Obligations of financial services providers and payment services providers under the Emergencies Act Order

February 21, 2022

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The Government of Canada declared a public order emergency and enacted an *Emergency Economic Measures Order* (Order) and related *Emergency Measures Regulations* (Regulations)[1] under the *Emergencies Act*, effective on February 15, 2021. These measures apply across Canada and target the financing of the truck convoy and blockades. The measures were revoked by proclamation on February 23, 2022. The Order and Regulations are no longer in force.

The measures create new obligations for payment services providers (PSPs), including crowdfunding sites and financial services providers (FSPs), requiring them to cease dealing with "designated persons". The changes also create new registration requirements for PSPs, which were historically not subject to regulation by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), the federal authority responsible for enforcing the *Proceeds of Crime, Money Laundry and Terrorist Financing Act* (PCMLTFA).

What you need to know

- The measures apply broadly to Canadian financial institutions, and other service providers in the financial sector, including: fintechs (payment processors), money services businesses; trust and loan companies; insurance companies; securities dealers or investment advisors; virtual currency businesses; and crowdfunding platforms.
- The measures expand the reporting entities subject to FINTRAC purview to include payment processors and crowdfunding platforms in certain circumstances.
- FSPs and PSPs are obligated to screen current and new clients for "designated persons".
- FSPs and PSPs have a continuing obligation to determine if they are in possession or control of property that is owned, held or controlled by or on behalf of a "designated person" and to disclose any such property to the Commissioner

of the Royal Canadian Mounted Police (RCMP) or to the Director of the Canadian Security Intelligence Service (CSIS).
- FSPs and PSPs must cease services related to an insurance policy for any vehicle used in a public assembly described under the Regulations (that is, an assembly that may reasonably be expected to lead to the breach of the peace by disrupting the movement or persons or goods, inferring with critical infrastructure, or support violence against people or property).
- There is an "immunity" provision under the Order, which legislates against civil proceedings for entities complying with the Order.
- A vote confirming these measures passed in the House of Commons on Monday, February 21, 2022. The measures were revoked by proclamation on February 23, 2022. The Order and Regulations are no longer in force.

Compliance with order and regulations by PSPs and FSPs

The Order requires a broad range of PSPs and FSPs to cease the following activities with "designated persons". Pursuant to the Order, PSPs include crowdfunding platforms (domestic, foreign or virtual currencies) and entities that provide or maintain electronic funds transfer accounts, hold funds on behalf of an end user, initiate/authorize/transmit/receive/facilitate an electronic fund transfer, and settlement or clearing services.

The prohibition includes the following:

- dealing in any property, wherever situated, that is owned, held or controlled, directly or indirectly, by a "designated person" or by a person acting on behalf of or at the direction of that "designated person";
- facilitating any transaction related to a dealing in property;
- making available any property, including funds or virtual currency, to or for the benefit of a "designated person" or to a person acting on behalf of or at the direction of a "designated person", or;
- providing any financial or related services to or for the benefit of any "designated person" or acquire any such services from or for the benefit of any such person or entity (Dealings Prohibition).

According to an announcement by the Department of Finance, the obligation applies to all funds of a "designated person", including those held in a deposit, chequing, savings, or trading account, and to cryptocurrency wallets, lending products, investment assets, and insurance policies for vehicles used in the type of public assembly described under the Regulations.

To comply with the Dealings Prohibition, FSPs and PSPs are required to undertake the same type of screening measures that they may already be subject to under Canadian economic sanctions and terrorist financing laws and the *Criminal Code*. The Office of the Superintendent of Financial Institutions has published guidance on complying with sanctions screening measures under these pre-existing Canadian laws.

However, unlike Canadian economic sanctions and terrorist financing laws, the Order does not specify a list of "designated persons". The Government provided a list of

activities under the Regulations whereby a person or an entity may be or become a "designated person". Some of these activities include:

- participating in a public assembly that can be expected to lead to a breach of peace;
- traveling to or within an area where assembly is taking place, or;
- collecting, providing, making available, or inviting a person to provide property to facilitate any public assembly to benefit any person who is facilitating the assembly.

With respect to these activities, there is no temporal restriction on when the activity occurs for a person or entity to become a "designated person".

In order to comply with the broad scope of "designated persons", FSPs and PSPs may reach out to their local law enforcement, or the RCMP. Under the Order, the federal or provincial government may disclose information to FSPs and PSPs if that disclosure contributes to the application of the Order. The RCMP has reached out to certain PSPs and FSPs with a list of "designated persons". FSPs and PSPs may also complete a media search for names of individuals that have been involved in the prohibited public assemblies. However, there is risk that individuals named in the media may not actually be a "designated person" and the restrictions in the Order do not apply to them.

The Order also requires FSPs and PSPs to determine on a continuing basis whether they are in possession or control of property that is owned, held or controlled by or on behalf of a "designated person".

Once an FSP or a PSP establishes that they have in their possession or control the property of a "designated person", they must disclose that information to law enforcement, and cease providing any services with respect to that property, which includes freezing or suspending an account without a court order. The Order includes an "immunity" provision for civil proceedings that may lie against an FSP or a PSP for complying with the Order.

Additionally, PSPs are now required to register with FINTRAC if they are in possession or control of property that is owned, held or controlled by or on behalf of a "designated person", including PSPs that were not previously subject to the PCMLTFA before the enactment of the Order. The language in the Order tracks the language in the proposed *Retail Payments Activity Act*. PSPs platforms may now pre-register with FINTRAC online here. PSPs are required to follow other PCMLFTA reporting requirements, which is to say they must file reports when a transaction is related to a money laundering offence or a terrorist activity financing offence by a "designated person".

Timeline for enforcement

A motion confirming the declaration of a public order emergency passed in the House of Commons on Monday, February 21. The measures were revoked by proclamation on February 23, 2022. The Order and Regulations are no longer in force.

We are monitoring closely for future information on whether the PCMLTFA will be amended to reflect the emergency measures requiring PSPs to register as reporting entities under FINTRAC.

[1] *Emergencies Act*, R.S.C., 1985, c. 22 (4th Supp.), s 19 (1): "While a declaration of a public order emergency is in effect, the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency".

Footnotes

[1] *Emergencies Act*, R.S.C., 1985, c. 22 (4th Supp.), s 19 (1): "While a declaration of a public order emergency is in effect, the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency".

[2] See following provisions under the *Emergencies Act:*

Revocation by Parliament

21 Parliament may revoke a declaration of a public order emergency in accordance with section 58 or 59.

. . .

Effect of revocation of declaration

[26] (2) Where, pursuant to this Act, a declaration of a public order emergency is revoked either generally or with respect to any area of Canada, all orders and regulations made pursuant to the declaration or all orders and regulations so made, to the extent that they apply with respect to that area, as the case may be, are revoked effective on the revocation of the declaration.

. . .

Vote

[58] (6) A motion taken up and considered in accordance with subsection (5) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.

Revocation of declaration

(7) If a motion for confirmation of a declaration of emergency is negatived by either House of Parliament, the declaration, to the extent that it has not previously expired or been revoked, is revoked effective on the day of the negative vote and no further action under this section need be taken in the other House with respect to the motion.

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