

JULY 2015

Consultation Paper on Draft Bill

DRAFT PROCEEDS OF CRIME
AMENDMENT ACT 2015

National Anti-Money Laundering Committee
(NAMLC)

INTRODUCTION

1. This Paper is submitted for the attention of industry, together with a draft Bill entitled **Proceeds of Crime Amendment Act 2015**. Notwithstanding the title, this Bill seeks to amend the following legislation:
 - a. the Proceeds of Crime Act 1997;
 - b. the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008;
 - c. the Financial Intelligence Agency Act 2007;
 - d. the Criminal Justice (International Cooperation) (Bermuda) Act 1994;
 - e. the Anti-Terrorism (Financial and Other Measures) Act 2004;
 - f. the Companies Act 1981;
 - g. the Revenue Act 1898; and
 - h. the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008.
2. As noted in the 2014 Consultation Paper¹, amendments to the above legislation are required to address existing gaps in Bermuda's AML/ATF² legislative framework, in light of the 2012 revision to the Financial Action Task Force's (FATF) 40 Recommendations. These amendments are intended to assist Bermuda in more fully meeting the technical compliance requirements of the revised FATF standards, when its regime is subjected to the Fourth Round mutual evaluation process.
3. The Draft Bill also contains a number of amendments that were not included in the 2014 Consultation Paper, as they pertained to streamlining certain prosecutorial procedures, as well as refining some administrative mechanisms for some NAMLC agencies. For instance, there are amendments to the confiscation provisions in the Proceeds of Crime Act that will simplify confiscation proceedings through the consolidation of the existing dual regime, which is artificially based on a distinction between convictions for drug offences and convictions for other serious crimes. In addition, the amendments seek to strengthen the Court's powers to enforce confiscation orders, thus improving Bermuda's ability to demonstrate effectiveness in stripping criminals of the proceeds of their criminal conduct.
4. Also, it is to be noted that the Draft Bill has a few editorial corrections to be made and these will be addressed before the Bill is finalised for Cabinet approval.

¹ Consultation Paper on Proposed Amendments to Anti-Money Laundering And Anti-Terrorist Financing Legislation, issued September 2014

² Anti-Money Laundering/Anti-Terrorist Financing

NAMLC's RESPONSE TO INDUSTRY COMMENTS

5. In addition to the draft Bill, this paper is also accompanied by a document setting out the considered responses of NAMLC to the comments submitted by various industry groups and individuals. Although no significant changes were ultimately made to the policy positions that were commented on, the responses provided by NAMLC adequately addresses the reasons for maintaining those positions in light of the international standards and best practice requirements.

KEY PROVISIONS

Amendments to the Proceeds of Crime Act (POCA)

6. Sections 9 and 10 of POCA are being repealed and replaced with one provision that establishes a single procedure for confiscation arising from convictions for any eligible offence. Consequently, amendments are also required to be made to sections 12, 13, 15, 17, 18, 19 and 23. In addition, a new section 26A is being added to facilitate enforcement of confiscation orders against delinquent defendants, by enabling them to be brought before the Court through the means of a warrant issued for that purpose. The section will allow the Court a range of powers once such a defendant is brought before it on warrant, with a view to having the Order enforced.
7. Amendments are also being made to the money laundering offences provisions contained in sections 43, 44 and 45, with specific amendments being made to the consent provisions which require the FIA's consent to be given before certain transactions can be undertaken. The amendments will incorporate time limits for giving of consent by the FIA.
8. Other provisions include amendments to the members of the National Anti-Money Laundering Committee; and the specific prohibition of the importation and exportation of the proceeds of criminal conduct.

Amendments to the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 (SEA Act)

9. The main amendment to the SEA Act is the inclusion of the Superintendent of Real Estate within the definition of 'competent authority' in section 2, as part of the process of bringing the real estate sector into the scope of the AML/ATF framework.

Amendments to the Financial Intelligence Agency Act 2007 (FIA Act)

10. A number of amendments are made to the FIA Act as a means of strengthening its operational independence; making clear its obligations in relation to receiving and addressing requests from foreign financial intelligence authorities; as well as incorporating a requirement for secure treatment of all information received and dealt with by the FIA.
11. Additionally, section 18 is amended to include a number of additional competent authorities within the list of entities to which the FIA may disclose information.

Amendments to the Criminal Justice (International Cooperation)(Bermuda) Act 1994

12. The main amendment to this Act is the inclusion of a new section 11D prohibiting disclosure of a request for assistance from a requesting state, without the permission of that state.
13. An amendment to section 8 also protects persons, who are transferred from another state to Bermuda under the provisions of that Act, from being prosecuted or detained in respect of offences which occurred prior to their transfer to Bermuda.

Amendment to the Anti-Terrorism (Financial and Other Measures) Act 2004

14. This amendment includes within the Minister's regulation-making powers, the ability to make regulations for the purpose of detecting and preventing the financing of proliferation of weapons of mass destruction.

Amendment to the Companies Act

15. This Act is amended to incorporate a requirement for companies to annually file with the Registrar of Companies, and keep up-to-date, a current listing of the directors of the company. The new provision specifies the particulars required to be filed and imposes an obligation on the Registrar to maintain a publicly available register of directors.

Amendment to the Revenue Act

16. This amendment establishes a penalty for the making, submission or use of a false document or statement in connection with a customs or excise matter.

Amendments to the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008

17. A number of amendments are made to these regulations, as previously described in detail in the 2014 Consultation Paper. These include the formal requirement in the Regulations for the appointment of Compliance and Reporting Officers (regulations 17 and 18A).

18. Other key amendments to the regulations include:

- a. Inclusion of the settlors of trusts within the meaning of “beneficial owner” vis-à-vis trusts;
- b. Strengthening of the definition of “customer due diligence (CDD) measures” in regulation 5 and the inclusion of requirements for CDD in relation specifically to trusts and life insurance in policies in regulation 6;
- c. Strengthening of the timing of verification requirements in regulation 8;
- d. Clarification and strengthening of the enhanced due diligence (EDD) requirements in regulation 11, by including the reference to risk designation made by FATF;
- e. Expanding the definition of “politically exposed person” (PEP) to address PEPs in or from Bermuda;
- f. Strengthening the requirements in regulation 12 in relation to branches and subsidiaries;
- g. Including a new regulation 14A dealing with the outsourcing of the AML/ATF compliance function by regulated entities, with related/consequential amendment to regulation 15 in respect of record-keeping during the outsourcing relationship;
- h. Requirement in a new regulation 17A for regulated entities to evaluate the robustness of their AML/ATF framework by means of an independent audit function;
- i. Strengthening of the wire transfer regulations to require the transfer of complete information on both payer and payee, as well as the verification of payer information by the payer’s PSP before transferring the funds and verification of the payee information by the Payee’s PSP; and
- j. Amendment of the Schedule to support the expansion of the definition of PEPs in or from Bermuda.

CONCLUSION & NEXT STEPS

19. This consultative process followed by the anticipated passage in Parliament of the finalized Bill, together represent the first step in achieving technical compliance with the revised FATF standards. However, as the achievement of technical compliance solely is no longer the sine qua non of a successful AML/ATF regime, the implementation of the updated legislative provisions must become an immediate priority for all NAMLC agencies and regulated institutions. The effectiveness of the regime is greatly dependent on how well the technical components such as the AML/ATF laws, systems and structures operate to combat and prevent money laundering and terrorist financing in Bermuda and as part of the wider international effort.
20. Accordingly, it is imperative that the consultative process be completed within a timely manner to enable the Bill to be reviewed in light of comments received, finalised, approved by Cabinet, and tabled and passed in Parliament during the upcoming session of Parliament. Due to drafting conflicts and resource challenges the finalisation and tabling of this Bill could not be achieved during the May to July 2015 session of Parliament, but every effort is now being made to have the bill ready for when Parliament reopens next.
21. NAMLC therefore seeks the cooperation of industry to review the draft Bill and provide written comments and feedback **no later than August 11, 2015** to either of the addresses below:
 - i. By mail: Office of the National Anti-Money Laundering Committee
4th Floor, Global House
43 Church Street
Hamilton, HM 12
 - ii. By e-mail: info-NAMLC@gov.bm