

Responses to Consultation Paper issued in October 2007

Question	Industry response	NAMLC comments
1 - Do you agree that all identifiable instrumentalities of proceeds of crime should be subject to confiscation?	Agree in principle but want to ensure that our approach is consistent with "competing jurisdictions". (1)	Appropriate provision has been incorporated into the draft legislation.
2. Do you agree that similar confiscation and seizure powers should be adopted for giving assistance to foreign authorities	Agree in principle but want to ensure that our approach is consistent with "competing jurisdictions". Also important that a proper process is in place.(1)	This proposal has been deferred to allow additional time for thorough research and analysis of all of the critical issues.
3. Do you agree that POCA and ATFA should have parallel requirements for preparing and filing SARs?	Agree in principle (1) .	Appropriate provision has been incorporated into the draft legislation.
4. Do you agree that professional accountants, excluding public accountants, who offer services as CSP will be caught in enlarged scope of the POCA regulations?	No need to extend definition of independent professional accountants beyond members of ICAB and b) current definitions used for these persons and for CSP's will, together with existing Financial Services Acts capture virtually all of those IMF intends to have overseen. (1) Agree but believe if any gaps become evident then definitions should be expanded. (1)	The definition will not be expanded at the current time.
5. Do you agree that civil fines administered by BMA for AML/CFT breaches can be an effective deterrent to ineffective systems and procedures amongst regulated entities?	Want to see details of regime particularly with regard to level of fines and due process and what will be applied to independent professionals (2).	Details for financial institutions will be provided in documentation circulated in Phase 2 of this round of consultation. Information regarding independent professionals will be circulated when available.

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<p>6. Do you agree that all financial institutions operating in and from Bermuda must be subject to AML/CFT requirements?</p>	<p>Query raised whether the AML/CFT regime would therefore be extended beyond insurers writing direct long term and annuity business.(1) Agree in principle but want to ensure "competitive position" is considered.(1)</p>	<p>FATF does not require all financial institutions to be brought into scope and therefore we have not extended the definition for insurers and reinsurers under Insurance Act 1978 beyond what was previously agreed with industry. The updated draft regulations do however include financial institutions in certain sectors which are currently exempt from licensing requirements.</p>
<p>7. Do you agree that a reporting threshold of \$15,000 for crossborder declarations is not burdensome?</p>	<p>Clarification requested that this applies to cash only. (2)</p>	<p>Threshold set at \$10,000. The obligation is to report not only cash but negotiable instruments.</p>
<p>Other Comments/Questions received</p>		
<p>Supervisory regime for licensed entities</p>	<p>Query whether AML supervision to be integrated or done separately from prudential.(1)</p>	<p>The current proposal is that it will be separate and a separate charge applied.</p>
<p>Registrar of Companies as regulator for CSP's</p>	<p>Disagreed with having Registrar of Companies as regulator for CSP's since many CSP's operate in conjunction with businesses that are already regulated by BMA or manage regulated businesses. Therefore was of the opinion that 2 regulators will cause unnecessary duplication of effort and confusion. (1) Query raised about steps being taken to address any gaps in experience/ expertise in Registrar's Office.(1)</p>	<p>Decision made to defer bringing CSP's into scope until a later phase as it was agreed that by extending the requirements to the financial institutions and independent professionals, most CSP's would be captured.</p>

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Review of legislation for Charities	Queries raised regarding status of review and any shortfalls regarding international standards. (1)	Work is ongoing and, as appropriate, information will be circulated.
Additional documentation	Need for updated regulations and guidance notes highlighted to allow for appropriate consideration of issues.(1)	Documents included in consultation package.
Timing	Query regarding timing of changes. (1)	Legislation, as noted in cover note, expected to be submitted to Parliament in summer session, with a proposed commencement date in fourth quarter.
Notes:		
a)	Number in brackets indicate the number of respondents providing specified response.	
b)	Responses were received from representatives of 3 entities/organisations.	

Proceeds of Crime Regulations 2007

Review of comments by stakeholders

The comments raised are referenced to the draft of the regulations dated May 8, 2007. Remarks refer to response of NAMLC as reflected in the draft of the regulations dated May 1, 2008

Regulation	Industry comment	Remarks and Recommendations
Regulation 1 Citation and Commencement	No Comment	
Regulation 2- Interpretation	<p>Regulations 2(4) (5) and (6)- difficult to ascertain 25% of property. In the case of trusts is this income or capital. Class of persons is not clearly defined legally. Need to clarify control when there is a trust.</p> <p>Who is the “customer” when there is trust.</p> <p>Regulation 2(9) (c) Need</p>	<p><i>The definition has been amended and reflects wording adopted by the UK in response to similar issues raised.</i></p> <p><i>The Customer is the trustee but the beneficial owners are defined as persons with an interest in the capital.</i></p> <p><i>The guidance notes will clarify who</i></p>

	<p>clarification whether the company or members are to be vetted when dealing with long term business. Similarly, with SAC's is it the group company or individual members who are to be vetted?</p> <p>Regulations 2(9)(d)- Why include SAC's at this time. They are subject to regulation under Insurance Act and responsibility of managers.</p> <p>Regulation 2(9)(e)- Query raised as to whether necessary if insurance managers are CSP's by definition.</p> <p>Query raised as to whether managers must verify promoters only or each member in insurance plan. Can the manager rely on the reliable introduction provisions through the</p>	<p><i>is to be vetted when dealing with long term business and the SAC's.</i></p> <p><i>Insurers who are registered as SAC's are now excluded from the general definition of financial institutions.</i></p> <p><i>At this time CSP's will not be regulated as part of the first phase of implementation of the national action plan except for insurance managers.</i></p> <p><i>Industry specific guidance notes will clarify who is to be vetted when dealing with insurance plans.</i></p>
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	broker?	
<p>Regulation 3- Application of regulations</p>	<p>Clarification of definition of activities that are within scope for professionals. Queries raised as to whether the application is too narrow and whether activities related to preparation of transactions are to be covered.</p>	<p><i>NAMLC has recommended that the scope should reflect FATF's defined scope of activities. The definition has been amended under the POCA legislation to cover professionals who participate in a financial or real property transaction concerning a class of activity specified in section 49 of the Act as amended. For this purpose of this section a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction.</i></p>
<p>Regulation 4- Meaning of</p>	<p>Regulation 3(2)(v)- Query whether trusts covered and if so should be expressly stated so no doubt. Queries how funds are to interpret</p>	<p><i>General language has been retained but is under review.</i></p> <p><i>Industry specific guidance notes will</i></p>

<p>Customer Due diligence measures</p>	<p>customer due diligence for fund administrators.</p> <p>Query vagueness of tests for interpreting due diligence requirements.</p> <p>Regulation 4(1)(a)- query as to whether insurers may rely on insurance brokers.</p> <p>Regulation 4(2)(d)- not clear what is the standard for keeping records up to date. The proposed test is more onerous than that applied in other jurisdictions.</p>	<p><i>address this matter.</i></p> <p><i>Guidance notes outline how regulated sector must carry out customer due diligence.</i></p> <p><i>Industry specific guidance notes will address how insurers may rely on brokers.</i></p> <p><i>The express requirement for ongoing monitoring has been modified such that the relevant person must make efforts as far as practicable to keep records up to date and the Guidance notes outline good practices for maintaining this requirement</i></p>
<p>Regulation 5- Application of customer due diligence measures</p>	<p>Regulation 5(1)(c) Query whether or not this is the standard obligation imposed on all persons under POCA and therefore not necessary to state</p>	<p><i>This obligation reiterates for regulated persons a circumstance under which CDD must apply.</i></p>

	<p>specifically for relevant persons.</p> <p>For subregulations (1) and (3), query whether the subparagraphs are conjunctive, “and” or disjunctive “or”.</p>	<p><i>The drafting has been clarified in regulation now numbered as regulation 6. For subregulation (1) the situations are separate and not conjunctive. For subregulation (3) the criteria are conjunctive.</i></p>
<p>Regulation 6- Timing of Due Diligence measures</p>	<p>Regulation 6(4)(a)- Query as to whether this section will apply to old clients of financial institutions which are coming under the regulations for the first time.</p> <p>Query as to whether this paragraph 6(4)(a) is needed.</p>	<p><i>Guidance notes indicate how to apply CDD measures to existing clients on a risk basis.</i></p> <p><i>The Requirement has been retained.</i></p>
<p>Regulation 7- Non-Compliance with customer due diligence</p>	<p>Regulation 7(1)(a)-(d)- the verbs “must” and “may” are used interchangeably. Is this intended?</p> <p>Regulation 7(2)- it is not clear why there is a carve out for legal professionals if they are not otherwise covered in the scope.</p>	<p><i>The drafting has been clarified and as the requirements are mandatory the verb “shall” has been used.</i></p> <p><i>The determination as to how lawyers will comply with the regulations will be addressed in guidance notes developed for the legal professionals.</i></p>

<p>Regulation 8- Simplified due diligence</p>	<p>Regulation 8(2)(b)-Not clear how institutions evaluate equivalent provisions. Proposal that a list of acceptable jurisdictions which have equivalent provisions</p> <p>Regulation 8(2) and (3) Not clear of the meaning of “situated”.</p> <p>Regulations 8(3)(b)- raise query about identifying disclosure requirements similar to Bermuda for listed companies. Recommend list of recognised stock exchanges.</p> <p>Regulation 8(6)- Not clear whether the value of the policy is for each member.</p> <p>Regulation 8(6) (c)- Unclear how to identify pensions. Maybe define as registered pensions with National Pension Commission.</p>	<p><i>NAMLC recommends that service providers seek out information about the AML regimes which apply to institutions with whom they are doing business. This information is now readily available.</i></p> <p><i>No change in draft at this time.</i></p> <p><i>The regulation now refers to appointed stock exchanges under the Companies Act.</i></p> <p><i>The draft of the regulation has been clarified and refers to insurance contract.</i></p> <p><i>General description of pensions has been retained.</i></p>
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<p>Regulation 9- Enhanced Customer due Diligence</p>	<p>Regulation 9(4)(c)-Uncertainty as to what is wealth test as different from “source”. Is not standard test for “source” not enough?</p> <p>Regulations 9(6) and (7) query how regulated persons can determine “known” associates.</p>	<p><i>Proposed to retain the standard wording.</i></p> <p><i>Regulation has been amended with more express provision as to how a regulated person determines who is a known associate. As well the Guidance notes indicate that institutions need only rely on information which is publicly known and it is not necessary to carry out active research.</i></p>
<p>Regulation 10- Shell Banks Anonymous accounts</p>	<p>Regulation 10(2)- “ensure” is a high test. At best institutions obtain contractual undertakings. Is this sufficient?</p> <p>Regulation 10(5)- There are legitimate reasons for anonymity. What will be standard test to apply?</p>	<p><i>Guidance notes reiterate that regulated persons should take measures that are appropriate when dealing with corresponding banks to determine the risk and how best to address that risk.</i></p> <p><i>The regulations have been modified to clarify level of due diligence for anonymous accounts.</i></p>

<p>Regulation 11- Reliance on third parties</p>	<p>Regulation 11(1)- what is the intent? It would appear that no reliance is now permitted as institutions still liable.</p> <p>Regulation 11(2)(b)(iv)- Query how institutions evaluate institutions which are equivalent to the BMA and especially for SRO's.</p>	<p><i>Guidance notes reiterate that the responsibility for CDD cannot be delegated but gives guidance as to how to enter into such arrangements with third parties.</i></p> <p><i>NAMLC recommends that service providers seek out information about the AML regimes which apply to institutions with whom they are doing business. This information is now readily available.</i></p>
<p>Regulation 12- Record Keeping</p>	<p>Regulation 13(1) Should not training be included to reiterate importance.</p> <p>What is meaning of subparagraphs 13(1)(vi) and (vii)? Are these matters which need policies <i>per se</i>?</p> <p>Regulation 13(4)- Access to records must also be "reasonable time</p>	<p><i>The matter of training is covered by separate regulation.</i></p> <p><i>The drafting has been modified to state policies on the monitoring and management of compliance with and the internal communication of such policies and procedures.</i></p> <p><i>Draft regulation amended and directs that a financial institution</i></p>
<p>Regulation 13- Systems</p>		

	permitted” . Regulation 13(4)(b) - Reviewing nature of relationship is onerous.	<i>must be able to respond “as soon as reasonably practicable” . The Guidance notes indicate the information required at the time of setting up the business relationship and the nature of the relationship.</i>
Regulation 15- Training	Clarification of reference to relevant persons and relevant employees. Regulation 15(b)- “regularly” is vague. Maybe better to put down time frame such as annually. Guidance on transitional clause and to whom regulations apply for entities now under the regulations.	<i>Text has remained unchanged Guidance notes address issues related to training. Guidance notes will address how institutions deal with existing clients.</i>
Regulation 16- revocation		