December 2017

Consultation Paper on Proposed Legislative Amendments – Investigative & Supervisory Matters

National Anti-Money Laundering Committee (NAMLC)

INTRODUCTION AND BACKGROUND

1. This Consultation Paper (CP) is submitted for the attention of industry in order to seek their feedback on the Government's intention to update its Anti-Money Laundering/Anti-Terrorist Financing (AML/ATF) framework.

2. This Consultation Paper focusses on a number of issues to be addressed in upcoming legislative amendments to enhance investigative powers, rationalise offence provisions and address remaining gaps in AML/ATF legislation.

3. The Bermuda Government is committed to strengthening the AML/ATF framework to ensure compliance with the relevant international standards, viz the FATF's 2012 Recommendations and the 2013 Methodology. Further the Government recognises the importance of ensuring that competent authorities have appropriate tools and powers to effectively carry out their role as guardians of Bermuda's reputation.

4. Bermuda continues to prepare for the next Mutual Evaluation of its AML/ATF regime, which is due in 2018. The Assessors will examine Bermuda's regime as against the FATF's 2012 Recommendations (Revised Standards) and the 2013 Methodology. Significant work has been done on this regard, but there are some further legislative gaps to be addressed.

5. The purpose of this Consultation Paper is therefore to:
    - Advise the public of the proposed amendments to AML/ATF legislation to achieve the outcomes described below; and

    - Solicit comments from stakeholders on the proposed amendments for areas of potential impact and concern to them.

PROPOSED LEGISLATIVE AMENDMENTS

A. <u>Investigative & Other Powers and Criminal Offences</u>

Production Orders

6. It is proposed that investigators be given the power to apply to the court to obtain Production Orders to support investigations, where property has been seized/detained under Part VI of the Proceeds of Crime Act 1997 (POCA). At present Production Orders cannot be sought in such circumstances, with the result that in order to support the prosecution of the forfeiture proceedings the police have to open a criminal investigation in order to be able to justify the use of a

production order. The corresponding provision in the UK Proceeds of Crime Act [section 345] has been amended to allow production orders to be used to support a "detained cash investigation".

THE PROPOSED AMENDMENT: Amend section 37 of POCA to allow Production Orders to be sought in cash detentions under Part VI of POCA.

Restraint Orders

7. It is proposed that investigators and prosecutors should be allowed to seek a restraint order under POCA when a criminal investigation has commenced and there are grounds to believe that the suspect has benefitted from criminal conduct. At present the DPP is only permitted to apply for a restraint order when charges have been laid in a case, or at a point when such charges are imminent. In the case of complex and/or lengthy investigations where charges cannot be laid immediately, the suspect is often aware of the inquiry (due to arrest or other circumstances) and may have the opportunity to dissipate or conceal assets prior to being charged. The corresponding provision in the UK Proceeds of Crime Act [section 40(2)] allows restraint orders to be made when "*a criminal investigation has been started in England and Wales with regard to an offence, and there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct.*" The UK Courts have monitoring jurisdiction over the use of such orders in pre-charge situations, through the existence of a statutory safeguard, which is similar to the provision that already exists in section 27(5) of POCA (Bermuda).

THE PROPOSED AMENDMENT: Amend section 27 of POCA to allow restraint orders to be granted where criminal investigations have commenced but before a criminal charge is imminent, in order to prevent the dissipation of assets by the suspect.

Disclosure Orders

8. It is proposed that the provisions contained in the UK Proceeds of Crime Act sections 357 to 362 be adopted in Bermuda, to allow investigators to seek to obtain "disclosure orders" from the Court, to facilitate the investigations required for successful confiscation and civil recovery actions under Parts II and IIIA of POCA. Such Orders would not be available for criminal investigations, such as for a money laundering investigation.

9. At present in confiscation proceedings in Bermuda, POCA provides for disclosure by a defendant under section 14 (UK equivalent, section 18). Production orders

under section 37 of POCA (UK equivalent section 345) can also be sought where third parties are believed to hold relevant documents/information. In such circumstances, the difficulty presented by the use of Production orders is that one has to be sought separately for each person believed to hold the information. In addition, the Order is confined in effect to the specific document or information particularized in the Order. Thus as the investigation progresses, further orders have to be sought specifying any additional information required. In the UK, Disclosure Orders have broader application and have continuing effect and may authorize an appropriate officer to give written notice to any person whom he believes has relevant information, requiring him to (a) answer questions; (b) provide information; and/or (c) produce documents. Of course, these powers are subject to certain safeguards prescribed in the provisions.

THE PROPOSED AMENDMENT: Amend POCA to include provisions analogous to sections 357-362 of the UK Proceeds of Crime Act, to afford the police a valuable additional tool when pursuing confiscation investigations and supporting the Enforcement Authority in civil asset recovery proceedings under Part IIIA.

Property Detention Orders

10. It is proposed that an amendment should be made to allow the police to renew property detention orders under section 50 of POCA for periods of 6 months, instead of the current maximum of 3 months. The total maximum period for which any property can be detained under section 50 is 2 years, and no change is being proposed in respect of that period. However, at present the police is required to return to court every 3 months to reapply for a renewal of the detention order until the investigation to support the forfeiture application under section 51 is complete, subject to the 2 year maximum.

11. If the property in question is retained for the maximum of two years, which is unusual, the police would be required to make 8 separate applications for renewal of the detention order. This is administratively burdensome on the limited human resources of the Financial Crimes Unit, which is responsible for all proceeds of crime investigations, as well as confiscation and forfeiture investigations. In the UK, each renewal order lasts for up to 6 months, significantly reducing the administrative burden involved in managing the detention while the investigation is underway. If the renewal of the detention period is allowed to be extended for 6 months, the interests of the interested parties would not be prejudiced because:
    i. The court may release the cash at any time on the application of any person if satisfied that the conditions for detention are no longer met (section 50(5));

ii. The court is not obliged to grant detention for six months and could always grant a shorter period in an appropriate case; and
iii. No extension of the overall maximum (2 years) is proposed.

THE PROPOSED AMENDMENT: Amend section 50(3) of POCA to extend the period for which seized property may be authorized for continued detention, from 3 months to 6 months.

Money Laundering Offences

12. At present, the offence of prejudicing an investigation under section 42 of POCA is only committed where the prejudicial conduct occurs after a production order, warrant or monitoring order has been issued in a criminal investigation. However, this is an artificial line of demarcation, because an investigation will usually have commenced long before any such order or warrant is sought. For example, the preparation of an application for a production order, will entail a significant amount of investigative effort before the application can actually be filed in court. In contrast, the corresponding section of UK POCA (section 342) does not require a specific order or warrant to have been sought or obtained for this offence to be committed. That provision renders the prejudicing action an offence, if the offender knows or suspects that the specified investigation is being conducted or is about to be conducted. Adoption of similar wording as found in the provision in the UK would enhance the section 42 offence and render it more useful in efforts to combat the behaviour at which it is directed.

THE PROPOSED AMENDMENT: Amend section 42 of POCA to remove the requirement for a production order, monitoring order or warrant to have been issued in a criminal conduct or civil recovery investigation. The amendment would also make it clear that the offender knows, suspects or has reasonable grounds to suspect that a confiscation investigation, civil recovery investigation, or a money laundering investigation is being conducted or is about to be conducted.

13. Sections 43, 44 and 45 of POCA create the principal money laundering offences in Bermuda. They were based on provisions in place in two pieces of UK legislation, which were subsequently replaced by the UK Proceeds of Crime Act. In the 2015 Bermuda amendments, sections 43 and 45 of POCA were updated to reflect the newer provisions contained in sections 327 and 329 of the UK Proceeds of Crime Act. However, section 44 of POCA was not at that time substantively updated to reflect the corresponding provision contained in section 328 of the UK Proceeds of Crime Act.

14. In its current form, section 44 of POCA is cumbersome and is also inconsistent with sections 43 and 45, both of which have now adopted the concept of "criminal property" with a different mental element than that which applies in the current section 44. The UK's section 328 addresses the situation where a criminal defendant cannot be fixed with possession of the "criminal property", but he can be proved to have become concerned in an arrangement which he knew or suspected facilitated the acquisition, retention, use or control of the "criminal property".

THE PROPOSED AMENDMENT: Replace section 44 of POCA with provisions analogous to section 328 of the UK Proceeds of Crime Act, to ensure conceptual consistency between all three money laundering offences in POCA. Also editorial adjustments will be required in the headings of sections 43 – 45 to remove references to 'the proceeds of criminal conduct' and replace with the 'criminal property' concept.

Administrative Forfeiture

15. Consideration is being given to including in POCA, provisions enabling administrative forfeiture of seized or detained property in certain limited circumstances. At present, under section 51 of POCA, forfeiture of such seized property is only available through an application made to the Magistrates' Court. This applies even when the person from whom the property has been seized waives all entitlement to the property in question and no entitled third parties can be identified to make a claim.

16. In the UK, sections 297A – 297G of the UK Proceeds of Crime Act now allows for forfeiture of seized cash to occur without the order of a Court. If satisfied that the conditions for forfeiture are met, a senior police officer, Inspector or above, may issue a notice to the person from whom the cash was seized and anyone appearing to have an interest in the cash, notifying them that it will be forfeited if no objection is received within 30 days. If no objection is received, the cash is forfeited. If one is received the matter may be referred to the court for a contested forfeiture hearing. Even when forfeiture occurs via this route, the court retains a residual power to set it aside.

17. The UK approach to administrative forfeitures offers a convenient, streamlined process which would reduce the administrative burden upon BPS, DPP and indeed the Courts involved in preparing and deciding full forfeiture applications in cases which are not realistically going to be contested.

THE AMENDMENT BEING CONSIDERED: Insert in Part VI of POCA provisions analogous to section 297A – 297G as appropriate, to allow for administrative forfeitures by the

Police in certain limited circumstances, when it is clear that the owner of the seized property does not intend to contest the forfeiture of the property in question, and no third party has expressed intent to challenge it. All safeguards necessary to protect against the possibility of abuse of this power would need to be enshrined in these provisions.

B. Supervisory Matters

Compliance with Targeted Financial Sanctions

18. It is proposed that in order to enhance the effectiveness of the targeted financial sanctions regime, supervisory authorities should be given a responsibility to monitor relevant persons for compliance with their obligations under the international sanctions regime. At present the Governor is the Competent Authority under each of the Sanctions Orders listed in the Schedule to the International Sanctions Regulations 2013. However, the Orders in question do not speak to matters of compliance, nor grant the Governor any powers to undertake monitoring of obligated entities to ensure compliance. The proposed amendment would rectify this gap and allow supervisors to use existing powers to carry out monitoring as necessary.

THE PROPOSED AMENDMENT: Amend section 5 of the Proceeds of Crime (Anti-Money Laundering Anti-Terrorist Financing Supervision and Enforcement) Act 2008, to include an additional responsibility for supervisory authorities to monitor relevant persons for compliance with obligations under Bermuda's international sanctions regime.

Supervisory Cooperation/Coordination

19. It is proposed that a general provision should be included to empower all supervisory authorities to be able to coordinate or cooperate with each other in order to more effectively discharge their AML/ATF responsibilities. As the preventive measures contained in the AML/ATF regulations are similar for most relevant persons, there are areas in which supervisory authorities may benefit from cooperating/coordinating their activities for maximum benefit. Areas such as the provision of guidance, sectoral outreach, consistency of data call requirements and other matters are areas in which supervisory authorities may cooperate or coordinate their activities. The proposed amendment allows for these more generalised forms of coordination/cooperation to occur.

THE PROPOSED AMENDMENT: Amend section 3 of the Proceeds of Crime (Anti-Money Laundering Anti-Terrorist Financing Supervision and Enforcement) Act 2008, to

include a provision empowering supervisory authorities to cooperate with each other or coordinate their supervisory activities to enhance their effectiveness.

Cooperation between Competent Authorities

20. FATF requires the competent authorities within a country, who have varying responsibilities within the AML/ATF framework, to be able to cooperate with each other and share information to support the discharge of their responsibilities. At present there is no clear gateway for the Bermuda Monetary Authority to share information with the Registrar General, which is the agency responsible for oversight of the charities sector. The Charities sector has its own AML/ATF legislative framework and therefore is not subject to the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008. Accordingly, the Registrar General is not designated under the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 as a supervisory authority. Accordingly, the Registrar General is outside of the cooperation framework facilitated under the supervision and enforcement legislation. To address this issue, an amendment is proposed to allow the BMA and other supervisory authorities to share information with the Registrar General as needed.

THE PROPOSED AMENDMENT: Amend section 32(1) of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 to include the Registrar General in the list of authorities to which disclosure of information is permitted, on condition that it to enable or assist him to discharge his functions under the Charities legislation.

Fit and Proper Test

21. It is proposed that Compliance Officers appointed by casino operators and dealers in high value goods should also be subject to the fit and proper test. At present section 11A of the Proceeds of Crime (Anti-Money Laundering Anti-Terrorist Financing Supervision and Enforcement) Act 2008 specifies that directors, controllers, senior executives and reporting officers of the businesses and professions designated in Schedule 2 of that Act, are subject to the fit and proper test. The designation of compliance officers was made a requirement in 2016 in regulation 18A of the AML/ATF Regulations, and it was expected that they should also be fit and proper persons. This amendment will therefore correct this oversight.

THE PROPOSED AMENDMENT: Amend section 11A(1) of the Proceeds of Crime (Anti-Money Laundering Anti-Terrorist Financing Supervision and Enforcement) Act 2008, to include a new category that must be subject to the fit and proper test, by specifying compliance officers who are designated in accordance with regulation

18A of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008.

C. Beneficial Ownership and Basic Information

CDD on Trusts

22. It is proposed that the current 25% threshold allowed for conducting customer due diligence (CDD) on trusts should be removed, so that CDD is conducted on any individual who is entitled to a specified interest in the capital of the trust property. At present in the definition of 'beneficial owner' which is contained in regulation 3 of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, there is a 25% threshold attached to the interest in the trust property. This is problematic, because the FATF customer due diligence requirements do not allow for such a threshold.

23. Technical Compliance Criterion 10.11 in the FATF Methodology requires financial institutions to "*identify and take reasonable measures to verify the identity of beneficial owners through the following information:*
    (a) for trusts, the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries36, and any other natural person exercising ultimate effective control over the trust (including through a chain of control/ownership);
    (b) *for other types of legal arrangements, the identity of persons in equivalent or similar positions*."

24. The requirement in the Methodology does not permit the use of thresholds in relation to determining the beneficial owners of trusts for the purpose of conducting CDD. This is unlike the situation in relation to the determination of what constitutes 'controlling ownership interest' in the case of legal persons, in which case a threshold approach is permitted. The proposed amendment will therefore bring this provision in line with the FATF Standards.

THE PROPOSED AMENDMENT: Amend regulation 3(3)(a) of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, to remove from the definition of "beneficial owner" in relation to trusts the threshold of "25%".

Protector of the Trust

25. It is proposed to incorporate in the obligations currently imposed on exempted companies and exempted trustees under section 13B of the Trustee Act 1975, an additional obligation to keep records on the Protector of the Trust and of any other natural person exercising control over the trust.

26. At present section 13B(1) of the Trustee Act imposes an obligation on exempted companies and exempted trustees to retain identification information in relation to the trustees, settlors and beneficiaries for the trusts for which they act as trustee or trust administrator. This requirement does not fully meet Technical Compliance Criterion 25.1(a) of the FATF Methodology, in which the record-keeping obligation specifies protectors of the trust (if any) as well as any other individuals exercising ultimate effective control over the trust.

THE PROPOSED AMENDMENT: Amend section 13B(1) of the Trustee Act to include 'protectors' and 'any other natural person exercising ultimate effective control over the trust' among the persons in relation to whom adequate and accurate identification information must be retained by exempted companies and exempted trustees.

Service Providers to Trusts

27. Criteria 25.1(b) and 25.2 in the FATF's Methodology require trustees to hold basic information on other regulated agents of and service providers to the trust, to include – investment advisors or managers, accountants and tax advisors. This information is required to be kept up-to-date and be accurate. At present there are no provisions in Bermuda trust legislation, specifically requiring this.

THE PROPOSED AMENDMENT: Amend the Trustee Act to include a requirement for trustees to keep up-to-date and accurate basic information on the regulated agents and service providers who provide services to the trust. Investment advisors and managers, accountants and tax advisors should be specified among the persons whose information should be kept by the trustee. A similar provision might also be included in the Trusts (Regulation of Trust Business) Act 2001.

Informing of Trustee Status

28. Criterion 25.3 in the FATF's Methodology requires countries to take measures to ensure that trustees disclose their status to financial institutions and Designated Non-Financial Businesses and Professions (DNFBP), when forming business relationships or carrying out an occasional transaction above the threshold. At present there is no clear provision in Bermuda trust legislation that obligates Trustees to disclose the fact that they are trustees. However, by implication the CDD requirements in the AML/ATF regulations mandate relevant persons to obtain beneficial ownership information and certain specified information from legal persons and legal arrangements. While this obligation on relevant persons would consequentially impose obligations on trustees to provide the information required

by regulated institutions, consideration is being given to imposing an explicit obligation on trustees.

THE AMENDMENT BEING CONSIDERED: A provision could be included in the Trustee Act, to require non-professional trustees and on exempted companies and exempted trustees to identify themselves as trustees when doing business on behalf of the trust with financial institutions and other regulated entities. A similar provision could also be included in the Trusts (Regulation of Trust Business) Act 2001 in relation to licensed trustees.

D. Customer Due Diligence (CDD) & Record-Keeping

Regulating Powers for Legal Persons/Arrangements

29. Criterion 10.9(b) of the FATF Methodology requires countries to ensure that financial institutions vet all customers; and as part of that process for on boarding, the financial institution should obtain specific information about legal persons, including the "documents that regulate and bind a legal person or arrangement". In the FATF Standards, such documents in the case of legal persons are considered to be the memorandum and articles of association. In the last round of amendments to the AML/ATF Regulations, the information to be collected was transferred from the Guidance notes to the regulations, but a specific requirement relating to criterion 10.9(b) was not included.

THE PROPOSED AMENDMENT: Amend regulation 6(1B) of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, to include in the customer due diligence requirements for legal persons and legal arrangements the requirement to collect the documents that set out the legal powers that regulate and bind the legal person or arrangement. In the Bermudian context, for legal persons this would include the memorandum of association and the bye-laws and in the case of trusts, this would include the trust deed.

Inability to Complete CDD

30. Criterion 10.19(a) of FATF's Methodology requires that where a financial institution (FI) is unable to comply with the CDD requirements in respect of a customer, the FI should be required not to open the account with that customer or terminate the business relationship. This requirement is specified in regulation 9 of the AML/ATF Regulations. However, regulation 9(1)(a) conflates the requirement 'not to open an account' with the requirement to 'not perform the transaction' and narrowly limits it to a 'bank account'. As there are other types of accounts that FIs can

establish with customers, and as not performing the transaction can be a separate thing from opening an account, paragraph (a) is too restrictive. The amendment would therefore remove any reference to 'bank accounts' and make it clear that in the circumstances described in regulation 9(1), the relevant person would be mandated 'not to open the account' or 'perform a transaction' for the customer in question.

THE PROPOSED AMENDMENT: Amend regulation 9(1)(a) of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, to specify that when a relevant person is unable to apply CDD measures in accordance with the Regulations, the relevant person 'shall not open an account or carry out a transaction for the customer'.

Record-Keeping

31. Criteria 11.1 and 11.2 in the FATF's Methodology stipulate the following in relation to record keeping:

> *11.1 Financial institutions should be required to maintain all necessary records on transactions, both domestic and international, for at least five years following completion of the transaction.*
>
> *11.2 Financial institutions should be required to keep all records obtained through CDD measures, account files and business correspondence, and results of any analysis undertaken, for at least five years following the termination of the business relationship or after the date of the occasional transaction.*

The above requirements establish two separate trigger points for record-keeping. In the case of transaction records, the trigger for the start of the 5 year record-keeping obligation is the date of completion of the transaction. However, in the case of CDD records, account files, correspondence and records of analysis the trigger for the end of the record-keeping obligations is 5 years following the termination of the business relationship or the date of the occasional transaction.

32. Regulation 15 of the AML/ATF Regulations set out the record-keeping requirements, but does not clearly make the distinction between the two different classes of records to be kept. Therefore it is not clear in regulation 15 that all transaction records must be kept for at least 5 years, starting on the date the transaction is completed. This should apply, whether or not there is a business relationship with the customer in question. Also, in the case of CDD and other records referred to in 11.2, it is not clear that such records should be kept throughout the business relationship and for a further 5 years after the relationship is terminated.

THE PROPOSED AMENDMENT: Amend regulation 15 of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, to clearly specify that

- **transaction records should be kept for five years following the completion of the transaction in question; and**
- **CDD records, account files, correspondence and the results of analysis undertaken in relation to a customer should be kept throughout the business relationship with that customer and for a period of five years after the termination of that relationship.**

CONCLUSION & NEXT STEPS

33. The relevant Government agencies are in the process of seeking approval for the necessary amendments to the AML/ATF legislative framework. It is anticipated that drafting instructions will thereafter be issued to facilitate drafting and finalisation of the Bill for tabling in Parliament in early February.

34. Accordingly, it is imperative that the consultative process be completed within a timely manner to enable the Bill to be drafted, taking into account any feedback received from industry, finalised, approved by Cabinet, tabled and passed in Parliament during the sitting of Parliament in February 2018.

35. NAMLC therefore seeks the cooperation of industry to review this Consultation Paper and should you have any preliminary observations concerning the proposed legislation you may provide written comments and feedback **no later than January 8, 2018** to either of the addresses below:

    i. Via mail: Office of the National Anti-Money Laundering Committee
    4th Floor, Global House
    43 Church Street
    Hamilton, HM 12

    ii. Via e-mail: info-NAMLC@gov.bm