants must open an FCA regulated UK bank or investment account and obtain a letter from the institution confirming that the account has been opened and due diligence completed. Some would however argue that these changes have not gone far enough.

With similar golden visa schemes springing up across Europe, the European Union passed the 6th Anti Money Laundering Directive “6AMLD”, which came into effect for EU member states on 3 December 2020. Following suit despite the split, The UK's Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020 ("MLTF Regulations") transpose similar obligations.

These MLTF Regulations are an attempt to quell any speculation about the UK becoming an offshore safe-haven for corrupt capital, avoiding accusations of operating to lower standards, whilst aiming to attract inward investment. Lawyers have always been required to conduct due diligence and report suspicious activity, but historically, most AML efforts have targeted the financial and credit sectors.

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However, increased money laundering in the real estate sector and investor immigration means that lawyers across all areas of both transactional and contentious practice should have a firm grasp of with the Regulations.

Implications for Immigration

With applications for the new Investor Visas expected to rise when travel restrictions are lifted, Immigration lawyers must be ever mindful of their obligation to disclose any suspicious behaviour that they observe whilst screening their clients. The Immigration Rules may have got tighter but they are actually more lenient than the regulations for the legal sector. Bizarrely, the Immigration Rules provide that, if the client has held funds for two years then the lawyer does not need to explain to the Home Office where the money came from. However, solicitor's wider professional obligations mean that it is not enough to simply confirm that the client held money for two years without deeper scrutiny.

Suspicious Activity Reports (“SARs”) must be filed with the NCA if there is suspicion or reasonable grounds for knowing or suspecting that a client is engaged in money laundering. The Legal Sector Affinity Group ("LSAG") advises conducting client due diligence as early as possible to protect firms from needing to submit a SAR as a defence against money laundering where suspicious funds have been paid into the client account. But what does "suspicious activity" look like?

Suspicious Activity

Lawyers are encouraged to undertake risk assessments for each client, basing their judgement on a holistic consideration of multiple factors. Generally speaking, a single factor may not automatically make a matter or client high risk in itself and lawyers should refer to the LSAG guidance on "Indicators of Low/ High Risk". However, there are two exceptions which indicate immediate, outright risk: where a client or counterparty is based in a high risk third country or is a politically exposed person (PEP).

The current list of High Risk third countries includes, Afghanistan, the Bahamas, Barbados, Botswana, Cambodia, The Democratic People's republic of Korea, Ghana, Iran, Iraq, Jamaica, Mauritius, Myanmar, Nicaragua, Pakistan, Panama, Syria, Trinidad and Tobago, Uganda, Vanuatu, Yemen and Zimbabwe.

So, who is a PEP? The MLTF Regulation 35 indicates that a PEP can be any one of the following non-exhaustive list, their family members or their close associates:

- heads of state or government, ministers and deputy or assistant ministers;
- members of parliament or similar legislative bodies;
- members of governing bodies of political parties;
- members of any judicial body whose decisions are not subject to further appeal;
- members of courts of auditors or of the boards of central banks;
- ambassadors, charges d'affaires and high-ranking officers in the armed forces;
- members of the administrative, management or supervisory bodies of state-owned enterprises; or
- Directors, deputy directors and members of the board of equivalent function of an international organisation.

Beyond holding any of the above offices, other indicators that a client is a PEP include, receiving funds from a government account or receiving correspondence on official letterhead.

In the first instance, if a potential client is confirmed to be a PEP, senior management must approve the business relationship, adequate measures must be taken to establish the source of wealth and the source of funds, and the business relationship should be closely monitored throughout the transaction.

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Lawyers are encouraged to consider what particular measures will satisfy their enhanced due diligence obligations with respect to the nature of the clients PEP status.

The Future of AML

The new National Security and Investment Bill ("NSI Bill"), passed on 5 May 2021 but yet to become effective, provides the government with new powers to screen investments. It is supposed to outline a clear and predictable process, so that investors can do business in the UK with confidence. However, it is unclear if the retrospective provisions in ss15 and 16, which creates a 5-year post-transaction call-in power for deals completed on or after 12 November 2020, will apply to notifiable acquisitions completed before the act came into force in exceptional circumstances.

The Citizenship & Immigration Team at Payne Hicks Beach have vast experience working with Politically Exposed Persons and are committed to the highest standards of due diligence, ensuring a smooth process of on boarding new clients and supporting those looking to Invest in the UK's economy. For further information please contact by email Kathryn Bradbury or Matt Ingham, or by telephone on 020 7465 4300, or alternatively your usual contact in the Citizenship & Immigration Department.
