The Criminal Finances Act 2017—examining the impact on POCA 2002

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Corporate Crime analysis: A number of changes were recently made to the Proceeds of Crime Act 2002 (POCA 2002) by the Criminal Finances Act 2017 (CFA 2017). Experienced criminal litigator, Ross Dixon, partner at Hickman & Rose, considers the key changes to POCA 2002 that corporate crime lawyers should be aware of.

Original news

Criminal Finances Bill receives Royal Assent, LNB News 27/04/2017 171

The Criminal Finances Bill, which contains legislation for the new corporate offences of failure to prevent facilitation of tax evasion, received Royal Assent on 27 April 2017.

What are the key issues brought about CFA 2017 for corporate crime practitioners?

Citing the attractiveness of the London property market to overseas investors, an open economy and the size of the financial and professional services sector, the government acknowledges that the UK has a particular exposure to the risk of money laundering. In response, CFA 2017 introduces significant changes to the anti-money laundering (AML) regime.

CFA 2017 received Royal Assent on 27 April 2017 shortly before the dissolution of Parliament. Passed in a rush, most of its key provisions await commencement regulations. Given that the timetable for implementation is unknown, early preparation would be prudent.

This article outlines the key changes made by CFA 2017 to the AML regime in POCA 2002:

- disclosure orders in money laundering investigations
- extension of the moratorium period
- introduction of further information orders, and
- voluntary information-sharing between entities in the regulated sector with the possibility of joint disclosures

Other significant changes in CFA 2017 are not within the scope of this article including:

- unexplained wealth orders
- the new offences of failure to prevent facilitation of tax evasion, and
- the extension of forfeiture provisions to high value goods and bank accounts

What is the impact of the changes to POCA 2002?

Disclosure orders

A disclosure order made under POCA 2002, s 357 can be a potent evidence-gathering tool. It compels a person to:

- answer questions
- provide specific information, or
- produce documents to an investigator

Failure to comply and knowingly or recklessly making a false or misleading statement in response to an order are criminal offences. Previously available only in civil recovery investigations or confiscation investigations, an order may now be made as part of a money laundering investigation, a significant extension in their possible use.

If an investigator dealing with a money laundering investigation considers a solicitor to be in possession of relevant information they will be able to apply to a Crown Court judge for a disclosure order. An order does not compel disclosure of material and information subject to legal professional privilege (LPP). However, it will override confidentiality and there

is provision for compelled disclosure of a client's name and address. If served with such an order a solicitor will have to review the extent to which information and material is subject to LPP rather than just a duty of confidence, and whether the crime–fraud exception applies. Assertions of LPP are increasingly subject to challenge by investigators and lawyers will need to be sure of their ground when making such a claim. If there is an ongoing retainer with a client then a further set of questions may arise:

- Is there a duty to tell the client about the investigation and the disclosure order (Code of Conduct, Outcome 2.2)?
- If this is a covert operation will there be a risk of committing an offence if the client is told?
- Can the lawyer continue to act on the matter and is there a risk of conflict?

These issues will call for careful consideration before deciding how to proceed.

Extension of the moratorium period

When making a suspicious activity report (SAR) to the National Crime Agency (NCA) the current provisions provide for an application to be made to allow the reporter to take a step that would otherwise be a principal money laundering offence. If the NCA do not respond within seven working days consent is deemed to have been given. Where consent is refused there are a further 31 calendar days—the moratorium period—during which the act for which consent is sought remains prohibited and the NCA can investigate.

The new provisions allow the NCA to apply to the Crown Court to extend the initial 31-day moratorium period for a further period of 31 days, and to keep making further applications up to a maximum 186 days on top of the original period. The court must be satisfied that the investigation is being conducted diligently and expeditiously, that further time is needed, and that an extension is reasonable in all the circumstances. Contesting such an application may not be straightforward as the court can exercise a discretion to exclude interested persons, or order that information relied upon by the authorities be withheld.

If a moratorium period is extended it will be increasingly difficult to keep the reason for delay confidential from the client and the risk of falling foul of the tipping-off provisions is likely to grow. It is hoped that the NCA will recognise these difficulties and how impractical it may become to continue to keep the investigation confidential in cases involving an extended moratorium period.

Further information orders

The extension of the moratorium period gives the NCA more time to investigate a SAR. Further information orders (FIOs) have been introduced to enhance those investigations. An FIO is made by a magistrates' court requiring information to be disclosed following an application by the NCA. The information can be sought from the maker of a SAR, or someone else in the regulated sector, it must relate to a matter arising from the SAR and it must assist the investigation. An FIO can also be made following an application on behalf of a foreign country—as a result of a SAR made in their jurisdiction. Failure to comply with an FIO leads to a financial penalty.

The extent to which the NCA will rely on FIOs remains to be seen. However, they appear to be a relatively straightforward route to obtaining information that is not voluntarily disclosed following a SAR. As the FIO can be made against anyone in the regulated sector, not just the maker of the SAR they have a broad reach.

An FIO does not override LPP. However, this may not be much of a restriction on further information being disclosed by the lawyer who made the SAR as they will already have concluded that privilege does not apply to the information disclosed. This underlines the importance of correctly determining whether privilege prevents a SAR being made in the first place.

Information-sharing and super SARs

CFA 2017 contains measures that allow for the sharing of information between regulated entities regarding suspected money laundering, further to a notification to the NCA. This is an approach that has been piloted by the NCA, and a number of banks in the Joint Money Laundering Intelligence Taskforce. It is intended to allow private sector entities to

pool information about suspected money laundering before providing this information to the NCA in a single joint disclosure report, or 'super SAR'.

CFA 2017 provides a legal basis for the sharing of confidential information in this way, and just as with a normal SAR using these provisions will not breach disclosure restrictions, such as client confidentiality. However, those in the legal sector will still have to consider whether LPP applies to information before it is shared with other entities on a voluntarily basis. In practice, this is likely to be a bar on lawyers participating in information-sharing under these provisions.

Interviewed by Tracey Clarkson-Donnelly.

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