Client Alert | White Collar/Investigations

Money laundering: the net closes in?

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Authors: Jonathan Pickworth, Joe Carroll, Jonah Anderson

Money laundering remains a hot topic for the UK government, and further developments in recent months show the continuing efforts to reform and enhance the UK's anti-money laundering ("**AML**") regime. It is still too early to report on enforcement of recent measures, but the net is tightening. What are these new measures and how will they change the ways in which business is carried on?

Overseas entities that own UK property will need to publicly disclose beneficial owners

Since 2016, most UK companies have been required to publicly disclose their owners and controllers. The Registration of Overseas Entities Bill, published in draft last month[1], will introduce similar measures for overseas entities that own UK property, in order to combat money laundering and improve transparency in the UK property market.

Overseas entities that own UK property will be faced with a dramatic change: as currently drafted, the Bill requires them to take reasonable steps to identify their beneficial owners and disclose those owners on a public register, to be updated annually. Entities that fail to disclose will in effect be unable to sell, mortgage or lease UK property, and various criminal offences will apply (to both the entity and its officers) where disclosures are false, misleading or not updated. It is expected that entities will be exempt if they make similar disclosures on an equivalent public register in their home jurisdiction. This would simplify matters for EU entities, as EU member states are required by the Fifth Money Laundering Directive to implement such registers by January 2020.

The draft Bill may well change, and the register itself is unlikely to be implemented until 2021. However, those using non-EU overseas entities to invest in UK property – particularly minority investors and those using complex ownership structures – will need to think well in advance about the Bill's requirements and any issues that might arise.[2]

Reform of the Suspicious Activity Report ("SAR") regime

SARs are intended to be one of the UK's key AML measures, giving the authorities intelligence about suspected money laundering and protecting reporting entities. In practice, the SAR regime has issues. The bar for suspicion is low, and the regime applies to laundering arising from any crime (not just serious crimes), so many businesses resort to defensive over-reporting. Given that it can be difficult for businesses to understand what should be included in a SAR, the result is a large number of poor quality SARs that enforcement agencies struggle to review and investigate. This defensive approach creates a heavy

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1 The draft Bill is available here – consultation on the draft Bill is open until 17 September 2018.

2 For example, minority investors may be concerned about being able to recover their investment if the majority investor fails to comply with the Bill's requirements.

compliance burden for businesses, and can cause the subjects of SARs significant financial loss (e.g. if a bank reports a single customer transaction and then freezes the entire customer account).

The Law Commission is seeking feedback on the current regime and various proposed reforms[3]. These include: a prescribed format for SARs; statutory guidance on what to look for and what constitutes a 'reasonable excuse' for not making a SAR; requiring SARs only where there are reasonable grounds to suspect money laundering in relation to serious crimes; making companies criminally liable for failure by associated persons to report suspicions of money laundering; and providing legal protection for banks that choose to freeze funds subject to a SAR but allow continued operation of the customer account.

At least some of these proposals are likely to be included in the Commission's report and adopted by the government – those in the regulated sector are encouraged to participate in the consultation, which closes on 5 October 2018. Given the problems with the current regime, any considered reform is likely to have a positive effect.

FCA seeking criminal prosecutions under the Money Laundering Regulations 2017

The FCA has the power to prosecute breaches of the Money Laundering Regulations 2017 – including AML systems and controls failings – under the 'requirements' offence in Regulation 86. To date, it has not done so, preferring to deal with breaches via civil means. This approach is now changing. In several current 'systems and controls' investigations, the FCA is actively considering both civil and criminal proceedings[4].

The new approach is unlikely to result in a deluge of prosecutions – the FCA expects to reserve prosecution for more serious cases, and it remains to be seen how many will pass the evidential and public interest tests for criminal proceedings. However, the fact that prosecution is on the table at all is likely to prompt increased concern in the regulated sector around AML compliance. This may well be the FCA's intention. Following the government's lead, the FCA (like other agencies) has begun to treat money laundering as a higher priority, opening more AML investigations and doing so more quickly where it suspects serious misconduct[5]. Dusting off powers to prosecute AML failings is an obvious way for the FCA to give this strategy teeth and encourage compliance with the Regulations.

The new approach may also prompt an expansion of the FCA's powers. Deferred prosecution agreements ("**DPAs**") are available for the 'requirements' offence, but the FCA does not yet have the power to enter into DPAs with organisations[6]. If it is serious about pursuing prosecutions, it may well seek to be granted this power, in order to have the full range of options available to it.

Conclusion

The ongoing reforms and enhancements are welcome, in principle. However, as demonstrated by the difficulties with the SAR regime and the FCA's change of approach to AML cases, the new measures and offences (like those in the draft Bill) will need to be subject to sufficient scrutiny and enforcement by UK agencies if they are to be effective. If the UK government is serious about treating money laundering as a priority, it should ensure that UK agencies have the resources they need and are in a position to follow the FCA's example.

Sofia Lambert assisted with this alert.

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3 The Law Commission's consultation is available here.

4 See this speech on 3 July 2018 by Mark Steward, the FCA's Director of Enforcement and Market Oversight.

5 See the FCA's Anti-Money Laundering Annual Report for 2017/18.

6 For further discussion, see our alert *Money laundering goes mainstream – How will the FCA respond?*

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000