

## **Banks Face Criminal Charges Under Landmark UK Law**

By **Mark Taylor**

*Law360, London (October 14, 2016, 8:40 PM BST)* -- Banks aiding tax evasion, even unwittingly, may face criminal charges under aggressive new laws unveiled Thursday by the British government, lawyers warned.

The Criminal Finances Bill had its first reading in Parliament on Friday, where politicians digested proposals to hand police extra powers to seize the proceeds of crime and demand suspected criminals explain the origins of their assets. A criminal offense for banks and companies that fail to prevent tax evasion has been proposed by the Home Office, meaning firms across the financial spectrum must take note.

"Financial institutions, private equity, all professionals dealing with wealthy individuals and potentially politically exposed persons really need to be aware of this," said Louise Delahunty, a partner at Cooley LLP. "Corrupt foreign politicians and organized criminals should be concerned."

Any firm with concerns around the source of monies received or where staff are involved in arrangements which could facilitate tax evasion will be at significant risk of criminal prosecution if they don't comply with the legislation, said Michael Ruck, a financial services senior associate at Pinsent Masons LLP.

"It may well come as a large shock to many companies and individuals who will be liable to criminal prosecution once the bill comes into force," he said.

Lawyers said the new laws will mean rising compliance bills and in some cases a culture change of the largest and more complex financials from the boardroom down.

"These provisions do not in any way reduce the burden on firms, including banks and other financial services firms, to meet their financial crime requirements, in particular, in relation to due diligence and reporting of suspicions," Ruck said.

A new proposal, unexplained wealth orders, or UWOs, will force those suspected of serious crime to explain where their wealth has come from or risk having it seized. Until now, enforcement agencies have been restricted in attempts to freeze assets, bound by red tape.

"A judge will make an order for a UWO, requiring them to explain how they obtained the wealth, if it is valued at over £100,000 and there are reasonable grounds for suspecting that their lawful income would

have been insufficient to acquire the property," said James Maton, commercial partner at Cooley.

"Foreign politicians on low salaries who own exclusive London property and high-end cars will struggle to provide a plausible explanation," added Maton, a member of the anti-corruption nonprofit Transparency International panel that proposed UWOs in 2015.

This extension of powers is a bold play by the British government and reminiscent of U.S. enforcement agency tactics to go after crime even across borders, said James Greig, partner at White & Case LLP.

"It is potentially a major extraterritorial issue — it doesn't look at just breaches of U.K. law, it looks at potentially breaching U.S. law, for example," he said. "In Europe, there is a feeling that the Americans got ahead of the game. Look at where the biggest money-laundering sanctions have been levied in the U.S., they showed how low their tolerance is."

Lawyers said large organizations can be hard to police, especially when dealing with transactions for big clients or high-net-worth individuals with limited liability partnerships across several offshore jurisdictions.

"When a London-based financial institution is assisting a deal, they need to make certain they run a ruler over that to ensure it's not just running the risk of evading U.K. tax, but also not evading tax in any other jurisdiction, and that is one hell of a challenge," Greig said.

The introduction of the criminal offense for companies that fail to prevent tax evasion was not surprising, lawyers said, but many proposals went much further than expected.

"There are a number of interesting provisions," said Susannah Cogman, partner at Herbert Smith Freehills LLP. "Although probably the most significant from a compliance perspective is the corporate failure to prevent tax evasion offense — the equivalent of the Bribery Act 'corporate offense,' given the need to have 'prevention procedures' as a defense."

A controversial shake-up on how data from financial transactions is shared with regulators also features. Earlier this month, HSBC Holdings PLC Chief Legal Officer Stuart Levey said banks had been restricted in their ability to hand information to regulators, and suffered heavy sanctions for issues they could not control.

"It could be said that the bill is aimed at facilitating the transition between old and new practices in transparency and enabling banks to share more data, but it seems to me that complaints of being hamstrung are something of an excuse," Greig said. "It's quite a hard point to make, but there are very few jurisdictions in the more sophisticated parts of the financial marketplace where data protection restrictions are a real issue and beneficial owner issues cannot be solved by client consents to disclosure."

He said becoming unwitting partners in a tax evasion scheme was a much more serious problem for banks and broker-dealers, and one which had got sections of the industry worrying.

"Banks' detailed due diligence, and [anti-money laundering and know your customer] checks should manage this risk," Delahunty said. "However, in the small number of cases where the corrupt or criminals have evaded due diligence, the police may apply to freeze the funds prior to civil recovery proceedings against the asset held by the bank."

Another issue may be enforcement resources, according to Ruck, and whether there is the ability or appetite to pursue them.

"The new data-sharing requirements and unexplained wealth orders seek to make it easier to identify the proceeds of crime, but are likely to provide for a lot of red herrings for prosecuting agencies to pursue," he said.

The laws propose enhancing the suspicious activity reports regime, providing additional powers to officers at the National Crime Agency to study transaction reports related to financial crime logged by banks. Extensions to the amount of time senior officers have to investigate are in the bill.

"One must question if the underresourced national crime authority can delay a transaction by up to six months to enable it to investigate or assess whether it will allow the transaction to progress," Ruck said. "Does this not automatically mean such deals or transactions will be canceled by default as the parties involved will not be able to delay for commercial reasons? Is this not providing a back door for the NCA to stop such transactions simply by delaying its response when parties are seeking consent to proceed?"

London has been entrenched in financial scandal since the crash of 2008, with fallout from the Panama Papers leak of 11 million files from Panamanian law firm Mossack Fonseca in April ongoing. The murky work of offshore accounting highlighted how the rich and powerful made use of anonymous shell companies to disguise asset ownership.

In response, the U.K. government made cleaning up the big financial services sector, known as the City, and bolstering law enforcement agency response to the threats from terrorist financing a major priority. The bill will also mirror many of the provisions so that they also apply for investigations into offenses under the Terrorism Act 2000.

"The Panama Papers and all the disclosures made it very clear that there is a sophisticated network of firms, banks, law firms, etc., spread globally, that are in most cases inadvertently involved in this," Greig said. "The money laundering part seems to me almost incidental to the terrorist financing section; the real driver of this is terrorist financing. This is where the political heat and security agenda and the banking agenda link up."

--Editing by Katherine Rautenberg and Catherine Sum.