

FEBRUARY 2017

Consultation Paper on
Proposed Legislative
Amendments –
Foreign Tax Crimes

National Anti-Money Laundering Committee
(NAMLC)

INTRODUCTION AND BACKGROUND

Proposed Amendment to Money Laundering Predicate

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 by expanding the predicates of money laundering to include foreign tax crimes. This is part of Bermuda's continuing efforts to more fully comply with the spirit and intent of the Financial Action Task Force's (FATF) global standards. This Consultation Paper is therefore focussed on this narrow issue.
2. 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. The Bermuda Government is committed to strengthening the AML/ATF framework to ensure compliance with the revised international standards.
3. Currently a gap exists in Bermuda's framework in relation to the manner in which it incorporates tax crimes into the predicates for money laundering. Accordingly, the predicate offences in Bermuda do not capture the range of tax crimes that are intended by FATF.
4. As noted in the 2013 Consultation Paper¹, expanding the scope of Relevant Offences to include tax offences was identified as one of the further amendments that were necessary for Bermuda to make, in order to ensure its AML/ATF regime satisfies the FATF's revised requirements. This outstanding issue is now being addressed.
5. The FATF standards require jurisdictions to criminalise money laundering. FATF also requires that countries should ensure that in their criminal framework, the offences that are specified as giving rise to money laundering (the predicates) should include the widest range of offences, including tax crimes, and countries should extend the predicates to equivalent conduct that occurs in another country.
6. In recent times there has been heightened global focus on taxation and tax transparency issues, which will have an impact on the examination of countries' AML/ATF regimes against the FATF standards. Thus, it is expected that Bermuda's ability to investigate domestic money laundering (ML), resulting from the proceeds

¹ Consultation Paper on Proposed Amendments to the Anti-Money Laundering and Anti-Terrorist Financing Legislation, issued May 2013

of foreign tax crimes, will be an area subjected to close inspection during the 2018 evaluation.

7. Whilst the offence of criminal tax evasion under the Taxes Management Act 1976 is currently included as a predicate offence to ML, this offence is constrained by the narrow tax categories referenced in section 2 of that Act; and thus excludes income/profit-based taxes that represent the bulk of taxation in the vast majority countries/jurisdictions outside of Bermuda. The absence of income/profit-based tax offences as predicates of ML in Bermuda, will be perceived by an assessor as a significant gap in Bermuda's money laundering regime, as they will be of the view that the most common forms of tax-based money laundering, the proceeds from which are often believed to be diverted into offshore international financial centres, are not being captured in the current framework.
8. One possible implication of the current scope of ML predicates in Bermuda is that tax-based money laundering that commences in another country and continues in Bermuda, would cease to be characterised as money laundering the moment the laundered funds enter Bermuda's financial system. This could therefore give the false impression that Bermuda is an attractive destination for the laundered proceeds of foreign tax crimes.
9. Government therefore intends to amend the Proceeds of Crime Act 1997 (POCA) to include foreign tax crimes as a predicate for money laundering in Bermuda, thus ensuring that tax crimes are adequately captured as a predicate offences pursuant to the FATF requirements. This is consistent with Bermuda's steadfast commitment to have procedures in place to detect and prevent money laundering. The Bermuda Government 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.
10. The purpose of this Consultation Paper is therefore to:
 - Advise the public of the proposed amendment to the Proceeds of Crime Act 1997, for the purpose of expanding the definition of "relevant offence", in order to add a new category of criminal conduct, which occurs overseas, that would amount to criminal tax evasion; and
 - Solicit comments from stakeholders on this proposed amendment for areas of potential impact and concern to them.

PROPOSED LEGISLATIVE AMENDMENT

11. It is proposed that the definition of 'relevant offence', contained in section 2 of POCA, be amended to include criminal conduct which would constitute an offence of criminal tax evasion pursuant to section 37(2) of the Taxes Management Act 1976, if it had occurred in Bermuda, while, for these purposes only, dis-applying the limitation on the categories of tax that is stipulated in section 2 of that Act.
12. The proposed amendment will include as a predicate for money laundering in Bermuda, foreign crimes that are related to income/profit based taxes that are lawfully imposed in a foreign jurisdiction. The amendment will allow Bermudian reporting entities to file suspicious activity reports relating to suspected money laundering in Bermuda that is derived from foreign tax crimes involving income/profit based taxes. Further, it will authorise Bermudian authorities to take appropriate action to pursue, or facilitate the pursuit of, money laundering enquiries arising from such reports or from other intelligence in respect of tax-based money laundering.
13. To be clear, the proposed amendment to the predicate for money laundering does not change the scope of tax crimes in Bermuda and will not require reporting entities to investigate whether customers or clients have committed a tax crime abroad.
14. The proposed amendment does however broaden the scope of proceeds-generating criminal conduct that will underpin the money laundering offence in Bermuda, to ensure that, consistent with our approach to other foreign crimes, it will be unacceptable for Bermuda's financial system to be misused as a conduit by foreign tax criminals to launder their proceeds of crime.

KEY PROVISION

Amendment to the Proceeds of Crime Act 1997 (POCA)

15. The proposed amendment is to section 2 of POCA, to include an additional paragraph (c) in the definition of "relevant offence". The suggested wording is:

"(c) any criminal act or omission in relation to any tax lawfully established in a jurisdiction outside Bermuda which, notwithstanding section 2 of the Taxes Management Act 1976, would have constituted an offence contrary to section 37(2) of that Act, had it occurred in Bermuda."

CONCLUSION & NEXT STEPS

16. The relevant Government agencies are in the process of drafting instructions to make the necessary amendments to the AML/ATF legislative framework. It is anticipated that drafting instructions will be issued in the coming weeks and following this consultative process the finalised Bill will be tabled in Parliament. As the 2018 evaluation requires Bermuda to demonstrate effective implementation of its AML/ATF regime, it is important to have this matter finalised expeditiously.
17. 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 this current session of Parliament which ends in March.
18. 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 February 17, 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