

# Money laundering goes mainstream – How will the FCA Respond?

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Money laundering has gone mainstream. The television drama *Breaking Bad* contained one of the clearest explanations of money laundering ever given. The new series *McMafia* has highlighted London as a hub for money laundering. The increased prominence in mainstream media reflects the priority put on money laundering by Governments and law enforcement.

A recent interview given by the Director General of the National Crime Agency (“NCA”), Lynne Owens, indicates a greater focus on money laundering investigations in relation to financial services. Ms. Owens indicated that the NCA is pursuing a case against senior bankers in relation to bribery and money laundering.<sup>1</sup> But what of the Financial Conduct Authority’s (“FCA”) role in criminal investigations relating to money laundering? This alert discusses the increasing likelihood of the FCA prosecuting regarding money laundering failings.

## The FCA – criminal enforcement

The FCA has made it clear that in addition to exercising its supervisory and civil enforcement powers in relation to those it regulates, it may use its criminal powers to prosecute firms and individuals.

The FCA will generally use its civil enforcement powers to target poor AML controls, but if failings are particularly serious or repeated, then the FCA may consider criminal enforcement appropriate.<sup>2</sup> The FCA is a designated prosecutor in relation to prescribed regulations regarding money laundering along with certain other offences. The FCA is also able to prosecute the substantive money laundering offences as a private prosecutor.<sup>3</sup> The FCA may also refer cases of suspected money laundering to other law enforcement agencies.

## Potential wide-ranging offence

There is a wide-ranging criminal offence under the money laundering regulations. The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (“MLR 2017”) came into force on 26 June 2017, replacing the Money Laundering Regulations 2007 (“MLR 2007”).<sup>4</sup> MLR 2017 transpose the requirements of the Fourth Money Laundering Directive into national law.

<sup>1</sup> “National Crime Agency boss Lynne Owens: ‘Organised criminals pose a greater threat than terrorists’”, *The Sunday Times*, January 14, 2018.

<sup>2</sup> See the FCA’s Business Plan for 2017/18.

<sup>3</sup> *R v Rollins* [2010] UKSC 39

<sup>4</sup> The MLR 2007 were effective from 15 December 2007 until 26 June 2017.

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Both sets of regulations set out the requirements that those in the regulated sector (i.e. gatekeepers to the financial system including banks and auditors) need to meet in relation to controls intended to prevent their business from being used for money laundering purposes. These requirements include provisions regarding customer due diligence and policies, controls and procedures in relation to money laundering and terrorist financing. Certain firms also have additional regulatory obligations.

Both sets of regulations contain a criminal offence in relation to the breach of requirements under the regulations (the “**Requirements Offence**”).<sup>5</sup> The maximum sentence under both sets of regulations is two years and/or an unlimited fine. To date, the Requirements Offence under the MLR 2007 has rarely been pursued.

## Looking to the future

Currently, the FCA does not have the power to enter into a deferred prosecution agreement (“**DPA**”) with a corporate. Only the Crown Prosecution Service and the Serious Fraud Office are designated prosecutors for the purposes of the DPA regime. However, the inclusion of various offences under the Financial Services and Markets Act 2000 within the list of specified offences regarding a DPA has been seen as an indication that the FCA may one day gain the ability to enter into a DPA.

The list of specified offences for which a DPA is available also includes several money laundering offences, including the substantive money laundering offences, the failure to disclose in the regulated sector offence and the Requirements Offence.

If the FCA were to become a designated prosecutor for the purposes of the DPA regime, a DPA could be a useful tool for the FCA in relation to sufficiently serious failures in AML controls and a way to send a message to the market that serious failings in the AML sphere can attract serious consequences.

In the meantime, the use of available criminal prosecution powers could be the next trend in AML enforcement. Firms should bear in mind that the FCA can initiate a criminal prosecution in relation to the Requirements Offence. Firms should therefore ensure that they have appropriate systems and controls in place in order to avoid the risk of criminal or civil enforcement arising.

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<sup>5</sup> Regulation 86 of the MLR 2017 and Regulation 45 of the MLR 2007.