AML compliance not optional: you can be criminally charged

Angela Foyle counters claims that the CCAB's guidance on money laundering and terrorism finance contains questionable recommendations

As insolvency professionals, a key part of your work is protecting the financial eco-system. We must be sure of where funds have come from and where they are going, and when we are not sure we must ask questions – and alert the authorities as appropriate.

So, following discussion of AML guidance for IPs in the last issue of *Recovery (CCAB's guidance contains questionable recommendations, p26)*, I thought it would be useful to outline the requirements in this area and the Consultative Committee of Accountancy Bodies' (CCAB) approach in response.

AML compliance is not an optional extra; an IP is obliged to comply with AML requirements, and it is an important part of an IP's work. As part of these obligations, an IP must also alert law enforcement to anything suspicious. This is not a box-ticking set of rules; done properly, there is a value and benefit to wider society in addition to being part of your legal obligations. At the CCAB, we issued guidance on AML procedures for IPs because we knew it was vitally important that practitioners get this right. This guidance is not arbitrary and has not materialised from thin air; it is based on laws and regulations designed to prevent money laundering and counter terrorism and proliferation financing. These are not abstract concepts; consider the very real impacts of people trafficking, modern slavery and organised crime, and it is clear why it matters that IPs get this right. To ensure a common approach, the supplementary AML guidance for IPs was drafted by the five bodies that comprise the CCAB – ACCA, CAI, ICAEW, ICAS as well as R3, the IPA and the Insolvency Service. The guidance has been approved and adopted by all 13 of the AML accountancy supervisory authorities. Moreover, it has been approved by HM Treasury and so represents the Government view on the important application of these regulations.

> **Ignoring government-approved professional guidance is very unwise, and we would urge anyone who remains unsure to consider what the consequences could be**

> **IPs should understand the business relationship, its transactions and the identity of the directors behind the company, so that they know the assets are not tainted and that a SAR is raised if needed**

From the very first page, the CCAB guidance explains that IPs and accountants are key gatekeepers to the financial system, facilitating vital transactions that underpin the UK economy. As a result, the profession has a significant role to play to ensure that services are not used to further a criminal purpose. With effective due diligence, IPs can spot situations that could involve the proceeds of crime, and then submit a suspicious activity report (SAR) to the National Crime Agency. Just as due diligence is ongoing, so SARs can be submitted at any time to reflect the emerging picture as the insolvency progresses.

For the avoidance of any doubt, let us stress that compliance with money laundering regulations is not optional. Furthermore, ignoring government-approved professional guidance is very unwise, and we would urge anyone who remains unsure to consider what the consequences could be.

Ask yourself: what if an IP decides that they do not need to perform client due diligence at the start of their engagement but, subsequently, after handling and distributing funds, it is discovered that the funds are tainted? The fact that the firm did not comply with regulations at commencement could make them more vulnerable to charges.

> **Without the proper checks, IPs could find themselves shutting down businesses that were up to mischief, with no real scrutiny**

Of course, by their very definition, IPs become involved with companies and individuals at a difficult time. With pressure from creditors, employees and other stakeholders, it is vital that IPs understand the funds and assets they are handling, so they can determine whether they risk handling the proceeds of crime and, if so, make the appropriate reports to the National Crime Agency. Client due diligence should be an ongoing process, but it needs to start at the beginning.

Those who remain unconvinced may say that while of course client due diligence is important as a general principle, the legislation talks of a business relationship, not a client. There is clearly a business relationship with the insolvent company or the debtor; after all, the IP is taking control of their assets and using them to pay creditors. Rather than being hung up on who the client is, IPs should understand the business relationship, its transactions and the identity of the directors behind the company, so that they know the assets are not tainted and that a SAR is raised if needed.

Arguably the customer in business terms might not necessarily be the debtor, but the bottom line is that the IP must consider the money laundering risks associated with their engagement. The IP will need to assess whether the debtor has been involved in money laundering and whether the IP therefore risks handling and distributing

assets that are the proceeds of crime. To do this effectively the IP should understand who the controller is, as they will be the ultimate beneficial owner. Where directors are not the owners, the regulations prescribe verification of these individuals using a risk-based approach.

In cases where IPs need to move quickly and delays in getting DAMLs approved can prove challenging, ICAEW has negotiated a fast-track process for IPs to engage with the NCA, for example with payroll.

Members' voluntary liquidations

Members' voluntary liquidations are a long-standing way of returning assets to a company's members when its trading life is over. In such scenarios, there is no responsibility on the liquidator to investigate the company's history, so this process can be used by the unscrupulous to launder money. And given that in many cases the IP will be distributing significant cash balances to the members, for IPs these engagements can be very high risk from an AML perspective.

So how should the IP proceed? Firstly, before accepting all but the simplest of insolvency cases it is wise to do an internet search of the names of the directors and shareholders. Doing so can highlight some obvious red flags; we have seen this highlight directors and shareholders who have been jailed for fraud both in the UK and overseas, and others connected to territories that themselves may raise red flags. This kind of search is simple and if it brings up adverse media, the risk of accepting a particular appointment is elevated.

> **Professional scepticism is important when dealing with so many aspects of insolvency work but could be critical when dealing with high-value MVLs. We would urge IPs to ensure that the declaration of solvency makes sense when taken into context with previous years' accounts**

In the case of an MVL, IPs are unlikely to look behind the books and records that support the declaration of solvency, which could also leave them exposed. For example,

what if the company had ceased trading some time back and its recent accounts show little by the way of assets, but the draft declaration of solvency figures you are presented with show a large cash balance to be distributed to the members? Would you identify this as a risk? Would you look back at previous accounts? And if not, how could you even know to ask about the source of the funds? Failing to identify a scenario like this could leave you at risk of complicity in enabling money laundering if there do turn out to be legitimate concerns over the origin of the funds.

There is an AML risk in that, without due diligence, the IP could distribute funds to the fraudster because they are the shareholder. Without the proper checks, IPs could find themselves shutting down businesses that were up to mischief, with no real scrutiny.

Appropriate enquiries

Professional scepticism is important when dealing with so many aspects of insolvency work but could be critical when dealing with high-value MVLs. We would urge IPs to ensure that the declaration of solvency makes sense when taken into context with previous years' accounts.

Before accepting the appointment, you should understand where any large cash balance has come from – has it built up gradually over time? Can you see if it has arisen from asset sales, or has it just appeared in the company's account? Understanding this, making appropriate enquiries and reviewing relevant documentation could be vital if you want to ensure you are not being unwittingly involved in an MVL that may have been engineered to facilitate money laundering.

It should not need repeating that AML compliance is not optional but let us stress it again. This is the law and IPs must comply with it. If your supervisor comes in, checks your work and you have not complied, it is on you. And if you are handling the proceeds of crime, it's not just your supervisor who will see this as a problem, it is law enforcement too – and you can be charged with facilitating money laundering.

Client due diligence can be done at any time, and it should be refreshed and reconsidered as new facts come to light, to feed into the AML risk on an ongoing basis. Accordingly, a SAR can be reported at any time as the scenario – or your professional assessment of it – changes.

As trusted professionals, it is incumbent on accountants, lawyers, IPs and those who handle money that it is not tainted and that we stand by our ethical principles to keep dirty funds out of the UK economy. Due diligence is vital; do not ignore it.

Angela Foyle is chair of the CCAB's crime panel