



**The National Anti-Money Laundering Committee
and the
Bermuda Monetary Authority**

CONSULTATION PAPER

**Proposed Legislative Amendments - Enforcement
and Supervisory Matters**

FEBRUARY 2018

INTRODUCTION AND BACKGROUND

1. This Consultation Paper is submitted by the Bermuda Monetary Authority (Authority) on behalf of the National Anti-Money Laundering Committee (NAMLC) for the attention of Bermuda's financial services industry in order to seek their feedback on the proposed update of the Anti-Money Laundering/Anti-Terrorist Financing (AML/ATF) framework by making certain amendments to the Proceeds of Crime (Anti-Money Laundering & Anti-Terrorist Financing Supervision & Enforcement) Act 2008 (the Act).
2. This Consultation Paper focusses on a number of issues to be addressed in upcoming legislative amendments to rationalise enforcement provisions.
3. Bermuda's AML/ATF regime will be assessed in 2018 against the Financial Action Task Force's (FATF) 2012 Recommendations (Revised Standards) and the 2013 FATF Methodology. The Bermuda Government is committed to strengthening the AML/ATF framework to ensure compliance with the relevant international standards, and significant work has been done on this regard. As Bermuda continues to prepare for the assessment, 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; consequently, there are some further legislative gaps that need to be addressed.
4. The purpose of this Consultation Paper is therefore to:
 - Advise the public of the proposed amendments to the 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
5. 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 March 26, 2018 to either of the addresses below:
 - i. Via mail:
Bermuda Monetary Authority
43 Victoria Street
Hamilton, HM 12
 - ii. Via e-mail: Policy@ bma.bm

PROPOSED LEGISLATIVE AMENDMENTS

A. Enforcement Powers

5. It is proposed that the suite of enforcement powers provided for in the Regulatory Acts¹ relevant to each sector of the financial services industry in Bermuda be included in the Act. The only powers currently available for a breach of AML/ATF requirements under the Act are the imposition of a civil penalty on a licensed AML/ATF regulated financial institution, or the cancellation of the registration of a non-licensed AML/ATF regulated financial institution. At the time of enactment, it was considered that these powers in the Act represented the appropriate regulatory response for a breach of AML/ATF requirements. However, developments in international standards and the heightened concerns about effective AML/ATF regulation now require that these powers be re-visited and augmented.
6. The available powers under the Act need to be contrasted with the Regulatory Acts, which contain a set of additional enforcement options including the power to impose directions; restrictions and conditions; impose prohibition orders against individual directors and officers; object to controllers; winding up; public censure; injunctions; and referral to the police.
7. A wider range of powers is required under the Act to assign more graded and dissuasive penalties tailored to the circumstances of each case. One of the primary drivers for the proposed amendments is the international expectation in the AML/ATF area. Increasingly the quality and standards of a jurisdiction are being evaluated by reference to the powers available to the regulator to manage misconduct and enforce regulatory standards. In accordance with international standards, and FATF Recommendations, a financial regulator should be able to apply a wide range of supervisory and enforcement measures designed to affect changes in behaviour and to protect against the risk of ML/TF. The range of such measures must be punitive as well as remedial, to compel financial institutions to take action to prevent future compliance failures and to promote future complaint behaviour. As a minimum, these should include withdrawal of the capacity to be a fit and proper manager, imposition of temporary limitations to business activities, imposition of a restriction or cancellation of a licence or registration for the most egregious misconduct, as well as referral to law enforcement for suspected criminal violation of AML/ATF preventative measures.
8. Currently, there is a gateway in the Regulatory Acts which allows, in certain circumstances, for the full range of enforcement powers to be used where there has been a breach of AML/ATF requirements. Licensed institutions are obligated to meet the Minimum Criteria for Licencing, which includes a requirement to conduct business in a prudent manner. In determining whether a licenced or registered person is conducting business in a prudent manner, the Authority may take into account any failure by that person to comply with the provisions of any law pertaining to AML/ATF, including the Proceeds of Crime Act 1997, the Anti-Terrorism (Financial & Other Measures) Act 2004, and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008.
9. In cases where a breach of AML/ATF requirements, therefore, constitutes a failure to conduct business in a

¹ E.g. the Insurance Act 1978; the Investment Business Act 2003; the Banks & Deposit Companies Act 1999; the Corporate Service Provider Business Act 2012, etc

prudent manner (such as where the breach evidences poor corporate governance), the full range of enforcement powers are brought into play and are available to the Authority. However, it is not always clear in every case of a breach of AML/ATF requirements whether the non-compliance will also amount to a breach of the Minimum Criteria. There may be cases where it is not possible to draw that conclusion, and in such circumstances the situation may require a response other than, or in addition to, a civil penalty in cases where it is not clear that the breach raises prudential concerns.

10. It is therefore proposed that the Act be amended to include a full range of enforcement powers, together with provisions that ensure due process and fairness. It is further proposed to make consequential amendments to the Act to ensure consistency of process with the Regulatory Acts.
11. In order to provide clarity, to meet a potential legislative gap, and to achieve consistency of approach, it is further proposed that the Act be amended in order to provide a power to impose civil penalties and other enforcement options upon individuals as well as institutions. This would bring the Act into line with the Regulatory Acts which provides for disciplinary measures to be taken against both.
12. With respect to non-licensed AML/ATF regulated financial institutions, it is proposed to include the ability to refuse to register an applicant unless it appears to the Authority that the person is a fit and proper person, and to include the power to de-register a person in the event that they are found to be not fit and proper.
13. Further, there is currently no power for a penalty to be imposed under the Act for non-licensed AML/ATF regulated institutions who conduct business without making an application to be included in the register, in breach of section 9. It is therefore proposed that section 9 of the Act be amended to make a breach a criminal offence, and to provide for appropriate criminal penalties.
14. Section 14 of the Act provides for an annual fee to be paid by those registered as a non-licensed AML/ATF regulated financial institution. However, in practice, registrants are often late in paying the annual fee. It is therefore proposed that the Act be amended to include a power to impose a late penalty fee. The late penalty fee will be a percentage of the annual fee for every month or part thereof during which the fee remains unpaid.

THE PROPOSED AMENDMENT: Amend the Act to allow for the following powers (to be applied to all AML/ATF regulated financial institutions and individuals (as appropriate), whether licensed or not):

- (i) **Power to refuse to register a non-licensed AML/ATF regulated financial institution unless the Authority is satisfied that the applicant is a fit and proper person.**
- (ii) **Power to issue a direction in the event of a failure to comply with a requirement of the AML/ATF Regulations. A direction may be on unlimited or limited duration, and may specify such matters as deemed appropriate by the Authority.**
- (iii) **Power to restrict a license or registration by the imposition of such conditions as deemed appropriate by the Authority, with truncated notice periods for restriction in cases of emergency.**

- (iv) **Power to revoke or cancel a license or registration, including on grounds that the person is not a fit and proper person, and to issue directions after a license or registration is revoked.**
- (v) **Power to wind up on petition by the Authority on just and equitable grounds.**
- (vi) **Power to object to an existing controller on grounds that (s)he is no longer fit and proper.**
- (vii) **Power to issue a Public Censure.**
- (viii) **Power to issue a Prohibition Order if it appears to the Authority that an individual is not a fit and proper person, prohibiting that person from performing a specified function, either permanently or for a specified period of time.**
- (ix) **Power for the Authority to apply to the Court for an injunction where there is a reasonable likelihood that a regulated financial institution will contravene an AML/ATF requirement, or that such contravention has taken place and that there is a reasonable likelihood that the contravention will continue or be repeated.**
- (x) **Consequential amendments to provide for a Warning Notice and Decision Notice process, publication, and appeals.**
- (xi) **Amend section 9 of the Act to criminalise a breach. A person who contravenes section 9(1) of the Act will be liable on summary conviction to a fine of \$100,000, or to imprisonment for period of two years or to both; or on conviction to an unlimited fine or imprisonment for a period of 5 years, or to both.**
- (xii) **Amend section 14 of the Act to include the power for the Authority to impose a fine for late payment of the annual fee for registration of non-licensed AML/ATF regulated financial institutions and individuals.**

B: Increase the maximum limit of \$500,000 for civil penalties

15. Section 20 of the Act provides a power for the Authority to impose civil penalties on an AML/ATF regulated financial institution which fails to comply with any requirement of the specified AML/ATF Regulations. Section 20(1A) provides that:

“(1A) The maximum amount of the civil penalty that may be imposed under subsection (1) is (a) in the case of a person or entity supervised by the BMA, such an amount not exceeding \$500,000 as the BMA considers appropriate.”

16. As a result, more punitive civil penalties cannot be issued unless several deficiencies are identified, regardless of the severity of the deficiency. The Act defines an appropriate level of civil penalty as one that is “effective, proportionate and dissuasive”. In order to be “dissuasive”, civil penalties in excess of the current statutory maximum may be justified in cases that are particularly egregious. These will include cases where there has been a systemic failure on the part of a supervised entity that has caused ML/TF and/or which exposed the jurisdiction to a substantial risk of ML/TF having occurred, or where ML and TF actually occurred.

17. As part of the Authority’s technical assessment, a comparative analysis was undertaken with

comparable jurisdictions:-

JURISDICTION	MAXIMUM AMOUNT – CIVIL PENALTIES/FINES (PER BREACH)
BERMUDA	\$500,000
United Kingdom - PRA	Unlimited
United Kingdom - FCA	Unlimited
JERSEY - JFSC	Three ‘Bands’: 4% of ‘relevant income’ or 6% of ‘relevant income’ or 8% of ‘relevant income’: where ‘relevant income’ is income derived from licensed business activities subject to an overall maximum of UKP4 million
GUERNSEY - GFSC	UKP4 million ²
CAYMAN - CIMA	CIS\$1 million for corporations CIS\$100,000 for an individual
IRELAND-Bank of Ireland	EUROS 10 million for corporations 10% of turnover if unincorporated EUROS 1 million for individuals
SINGAPORE - MAS	3 times profit made or loss avoided (where financial gains can be identified) S\$2 million per breach otherwise

18. It is apparent, therefore, that Bermuda’s current cap has fallen behind that of other comparable regulatory bodies. Therefore consideration needs to be given to increasing the maximum penalty.

19. A maximum provides some degree of certainty for industry in that it will know what the worst possible outcome may be in any given case. It is proposed that the maximum be increased to **\$10 million per breach**. This is the amount considered appropriate taking into account the size and profile of the regulated financial industry in Bermuda. This amount will allow for sufficiently effective, proportionate, and dissuasive penalties to be applied in the most serious of cases.

THE PROPOSED AMENDMENT: Amend section 20(1)(A) of the Act by amending the upper limit of \$500,000 per breach to \$10 million per breach.

² Any fine over UKP300,000 is limited to a maximum of 10% of turnover.

CONCLUSION & NEXT STEPS

20. The relevant Government agencies are in the process of seeking approval for the necessary amendments to the AML/ATF legislative framework.
21. 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 prior to the commencement of the assessment.