Criminal Justice (Money Laundering and Terrorist Financing) Bill 2009

By Kevin O'Doherty, FCA

The Minister for Justice has introduced draft legislation to implement the Third EU Anti Money Laundering Directive. Kevin O'Doherty considers its implications.

On 28 July 2009, the Minister for Justice, Equality and Law Reform published the long awaited Criminal Justice (Money Laundering and Terrorist Financing) Bill 2009 (the 'Bill'). The Bill updates Irish anti money laundering and terrorist financing (AML) legislation to bring it in line with the requirements of the Third EU AML Directive, which was due to be transposed into Irish law by 15 December 2007.

While the provisions of the Bill will be familiar to anybody who has reviewed the general scheme of the Bill circulated in 2008 or the provisions of the Third EU AML Directive, they represent a major shift from the requirements and obligations in force under current legislation, the Criminal Justice Act 1994 (the '1994 Act') and the Criminal Justice (Terrorist Offences) Act 2005. Guidance on the existing AML regime for accountants is set out in two publications by the Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) entitled *Anti Money Laundering Procedures Republic of Ireland* and *Miscellaneous Technical Statement M42: Anti Money Laundering Guidance Republic of Ireland*.

There are a variety of implications for accountants, not just those in practice, but also employees of firms subject to the provisions of the Bill. Aside from the requirement to perform due diligence on their clients and report suspicious transactions, the Bill imposes a number of organisational requirements on those firms and persons subject to its provisions ('designated persons') including requirements to risk assess their business, conduct ongoing monitoring of business relationships and provide relevant ongoing training to staff.

Scope of the Bill

- The Bill requires designated persons to move to a risk-based approach in identifying clients. A risk assessment of the firm's business, products, markets and customers will be fundamental to moving over to the new requirements. This is an area which may not have received significant operational consideration to date but which will place demands on firms as they recast their AML procedures to conform to the new requirements.
- The scope of designated persons is widened to include trust and company service providers (TCSPs). Members of designated accounting bodies are specifically excluded from the definition of a TCSP. The Bill contains extensive provisions regarding the authorisation of such firms. This scope extension could also have consequences for professional non-executive directors utilising personal service companies and persons providing serviced and virtual offices, among others.
- Dealers in high value goods have been redefined as dealers in any goods, where there is a payment receipt in cash in excess of €15,000. The most obvious effect of this is to potentially bring motor dealers into the scope of the Bill, but any merchant accepting payment in cash in excess of €15,000 could be affected.

Impact on Accountants

- Designated persons are persons subject to the provisions of the Bill. The definition of designated persons includes 'an auditor, external accountant or tax adviser'.
- Auditor is not defined as a term in the Bill.
- 'External accountant' is defined in S. 24 as 'a person who by way of business provides accountancy services (other than when providing such services to the employer of the person) whether or not the person holds accountancy qualifications or is a member of a designated accountancy body'. This definition would seem to exclude accountants in employment and self-employed persons who hold accountancy qualifications or who are members of Chartered Accountants Ireland, but who are not in practice or providing accountancy services. This exclusion is not a blanket one, however - accountants who are employed by firms which are themselves designated persons will be subject to its provisions by virtue of their employment.

- 'Tax adviser' is defined as 'a person who by way of business provides advice about the tax affairs of other persons'.
- Readers should note that in mid-August, offices of accountants and solicitors were raided by Gardaí looking for evidence of assets and cash generated through gang crime and how the proceeds of crime were laundered. Previous examples of accountants' offices being raided include investigations of tax offences and the infamous Northern Bank robbery. It can therefore be appreciated why identifying clients and maintaining identity and transaction records is a vital part of the new law.

Identification and Customer Due Diligence

- Identification requirements will now explicitly extend to beneficial owners of the named customer. The requirement to be satisfied as to the adequacy of previously obtained documents could require firms to ensure their historical customer files come up to the new standards required by the Bill and to take remedial action if this is not the case.
- Customers are required to be identified prior to the establishment of a business relationship, with the designated person making an assessment of the degree of due diligence required although this time scale can be relaxed for low risk customers, customers of credit institutions and beneficiaries of life assurance policies. As customers, credit institutions, certain financial institutions, listed companies and various forms of public bodies can be exempted from the identification requirements, although as a practical matter the firm will have to document this exempted status.
- Enhanced due diligence procedures are mandated for non face-to-face business customers.
- Further risk-based procedures are required where the customer is a politically exposed person residing outside the State, including determining source of wealth. This also applies to their immediate family members and close associates.
- The designated person is required to obtain information about the purpose and nature of the customer relationship and then monitor the operation of the account on an ongoing basis.
- The Bill provides for designated persons to rely on other designated persons certifying the identification of customers. The designated person remains responsible for any failure by the third party to apply the identification requirements. In order to manage this exposure, designated persons will have to determine some method of satisfying themselves that the third party is not failing in these responsibilities.

Reporting Suspicions and Tipping Off

- In common with the existing legislation, there is an obligation to report knowledge or suspicions of money laundering or terrorist financing. Designated persons are also obliged to report any business done with certain designated countries.
- However accountants should note a potential new objectivity test. The existing law only requires a report where the accountant is suspicious. The new Bill compels the accountant to report where he/she has knowledge, suspicion or reasonable grounds to suspect. What constitutes 'reasonable grounds' is likely to be argued on a reasonable person test and not the current subjectivity test.
- Description of the role of the Money Laundering Reporting Officer remains limited to that of an 'internal reporting procedure established by an employer' in the Bill, but in practice may be accorded responsibilities by firms to discharge responsibilities arising under other sections.
- Tipping off remains an offence, but can now occur before a suspicious activity report is made. It may now be permissible to inform an affected customer that the designated person is precluded from carrying out a requested transaction by virtue of a Garda direction. The Bill provides for disclosure within the firm and, with some restrictions, the wider group of which the firm is a member. Disclosures between relevant professionals working in different entities and disclosures to supervisors also benefit from protection.

Organisational Requirements

- A designated person is required to have in place internal policies and procedures to risk assess the firm and manage the AML risks faced by the firm. These measures must include internal controls and reporting procedures. The designated person is required to have measures to monitor ongoing business and identify unusual transactions.
- Directors, officers and other employees in the firm must be instructed in the law and provided with relevant ongoing training.
- Internal procedures must conform with any code of practice approved for application to the designated person's business.
- Anonymous accounts and relationships with shell banks are prohibited.
- Records must be retained for a period of 6 years after a transaction or closure of an account – an increase from the 5 year retention period set out in the 1994 Act.

Supervision

- Various supervisory bodies including the nine prescribed accountancy bodies recognised by the Irish Auditing & Accounting Supervisory Authority (IAASA) are charged to effectively monitor members under their supervision and to take such measures as are reasonably necessary to ensure compliance with the Bill.
- In the absence of a prescription to the contrary, a designated person who is an auditor, external accountant, tax adviser or TCSP will have as their supervisory body the designated accountancy body they are a member of.
- Even if the designated person is not a member of a designated

accountancy body, S. 60(2) of the Bill provides that the designated accountancy body, in the absence of a prescription to the contrary, will be responsible for supervising where the activities of the designated person are carried out 'through officers, members or employees of it who are members of a designated accountancy body'. This lays open the possibility of firms being supervised for AML compliance purposes by a professional accountancy body simply by virtue of the fact that they employ an accountant who is a member of that body.

- The Minister and the Central Bank Financial Services Authority of Ireland are given the power to appoint officers with the power to enter premises, inspect, copy or remove documents, require information and secure premises.

Trust or Company Service Providers

- S. 87 requires that persons carrying on business as a TCSP will require to be authorised by the Minister.
- A TCSP is any person whose business involves forming companies; acting as a director or secretary of a company under an arrangement with a person other than that company; arranging for another person to act as a director or secretary of a company, as partner of a partnership or trustee of a trust; acting or arranging for another person to act as a nominee shareholder for a person other than a listed company; or, providing a registered office, business address, correspondence or administrative address or other related services.
- S. 84 excludes members of designated accountancy bodies, barristers, solicitors, credit institutions and financial institutions from the definition of TCSP.
- As can be seen the definition of TCSP is broadly drawn. For example, persons providing serviced office facilities and virtual offices for small businesses will surely be deemed to be providing a business, correspondence or administrative address. There may be implications also for some professional non-executive directors.

What happens now?

Having been introduced, the Bill will follow the normal legislative process when the Oireachtas resumes. Once signed into law, the Minister can set suitable dates for commencing the various provisions. Affected parties will obviously need a degree of lead-in time in order to amend their systems and procedures to be compliant on the effective date and this will impact on the timing of commencement. The Money Laundering Steering Committee has prepared draft Guidance Notes– these will need to be amended once the final form of the legislation is known. The CCAB-I will similarly have to update its AML guidance for accountants. It will be a busy autumn!

Kevin O'Doherty is a director of Compliance Ireland Regulatory Services Limited and contributes to specialist website www.antimoneylaundering.ie.