

APRIL 2017

Consultation Paper on
Proposed Legislative
Amendments –
Anti-Money Laundering
Legislation

National Anti-Money Laundering Committee
(NAMLC)

INTRODUCTION AND BACKGROUND

Proposed Amendments to the Anti-Money Laundering and Anti-Terrorist Financing Framework

1. This Consultation Paper (CP) is submitted for the attention of industry and other affected persons to seek their feedback on Government proposals to further strengthen Bermuda's Anti-Money Laundering/Anti-Terrorist Financing (AML/ATF) Framework. The Bermuda Government is committed to ensuring that Bermuda has a strong and robust AML/ATF framework that is compliant with the relevant international standards, namely the Financial Action Task Force (FATF) 2012 Recommendations (the Recommendations) and the 2013 Methodology (the Methodology). These legislative proposals are a part of the ongoing process for Bermuda to more fully comply with the spirit and intent of the global standards.
2. It should be noted that 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 against the requirements in both the Recommendations and the Methodology. The outcome of this evaluation is key to the protection of Bermuda's standing as a quality international financial centre, further reinforcing the need to appropriately comply with the standards.
3. In a continuing effort to tighten and strengthen the customer due diligence (CDD) requirements in order to address existing gaps and to enhance the ability of institutions to know their customers, amendments are proposed to address issues relating to CDD on legal persons and third party depositors, as well as in relation to tipping-of. The proposed amendments will also seek to cover due diligence requirements for trusts managed by non-professional trustees.
4. Further, the framework should be enhanced to provide a gateway for the exchange of domestically available information between the supervisors and law enforcement authorities, in order for there to be effective national co-operation and co-ordination consistent with FATF Technical Compliance criterion 2.3.
5. Additionally, amendments are proposed to seek to enhance the oversight powers of the Financial Intelligence Agency (FIA) in relation to dealers in high value goods, to ensure that they are able to take appropriate steps to determine whether persons or entities are operating in breach of the AML/ATF laws and thus be able to act accordingly.

6. Government therefore intends to amend the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 (POC Regulations), the Trustee Act 1975, the Bermuda Monetary Authority Act 1969 and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 (SEA), to strengthen Bermuda's AML/ATF regime.
7. The purpose of this Consultation Paper is therefore to:
 - Advise the public of the proposed amendments to the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, the Trustee Act 1975, the Bermuda Monetary Authority Act 1969 and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008; and
 - Solicit comments from stakeholders on this proposed amendment for areas of potential impact and concern to them.

PROPOSED LEGISLATIVE AMENDMENTS

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

8. Technical Compliance Criterion 10.4 of the FATF's Methodology requires that financial institutions be required to verify that any person purporting to act on behalf of a customer is authorised and that the financial institutions verify the identity of such persons. The proposed amendment will be directed specifically at banks, in relation to identification and verification of persons who deposit funds into accounts held by others, as there is currently no such legislated requirement in place.
9. Therefore, the **proposed amendment to regulation 5** of the POC Regulations is to make specific provision for banks to require identification and verification of depositors other than the account holder.
10. The Standards (Technical Compliance Criterion 10.9 of the FATF's Methodology) also require that where customers are legal persons or legal arrangements, financial institutions should identify the customer and verify its identity through the following information: (a) name, legal form and proof of existence; (b) the powers that regulate and bind the legal person or arrangement, as well as the names of the relevant persons having a senior management position in the legal person or arrangement; and (c) the address of the registered office and, if different, the principal place of business. This is currently set out in paragraphs

4.84 and 4.109 of the BMA's AML/ATF Guidance Notes, but the requirement is not enshrined in law. All the Technical Compliance Criteria related to the FATF's Recommendation 10 are required to be embedded in law.

11. Therefore, the **proposed amendment to regulation 6** of the POC Regulations is to include an additional regulation 6 (1B) to stipulate that the CDD requirements for legal persons or legal arrangements should include:

- i. Full name and trade names;
- ii. Date and place of incorporation, registration or establishment;
- iii. Registered office address and, if different, mailing address;
- iv. Address of principal place of business;
- v. Whether and where listed on an exchange;
- vi. Official identification number (where applicable);
- vii. Name of regulator (where applicable);
- viii. Legal form, nature and purpose (e.g., discretionary, testamentary, bare);
and
- ix. Control and ownership.

12. Technical Compliance Criterion 10.20 of the FATF's Methodology states that if financial institutions (FIs) form a suspicion of money laundering or terrorist financing, and they reasonably believe that performing the CDD process will tip-off the customer, they should be permitted not to pursue the CDD process and instead should be required to file a suspicious activity report (SAR).

13. Regulation 6(5) and 6(6) of the POC Regulations was intended to incorporate this requirement by directing FIs and designated non-professional businesses and professions (DNFBPs) not to conduct CDD if doing so could result in tipping-off to any person information that is likely to prejudice an investigation or proposed investigation. However the language in regulation 6(5) does not reference 'a suspicion that transactions relate to money laundering or terrorist financing' as is required in Technical Compliance Criterion 10.20. In order to address this technical issue, the proposed amendment seeks to fully capture in Regulations 6(5) and (6) the requirements of Technical Compliance Criterion 10.20.

14. Therefore, the **proposed amendment to Regulation 6(5) and 6(6)** is to make it clear that a SAR should be filed with the FIA and CDD should not be performed where a relevant person forms a suspicion about money laundering or terrorist financing and they reasonably believe that performing customer due diligence measures required under Regulation 6 will tip-off the customer or potential customer.

Amendment to the Trustee Act 1975

15. Technical Compliance Criterion 25.1 of the FATF Methodology also stipulates that countries should require: (a) trustees of any express trust governed under their law to obtain and hold adequate, accurate, and current information on the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust; (b) trustees of any trust governed under their law to hold basic information on other regulated agents of, and service providers to, the trust, including investment advisors or managers, accountants, and tax advisors; and (c) professional trustees to maintain this information for at least five years after their involvement with the trust ceases. This FATF requirement applies to all trusts and currently there is a gap in the Bermuda framework as the law fails to apply the relevant requirements to trusts managed by non-regulated trustees. This amendment aims to remedy this by enshrining in the Trustee Act 1975 the common law duty to know the settlor, protector and beneficiaries in legislation, and appropriately expanding the requirements to meet the FATF standards.
16. Therefore, **the proposed amendment to the Trustee Act 1975** is to provide a statutory duty for non-professional trustees to know and document their knowledge of the settlor, protector and beneficiaries. There should also be a corresponding penalty where a non-professional trustee does not comply.

Amendment to the Bermuda Monetary Authority Act 1969

17. Technical Compliance Criterion 2.3 of FATF's Methodology requires that mechanisms should be in place to enable policy makers, the Financial Intelligence Unit, law enforcement authorities, supervisors and other relevant competent authorities to co-operate, and where appropriate, co-ordinate domestically with each other concerning the development and implementation of AML/CFT policies and activities. These mechanisms should apply at both the policymaking and operational levels. At present the Bermuda Monetary Authority Act 1969 (BMA Act) does not expressly provide a gateway for the Bermuda Monetary Authority (the Authority) to share information or engage in other forms of co-operation with the Bermuda Police Service. Strengthening the legislative framework to provide a gateway for the Authority to cooperate with the Bermuda Police Service in various ways, will close this gap in the framework.

18. Therefore, **the proposed amendment is to the Bermuda Monetary Authority Act 1969** to expressly give the Bermuda Monetary Authority the power to co-operate with the Bermuda Police Service.

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

19. Section 9 of the SEA mandates that no regulated non-financial business or profession “shall carry on business unless the person or entity has applied to the competent authority that has supervisory duties over it and has been included in the register.” Dealers in High Value Goods (HVDs) that accept cash payments of at least \$7,500 have been designated by the Minister of Legal Affairs as regulated non-financial businesses that are subject to supervision by the FIA, to ensure compliance with the POC Regulations. Further, HVDs have been defined in section 2(1) of SEA as jewellery dealers; car, boat and motorcycle dealers; precious metal and stone dealers; antique dealers and auctioneers.

20. In accordance with section 9 of SEA, steps have already been taken by the FIA to commence registration of HVDs who meet the statutory requirement for registration; and to provide the guidance required by the sector to be in compliance with AML/ATF laws.

21. Although the FIA has powers under SEA in relation to access to information in relation to HVDs, it has been determined that it is necessary to specify in the Act that the FIA can require any HVD to provide information on whether they will or will not accept cash of \$7500 or above. This will enhance the effectiveness of the regime to allow for timely determination of whether a business needs to be registered and the appropriateness of their policies and procedures.

22. Therefore, **the proposed amendment is to section 18A of SEA** to stipulate that the powers provided in Part 3, Chapter 3 may be exercised by the competent authority to enable them to establish whether a non-financial business or profession specified in Schedule 2 is carrying on business contrary to section 9.

CONCLUSION & NEXT STEPS

23. As noted above, these proposed legislative amendments are consistent with Bermuda’s steadfast commitment to develop and implement a framework in place to effectively detect and prevent money laundering. The Bermuda

Government also remains committed to compliance with the global standards to combat money laundering, terrorist financing and the financing of proliferation, and intends to continue to build upon Bermuda's stellar reputation as a well-regulated jurisdiction, providing a positive and secure environment to conduct quality business.

24. As the 2018 evaluation requires Bermuda to demonstrate effective implementation of its AML/ATF regime, it is important to have this matter progressed in a timely manner. Therefore, it is anticipated that drafting instructions will be issued in the coming weeks. Taking into account input provided during this consultative process, the finalised Bill will be tabled in Parliament as early as possible in the next session which commences in May.

25. NAMLC therefore seeks your cooperation of to review this Consultation Paper and provide feedback in writing **no later than 4 May, 2017** 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