

How confidential is a SAR?

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Authors: [Jonathan Pickworth](#), [Jonah Anderson](#)

The Criminal Finances Act 2017 (“CFA”) extended the time available to UK law enforcement to act on any suspicious activity report (“SAR”) following a refusal of consent to proceed with a transaction. In reality this means that whenever an extension is sought (which can now potentially be up to 217 days), there is little prospect of that SAR remaining confidential, and it is likely to expose the identity of the SAR maker.

If an entity wishes to undertake a transaction involving property suspected of representing the proceeds of crime, it will not commit any of the principal money laundering offences if it files a SAR with the National Crime Agency (“NCA”) seeking consent, and in turn receives such consent. The NCA has a 7 day working period in which to consider the proposed course of conduct and decide whether or not to give consent (or as the NCA now prefers to say, a defence against money laundering).

If consent is refused, there is no defence against a money laundering offence for a period of 31 days from the date of refusal (known as the moratorium period). This is to allow the NCA time to gather evidence to determine whether further action should occur, including a restraint order, a property freezing order or an unexplained wealth order. Under the old regime, 31 days did not generally provide sufficient time for law enforcement to take action, particularly where evidence was sought from overseas. The CFA changed the position from 31 October 2017, allowing the NCA to apply to a Crown Court judge to extend the moratorium period in increments of 31 days (up to a total of 217 days). Regulated entities are beginning to feel the pain of this legislative change.

Practical Consequences

There is an argument that the NCA is insufficiently resourced, and that it will only apply for an extension of the moratorium period in relatively few cases, where it considers further investigation necessary. But in these cases, a number of problems may well arise for regulated entities. To start with, this type of potential delay will undoubtedly cause the client or customer to start asking questions of the entity which submitted the SAR, and they are also likely to suspect that a SAR has been filed by that particular entity. To complicate matters further, as part of any application to the Crown Court to extend the moratorium period, the NCA has to put the entity that submitted the SAR on notice, along with any other interested party (which is likely to include the client or customer). This increases the likelihood of the identity of the entity that submitted the SAR being revealed and the client or customer relationship being compromised.

Even in the less risky scenario of a joint consent SAR being submitted by both a professional services firm and its client, (for example regarding the acquisition of a target company in circumstances where the due diligence process has revealed potential bribery issues), practical problems will still remain. A potential 217 day moratorium period in such circumstances is likely to be commercially untenable.

Will fewer SARs be filed?

In the regulated sector, the threshold for filing a SAR is low, due to the low bar for suspicion and regardless of whether the SAR is a consent SAR or to avoid liability under the failure to disclose regime. This has led to a huge number of SARs being filed every month. An unintended side effect of this, is that potential SAR makers

may be less readily inclined to report. Although the law is clear as to when a SAR should be made, it is possible that the risk of being exposed to a client or customer will put already hard-pressed compliance officers and MLROs under more pressure not to report – or even that fewer reports to MLROs will be made by relationship managers. Such an outcome would be unwelcome. Others may simply decide to de-risk and terminate certain high-risk client relationships, though when monies are held on account for the client, this could raise further potential consent issues. In any event, whilst the ability to extend the moratorium period may help the NCA, not a huge amount of thought has been given to the collateral impact on regulated entities.

The current process for seeking an extension of the moratorium needs urgent review, in order to protect the identity of the person or institution making the SAR and consent request.

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom
T +44 20 7532 2506

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