

UK Financial Conduct Authority Anti-Money Laundering Investigations Underway With Threats of Civil and Criminal Enforcement

Thursday, April 11, 2019

Speaking on 4 April 2019, the head of enforcement for the UK FCA, Mark Steward, [warned](#) those subject to the UK's anti-money laundering regulations that 'it is time that the FCA gave effect to the full intention of the Money-Laundering Regulations which provides for criminal prosecutions'. He added: '[The FCA is] now conducting 'dual track' AML investigations, i.e., investigations into suspected breaches of the Money-Laundering Regulations that might give rise to either criminal or civil proceedings'.

Mr Steward's words suggest a hardening of the FCA's approach to enforcement.

Regulations and Requirements

Mr. Steward was referring to [The Money Laundering, Terrorist Financing and Transfer of Funds \(Information on the Payer\) Regulations 2017](#) (Regulations) which came into force 26 June 2017, implementing the EU's fourth directive on money laundering and replacing the previous, less prescriptive 2007 regulations.

The Regulations impose a number of requirements on financial institutions, credit institutions, auditors, tax advisers, lawyers, estate agents, accountants, and gambling providers (including casinos) (collectively referred to as 'relevant persons').

Chapter 2 of Part 2 of the Regulations contains requirements in respect of 'risk assessments and controls'. Under this chapter, relevant persons are required to take appropriate steps to identify and assess the risks of money laundering and terrorist financing to which their business is subject. In so doing, certain 'risk factors' must be considered, including those relating to customers, the products provided by the organization, and the countries in which the organization operates. Put another way, those subject to the Regulations must produce a written anti-money laundering risk assessment.

To mitigate and effectively manage any risks identified by such assessments, those to whom the Regulations apply must establish and maintain policies, controls, and procedures which must be regularly reviewed and updated. The Regulations accept that not all businesses face the same risks, so any policies and procedures adopted are required to be proportionate to the size and nature of the relevant person's business. Those working in businesses subject to the Regulations should have received training.

Investigation, Penalties, and Prosecution

The Regulations give wide-ranging powers to the FCA to require the production of information or documents and to interview the relevant person or anyone connected with the relevant person. In addition, the FCA may enter and inspect a relevant person's place of business and may require the person to provide an explanation of any documents or information found on the premises, and take copies of such documents or information.

Extensive Civil Penalties



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The FCA has draconian powers to impose fines, remove or suspend permissions (in addition to its practice of requesting that firms voluntarily accept the imposition of a requirement (VREQ)), impose prohibitions on management, and injunct in appropriate circumstances.

In addition, the Regulations provide for the prosecution of three separate criminal offences with punishments up to two years' imprisonment.

The Offences

The information offence:

A person commits an offence if, in purported compliance with a requirement imposed on that person under the regulation, that person provides information to any person which is false or misleading in a material particular; and

1. The person knows that the information is false or misleading; or
2. The person is reckless as to whether the information is false or misleading

Prejudicing an investigation:

If a person knows or suspects that an appropriate officer is acting in connection with an investigation into a potential contravention, that person commits an offence if

1. The person makes a disclosure which is likely to prejudice the investigation; or
2. The person falsifies, conceals, destroys or disposes of (or causes such actions) documents which are relevant to the investigation

Contravention of a 'relevant requirement':

The widest ranging of the three offences and the one in which Mr Steward, and indeed firms, will be most interested is the offence under Regulation 86.

This regulation makes it a criminal offence for a person to contravene a relevant requirement imposed on that person. This includes the requirement to mitigate and manage any identified risks by establishing and maintaining policies, controls, and procedures which are proportionate to those risks.

The regulation provides that a person will not be guilty of the offence if that person took all reasonable steps and exercised all due diligence to avoid committing the offence.

Analysis

This is not the first time Mr Steward has outlined the FCA's intention to pursue criminal prosecutions for breaches of the Regulations. Speaking in July 2018, Mr Steward [revealed](#) there were a 'small number of open investigations into firms' systems and controls'; those firms had been notified the FCA was considering whether there had been any misconduct which might justify a criminal prosecution.

Given the FCA's clear effort to increase its investigative activities, coupled with a desire to ensure the Regulations do not become a 'white elephant', it may not be long before we see at least some prosecutions in this area. As such, firms must ensure their own systems and controls are robust and up-to-date. Add into the mix specific criminal sanctions for prejudicing an investigation or providing false or misleading information (either intentionally or recklessly), and compliance becomes even more urgent.

Both speeches indicate that prosecutions for contravening the Regulations will likely be rare, reserved for the most serious cases where there may be some evidence that actual money laundering has taken place but cannot be proven to the criminal standard. Despite these indications, the Regulations are designed to have a deterrent effect and to help prevent money laundering before it takes place. Firms should make no mistake – criminal prosecution for breach of the requirements does not require proof of money laundering. All firms – particularly those subject to FCA anti-money laundering supervision – should review their anti-money laundering programs for compliance with the Regulations. It is critical to complete the required risk assessments and keep them current. In addition, policies and procedures should reflect risks identified and employees should be appropriately trained.

Firms and individuals subject to FCA investigation should immediately seek legal advice.

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