MLR 2017 FOR ESTATE AGENTS

MONEY LAUNDERING, TERRORIST FINANCING AND FUNDS TRANSFER (INFORMATION ON THE PAYER) REGULATIONS 2017 [MLR 2017]

Action required by estate agents

In this paper, we explore the main changes proposed by the new Money Laundering Regulations and how these impact Estate Agents.

INTRODUCTION

The go-live date was 26 June 2017, when all firms subject to the regulations had to be compliant with the new requirements.

The regulator, HMRC has got a lot tougher on non-compliance and all Estate Agency Businesses (EABs) must ensure that they fully identify what risks they face and then, how they will ensure that their firm is complying with the regulations. Undertaking a regulatory rule mapping exercise that first identifies all the applicable rules and maps those back to the operational controls and governance is an essential first step. Without this foundation, a firm may find itself floundering when the supervisor comes calling.

SUMMARY

The most obvious change is that the MLR 2007 was 45 pages long and the new MLR 2017 is 118 pages long. In response to the growing complexity of financial crime prevention and the prevalence of money laundering, the regulations are more detailed and more prescriptive.

Although always part of the MLR 2007, there is now a greater emphasis throughout the new regulations that firms must take a risk-based approach and make risk-weighted decisions. It is now expected that firms have a more mature risk appetite statement that links to and drives operational decisions. Senior managers are held accountable for these decisions and it is therefore important that detailed records are kept of decisions made and the rationale for them.

The MLR 2017 is structured in 11 Parts. The following sections summarise each of these, highlighting the main changes that will affect an EAB.

HMRC has published a great deal of new guidance in relation to the MLR 2017. An EAB will need to document carefully any departure from that guidance and the underlying analysis and rationale. In addition, it is to be expected that HMRC will increasingly align its guidance with that of the Financial Conduct Authority [FCA] in relation to financial institutions.

MLR 2017 now extends to purchasers as well as sellers of property but not to lettings

KEY CHANGES

- The regulations are much more prescriptive
- Both purchasers as well as sellers require CDD investigation
- Risk management and assessment is enhanced and must be documented
- AML training is the responsibility of senior managers
- The ability to rely on other firms is extended and now includes estate agents
- PEP definitions have been extended

TAKE ACTION NOW

See a prioritised list of the changes in the conclusion section to ensure you are now compliant with the new regulations

Part 1 - Introduction

This section sets out the definitions and meanings that apply throughout the regulations and the supervisory authorities for those persons within the scope of the regulations.

SCOPE

The first and probably the most fundamental change that will impact ***every EAB***, both large and small, is that the scope of the MLR now extends to counterparties which means **purchasers** as well as **sellers.**

In the section describing '**Meaning of Business Relationship**', regulation 4(3) states:

"For the purposes of these Regulations, an estate agent is to be treated as entering into a business relationship with a purchaser (as well as with a seller), at the point when the purchaser's offer is accepted by the seller".

This will increase the Customer Due Diligence (CDD) burden on every EAB, who must now also complete CDD on the purchaser at the point where an offer is accepted by the seller. In addition to the operational resource requirements, this will involve updating the firm's policies and ensuring that the onboarding and periodic review procedures are also updated to reflect this change.

Lettings are not covered by the MLR 2017.

GOVERNANCE AND ACCOUNTABILITY

There always had to be a Nominated Person (generally known as the Money-Laundering Reporting Officer or MLRO) within an EAB, but the new regulations extend this to requiring a firm to also appoint a director (or equivalent such as a senior partner) as having overall accountability for money laundering. We see this as following the lead of the financial services regulators who introduced a Senior Managers and Certification Regime (SMCR) on 7th March 2016, with the intention of strengthening accountability within financial services. This new regime makes individuals within organisations personally accountable for the actions of the firm, with potential criminal and/or civil penalties if they are found to have been at fault.

The new regulations also describe the rules around ownership and management restrictions of the EAB. This is found in the following section.

Part 2 - Money Laundering and Terrorist Financing

This section identifies the "relevant persons" to whom the money laundering provisions in these Regulations apply (regulations 8 to 15). Regulations 16 to 25 impose requirements for risk assessments to be carried out by HM Treasury and the Home Office, the supervisory authorities and relevant persons to identify and assess the risks of money laundering and terrorist financing. They also require relevant persons to have policies, controls and procedures to mitigate and manage effectively the risks of money laundering and terrorist financing identified through the risk assessments. Regulation 26 prohibits any person from being the beneficial owner, officer or manager of an EAB unless that person has been approved by HMRC.

RISK MANAGEMENT AND ASSESSMENT

Risk assessment is central to the MLR and impacts almost every aspect of the legislation. The rules have been significantly extended, now covering six pages rather than the one page found in the 2007 MLR. EABs are required to produce and maintain a detailed and comprehensive risk and control register. Risk management and assessment must broadly cover two perspectives:

1. Enterprise risk identification and management for the safe pursuit of the firm's strategy. This must be articulated through a 'risk assessment'.

2. Identification and assessment of risks presented by customer engagement and transactions, in line with existing regulations and driving the appropriate level of CDD.

The regulations are much more detailed when specifying the need for a comprehensive and integrated risk management framework and specify that this must be documented and made available to HMRC. Risk and control frameworks must include self-assessment mechanisms that are embedded within the day-to-day operations of the firm.

POLICIES, CONTROLS AND PROCEDURES

As an extension to the risk management framework and a step up from the existing regulations, the rules specify that firms must establish and maintain written policies, controls and procedures. Firms must implement processes to ensure that these are reviewed on a regular basis and that they are embedded and up-to-date. HMRC will require sight of these documents as well as the method for maintaining them and ensuring they remain effective. Departures from guidance issued by HMRC (and potentially in certain instances the FCA) will need to be documented and justified.

Firms must have established risk and control self-assessment procedures in place.

Part three - Customer due diligence

This section makes provision for customer due diligence measures. Regulations 27 to 32 identify what CDD measures must be undertaken by relevant persons, and when those measures must be undertaken. Regulations 33 to 36 identify when enhanced customer due diligence (EDD) measures must be applied by the relevant person in addition to the general customer due diligence measures required by regulations 27 to 32. Regulations 37 to 38 identify when simplified customer due diligence (SDD) measures may be applied by the relevant person.

PROVISION OF INFORMATION

Here we see a fundamental change that will have a significant impact to the way all CDD is conducted by EABs. Under MLR 2017 an obligation has been placed on a client to provide information but there is no time limit for the client to comply. This applies to parties being 'relied' upon, corporate bodies (limited companies and LLPs) and trusts which are incorporated or established in the UK only. This obligation is referenced several times throughout the MLR, but for example Regulation 43(1) states:

Corporate bodies: obligations

43.—(1) When a UK body corporate which is not listed on a regulated market enters into a relevant transaction with a relevant person, or forms a business relationship with a relevant person, the body corporate must on request from the relevant person provide the relevant person with—

(a) information identifying—

(i) its name, registered number, registered office and principal place of business;

(ii) its board of directors, or if there is no board, the members of the equivalent management body;

(iii) the senior persons responsible for its operations;

(iv) the law to which it is subject;

(v) its legal owners;

(vi) its beneficial owners; and

(b) its articles of association or other governing documents.

It is difficult to see how this will work and how enforceable it will be. However, if successful, this could greatly reduce the burden on CDD teams. Regulation 44(2) makes similar provisions for UK trusts.

Regulation 43(4) and Regulation 44(3) relating to UK corporates and trusts respectively mandate that a client ***must*** report changes to the relevant key information to the EAB within 14 days.

THREE-TIERED APPROACH

A three-tiered approach to CDD still exists, with customer due diligence being the default level. The concept of both simplified and enhanced due diligence remains, but the regulation is now more prescriptive about how these may be applied. It is important that all firms have a clear and robust risk assessment methodology that can be applied consistently to each new customer before deciding what level of due diligence is appropriate.

BENEFICIAL OWNERSHIP

Beneficial ownership, bodies, corporates or partnerships still only extends to control or ownership of 25% or more.

Regulation 26 (1) states, *"No person may be the beneficial owner, officer or manager of a firm within paragraph (2) ("a relevant firm") [a list including estate agents] unless that person has been approved as a beneficial owner, officer or manager of the firm by the supervisory authority of the firm."*

Estate agents must ensure that they have applied to HMRC for approval before 26 June 2018. You will not be in breach of this regulation if applications that have been made before that date have not yet been determined.

In this instance 'beneficial owner' will mean a shareholder or partner with more than a 25% share of control of the EAB. Officers and managers have the straight-forward meaning. HMRC will apply a new 'fit and proper' test and has issued guidance on this point. The application of a 'fit and proper' test to EABs is entirely novel.

PEPS

The definition of a PEP now includes domestic PEPs but the time limit from when a person ceases to be considered a PEP has not been changed and is still 12 months from leaving a politically exposed position; longer at the discretion of the firm conducting CDD. All EABs will need to have significant controls and on-going monitoring of any PEP relationship they establish. The FCA issued statutory guidance on the approach to both UK and domestic PEPs under Regulation 48 and this guidance applies to EABs by Regulation 35(4)(b)(i) and it may well be that guidance issued by HM Treasury will also apply to EABs under Regulation 35(4)(b)(ii).

Part four- Reliance and record keeping

This section sets out the circumstances in which an EAB may rely on another person to apply customer due diligence measures (Regulation 39). It also makes provision as to which records relevant persons are required to keep, and when they are to be deleted (Regulation 40), and clarifies the requirements as to data protection (Regulation 41).

RELIANCE

Reliance has been extended, making it easier to rely on a third party for part or all CDD. The regulations are more prescriptive and significantly, now extend to include other **estate agents as third parties on reliance may be placed**. However, it should be noted that the risks of relying on a third party are generally greater than the benefits. To mitigate this, the regulations specify that a third party must provide information immediately when requested.

Proceed with caution; it may now be easier to rely on others, but be aware that the risk of this information being inadequate or wrong still lies with you.

The regulations describe the type of written agreement that must be put on place when exercising reliance, as well as additional record keeping requirements. Firms must ensure that when placing reliance on any third party, that they adhere carefully to the rules and that detailed records are kept as these may be called on for up to five years after the completion of the transaction or business relationship. If you are the relevant person being 'relied' upon, you must also keep your own records for the same period.

RECORD KEEPING

Detailed records must be kept for a minimum of five years from the date the transaction or customer relationship ended. Under the MLR 2017 an EAB must delete records held after the required period of five years has elapsed. The only exception to this is when there may be other legal reasons for retaining the information, such as an ongoing investigation. Separate to the MLR is the General Data Protection Regulation 2016 (GDPR) [EU/2016/679] aimed at protecting customer and personal data and making sure that an individual has access to their data kept by organisations. This is a separate legislation, but applies in full to EABs. It is intertwined with the MLR and comes into force in May 2018. Firms would do well to adopt its recommendations ahead of the implementation date.

TRAINING

Training is a mandatory requirement and there is an increased emphasis on the importance of training. The regulator sees culture being at the heart of combatting financial crime and believes that it should be part of everybody's day-to-day job. ***This begins with awareness and that stems from training***. Senior managers will be held accountable for a lack of training which could result in financial penalties. Firms must ensure that they have reviewed and enhanced training to meet the new requirements in the MLR. This must be well documented and evidential; without which there is no way to prove it happened.

Part five - Beneficial ownership information

This section applies to corporate bodies and to trustees. It requires corporate bodies and trustees to provide specified information to a relevant person when entering into a relevant transaction with a relevant person (Regulation 43) and requires trustees to inform the relevant person of their status and to provide information to them and to law enforcement authorities (Regulation 44). Trustees have an additional requirement to provide information to HMRC in certain circumstances. HMRC have a requirement to hold the information that has been received from the trustee in a register (Regulation 45).

Part six - Money laundering and terrorist financing: supervision and registration

This section makes provision in relation to supervisory authorities and registration of relevant persons. It states that all supervisory authorities are subject to a duty to cooperate with other supervisory authorities, the Treasury and law enforcement authorities and a duty to collect information. Provision is made for the circumstances in which a supervisory authority may disclose information it holds for supervisory purposes. Regulations 53 to 60 require the Financial Conduct Authority and HMRC to maintain registers of certain relevant persons and impose corresponding requirements on relevant persons to apply for registration. The FCA and HMRC have powers to suspend or cancel the registration of a relevant person in certain circumstances.

Part seven - Transfer of Funds (Information on the Payer) Regulations

This section sets out the supervisory authorities for a payment service provider and the duties of the supervisory authorities. There are only two supervisory authorities for service providers: the FCA and HMRC.

Part eight - Information and investigation

This section gives supervisory authorities information gathering powers (Regulations 65 to 68), gives the FCA and HMRC further investigatory powers (Regulations 69 to 70) and makes provision for the way in which these powers may be exercised (Regulations 71 to 73).

SUPERVISORY OVERSIGHT

HMRC has increased the size of its supervisory teams for EABs and stated that it will carry out a greater number of supervisory visits. It is likely that we will see a significantly greater level of intervention and enforcement following the implementation of MLR 2017. ***Now is the time to get your house in order***.

Part nine - Enforcement

This section identifies "relevant requirements" for the purpose of these Regulations and gives the FCA and HMRC powers to impose civil penalties on any person who has contravened a relevant requirement. Regulations 86 to 92 provide for criminal offences where a relevant person has contravened a relevant requirement; prejudiced an investigation or disclosed false or misleading information to the supervisory authorities and make provision in relation to criminal proceedings.

BE WARNED

This section therefore does not impose additional requirements or make changes to the operational nature of what you are doing, however all EABs should take heed of this warning that HMRC are getting tough on non-compliance and failings.

Part ten – Appeals

This section provides for reviews and appeals in relation to decisions of HMRC (Regulations 94 to 100).

Part eleven - Miscellaneous provisions

Among other things, this ensures that charges or penalties imposed by HMRC may be recovered as a debt in civil proceedings (Regulation 101), ensures that HMRC are able to recover the costs of their supervision or enforcement action (Regulation 102) and imposes obligations on various public authorities to disclose any suspicions they may have of money laundering or terrorist financing (Regulation 103).

Conclusion

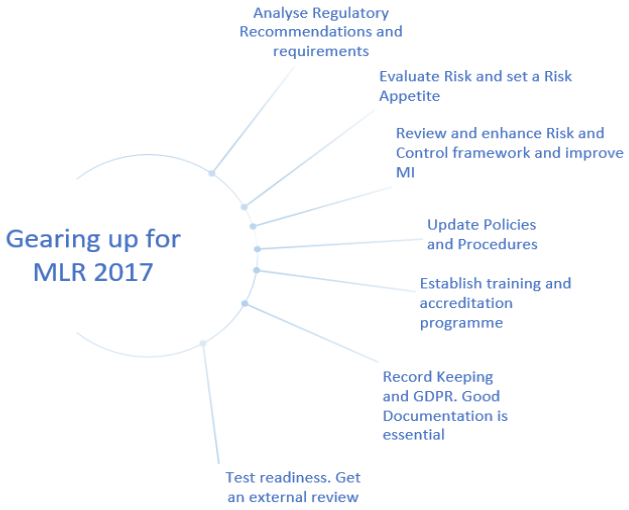
The new money laundering regulations represent a significant change to the way all firms must manage the risk of financial crime.

What should you do?

TAKE ACTION NOW

The following is a recommended list of actions you should undertake. Engage specialist help to get expert advice and perhaps more importantly, experience. Lysis Financial provides compliance advice to firms based on years of experience. We bring a set of pre-built tools and methodologies honed from repeated engagements, enabling us to bring solutions based on what works.

1. ***Rules Mapping*** – By far the most important first step is to understand how these changes affect your business. By creating a map from the regulations to your own operations, you will quickly be able to identify the gaps, enabling you to formulate a plan taking the changes on the front foot. When we engage with an organisation to do this, we provide a Compliance Risk Assessment (CRA). The CRA acts as an internal management tool, enabling the compliance function to target its activities, focusing effectively on the highest priority tasks.



2. ***Consider Risks and Risk Appetite*** – Once you have understood where the gaps are in your compliance framework, you should turn your attention to enhancing your approach to risk management. Document your risk appetite. Move onto a full review of your risk framework and the size of those risks will tell you where you need to make control adjustments to bring the firm in line with its appetite.

3. ***Review and enhance your risk and control framework*** – having stated your risk appetite and assessed your risks you will know where adjustment to the systems and control framework is necessary to achieve alignment. Management Information and reporting is critical to the success of risk and control management; make sure information and communication is effective. Document this well and the regulator will be satisfied.

4. ***Update Policies and Procedures*** – Once you've identified the necessary changes to your systems and controls you need to articulate your approach to AML, Counter Terrorist Financing and Financial Crime. Review and enhance your policies. Review and enhance your processes. Bring this all together through a Compliance Manual.

5. ***Training*** – The regulator will want to see a robust and comprehensive approach to training and culture. Build a programme and support this with a clear plan. Document everything to demonstrate successful completion and that nothing is falling through the cracks.

6. ***Record Keeping*** – Review the Data Protection Bill (when published) which implements the GDPR 2016 in the UK and align your record keeping with that. It doesn't come into force until May 2018, but getting that right now will save a lot of effort later.

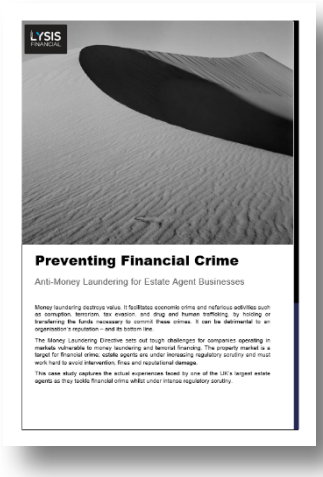
7. ***Test your readiness*** – Lysis will test your readiness for a supervisory visit. Visit the Lysis Financial website for further details.

ABOUT LYSIS

Lysis Financial is a specialist Governance, Risk and Compliance firm, providing advice, support and guidance to regulated firms. We have a range of services tailored to support firms as they operate in regulated spaces.

We work with Estate Agents and have a range of solutions, designed for both large and small firms.

Lysis embeds a risk-based strategic approach into its projects and operational decision-making, enabling our clients to be assured of sustainable success.



Case Study

Read a recent case study:

Taking one of the UK's largest Estate Agencies through a full AML change programme whilst under intrusive regulatory intervention. The outcome delivered an industry leading AML team and returned this firm to a sound footing with the regulator

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