July 9, 2019

Anti-money laundering: Law Commission proposes reforms to the SARs regime

On 18 June 2019, the Law Commission published its report on reform of the UK's anti-money laundering ("AML") and terrorist financing ("CTF") regime. The focus of the report is the submission of suspicious activity reports ("SARs"). Despite suggestions over recent years that root and branch reform may be appropriate, it has recommended that the current SARs regime remain in place with some relatively minor refinements aimed at alleviating the practical difficulties faced by institutions.

Background – why is reform needed?

There is broad agreement between entities operating in the "regulated sector", Money Laundering Reporting Officers within them and the UK Financial Intelligence Unit ("UKFIU"), overseen by the National Crime Agency ("NCA")), that there are too many SARs of poor quality that contain "limited, or even no, useful intelligence". Numbers of SARs filed far exceed those anticipated at the time when the regime was designed. The NCA's resources have been under consistent strain. Delays in decision-making cause significant practical issues for reporting entities, particularly where consent is being sought to proceed with time-sensitive transactions. There are also widespread concerns about variable levels of reporting between sectors. Continuing a debate that had been ongoing over recent years, the 56 consultation responses to the Law Commission's consultation paper mainly expressed support for retaining the current framework but identified the following key issues:

- A **lack of understanding of the statutory principles and obligations** underpinning the AML/CTF regime;
- The fear of personal liability leading to **defensive over-reporting**;
- The **absence of guidance** as to what should be included in an SAR and the format it should take.

Recommendations

The Commission has made the following recommendations targeted at improving the reporting process and the quality of SARs filed with the NCA:

- The **creation of a new Advisory Board** to oversee the drafting of guidance, monitor the effectiveness of the regime, and advise on possible improvements. It is hoped that this will make the regime more responsive to new and emerging threats.
- A new statutory obligation on the Secretary of State to **issue guidance on Part 7 of POCA**, with focus on a number of key statutory concepts to assist the regulated sector in complying with their legal obligations. Drawing on the unease felt by many MLROs with potentially significant personal liability for failures to report suspicious activity, the Commission identified that the legal interpretation of suspicion was not well understood, leading to unnecessary disclosures;
- **A new prescribed form for SARs**, and in particular the deployment of new technology to devise an online form, that would direct reporters to provide essential information and provide this to the UKFIU in an easy-to-read and accessible format.
- Amendment of POCA to permit credit and financial institutions to **ringfence criminal property** to avoid subjects of disclosures enduring disproportionate economic hardship resulting from their bank accounts being

frozen. It is also proposed that provision should exist for **applications to be made to Crown Court Judges for funds to be released** where an application for an extension to the moratorium period is made.

Commentary

The Law Commission's report is as noteworthy for what it omits as for what it includes. The suggestions of additional practical guidance will assist individuals and entities with making often delicate judgements about whether the relatively low threshold of "suspicion" has been crossed and how to handle interactions with clients and others once reports have been made. In particular, the recommendation that ringfencing of suspected "criminal property" should be allowed recognises a common practical issue and would formalise a practice that is already in certain cases approved by the NCA under the current consent regime.

However, given the statistics set out in the report, some will feel that the Commission has missed an opportunity to instigate wholesale reform by proposing a "reasonable grounds" threshold. An analysis of a sample of SARs indicated that reporters only properly articulated reasonable grounds to suspect, by demonstrating one or more objective ground, in 52.4% of cases. There is currently no requirement for suspicion to be "reasonable", leading to a widespread perception that large numbers of reports are purely defensive. The NCA's practice of refusing to grant or refuse a defence against the substantive money laundering offences in such cases causes significant practical difficulties for many reporting entities that may have sought to comply with their perceived (relatively ambiguous) obligations under current arrangements. Guidance as to where the line should be drawn in term of "suspicion" would be a welcome addition and may assist in reducing the numbers of such reports.

The Commission declined to recommend a move towards corporate, rather than individual liability. It likely took this approach as the Ministry of Justice has not yet abandoned the idea of seeking to introduce a broad corporate offence of failing to prevent economic crime (albeit there are no current firm proposals in this regard). Some may have hoped that the Commission would at least indicate its position on the merits of this approach. This is an area that will undoubtedly be subject to further scrutiny and review, not least by the Financial Conduct Authority, which continues to treat financial crime prevention as an area of enforcement focus.