Updating Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime

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On February 7, 2018, the Canadian Department of Finance (the "Department") released a consultation document entitled "Reviewing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime" (the "Finance Paper" or "Paper").

Overview

The consultation process with respect to the Finance Paper is intended to support the Parliament of Canada's upcoming study of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Canada) (the "Act"). The Act requires that a committee of Parliament review the administration and operation of the Act every five years.

The Department notes that a Mutual Evaluation report by the Financial Action Task Force ("FATF") found that Canada has strong anti-money laundering and anti-terrorist financing legislation and regulations, but noted there are several areas where action could be taken to ensure the framework meets technical standards and is even more effective. The Department acknowledges that the money laundering and terrorist financing environment continues to quickly evolve and that significant advancements in technology have not only changed the ways that Canadians interact with the financial system, but also present challenges to the regime. The Department also highlights that there has been an emergence of technologies that allow non-face-to-face interactions or foster an increasing array of complex financial products, including virtual currencies.

The Department states that it is undertaking this work in concert with the Canadian federal government departments and agencies that are part of Canada's AML/ATF regime. Along with ideas developed internally, the Department indicates that it sought input on areas for improvement with departments and agencies and members of the Advisory Committee on Money Laundering and Terrorist Financing. The Department indicates that these suggestions were then distilled into the contents of the Paper and that it intends to take the feedback submitted by the public and share them with the appropriate department or agency. The potential policy measures being considered by the Department are organized around the following themes:

1. Legislative and Regulatory Gaps
2. Enhancing the Exchange of Information While Protecting Canadians' Rights

3. Strengthening Intelligence Capacity and Enforcement
4. Modernizing the Framework and its Supervision
5. Administrative Definitions and Provisions

Set out below are some of the notable potential policy measures that are discussed in the Finance Paper:

1. Legislative and Regulatory Gaps

Corporate Transparency: The Department states that timely access for competent authorities to accurate and up-to-date beneficial ownership information is recommended within the FATF standards. Canada does not have a central registry of beneficial ownership information and information requirements not only differ across jurisdictions, but are also spread across a number of different statutes. To align with what is set out in the 2017 federal Budget to develop a national strategy to strengthen the transparency of legal arrangements and improve the availability of beneficial ownership information, the Department is seeking views on different beneficial ownership registry models and whether information should be made public. It is also seeking views on risks associated with legal entities that are not corporations, such as legal partnerships.

Expanding the Scope of the Act to High Risk Areas: The Department is seeking views on expanding obligations relating to Politically Exposed Persons ("PEPs") and Heads of International Organizations ("HIOs"). Currently, only financial entities, securities dealers, money services businesses ("MSBs") and life insurance companies are required to take reasonable measures in certain situations to determine if a client is a foreign PEP, a domestic PEP, an HIO, a prescribed family member or a close associate. The Department is considering whether these obligations should be extended to other reporting entities under the Act.

In addition, the Department notes that corruption and bribery scandals have been linked to international organizations that, while not established by governments of states, wield considerable political influence. As such, the Department is considering expanding the definition of HIO to include these entities. The Department also proposes clarifying the definition of PEPs given that the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") receives inquiries on the meaning of various positions contained in the definition.

The Department highlights the potential AML/ATF risk associated with a number of other sectors, notably white label automated teller machines, pari-mutuel betting which is used in gambling on horse racing, non-federally regulated mortgage lenders, and the financing and leasing sector in Canada. Other high risk areas identified in the Finance Paper are company service providers, armoured cars, high-value goods dealers and jewellery auction houses.

The Department is seeking views on risks associated with these areas and measures that would address them.

2. Enhancing the Exchange of Information While Protecting Canadians' Rights

The Department emphasizes that information sharing is critical for combatting money laundering and terrorist financing. As such, the Department is seeking views on options

to improve information sharing, through adding additional disclosure recipients, improving the understanding of information sharing options between the private sector to address cases of fraud, enhancing information sharing on methods and trends of money laundering and terrorist financing between FINTRAC and the private sector, and improving information sharing under international legal cooperation agreements. The Finance Paper also refers to strengthening Canada's partnerships internationally and identifies concerns about Canada's effectiveness in the area of international cooperation, including the capacity to effectively provide and obtain mutual legal assistance in criminal matters.

The Department is seeking views on whether to expand disclosure recipients and on how to improve partnerships related to the exchange of information.

3. Strengthening Intelligence Capacity and Enforcement

The Department notes the challenges that law enforcement, intelligence agencies and the private sector face in investigating and prosecuting money laundering offences.

Reportable electronic funds transfers, as currently defined under the Act, do not capture the transfers that pass through Canadian financial institutions where Canada is not the sending or recipient destination, such as those operating through correspondent banking relationships. The Department notes that this creates a gap in the information that FINTRAC receives and prevents them from identifying potential money laundering or terrorist financing transactions.

Bulk cash is also an area of concern — it is difficult for law enforcement to establish the link between the cash and the commission of a specific criminal offence. The Department is considering whether it would be appropriate to place a limit on the amount of bulk cash a person could carry in Canada without a legitimate purpose, whether Canada should develop a business registry for those businesses that deal in high volumes of cash and whether there should be a limit on the amount of cash a business in Canada could accept and/or report on.

The Department is seeking views on these areas related to intelligence gathering and enforcement where vulnerabilities have been identified.

Border Enforcement: The part of the Act that addresses border enforcement is administered by the Canada Border Services Agency and requires persons or entities to report the importation and exportation of currency or monetary instruments above a certain threshold. The Department is considering expanding the definition of monetary instrument to capture the cross-border movement of other types of value that could be used for money laundering or terrorist financing purposes. It is also considering whether penalties associated with failure to declare currency and monetary instruments are a sufficient deterrent.

The Department is seeking views on how to address the money laundering and terrorist financing vulnerabilities at the border.

4. Modernizing the Framework and its Supervision

Money Services Businesses: The Department acknowledges that money service businesses ("MSBs") have had challenges in maintaining accounts with financial institutions as a consequence of a de-risking trend which seriously impacts the business model of these MSBs. As a result, it expresses concern about driving financial transactions to informal channels that are not legitimate financial institutions. The Department is also considering improving the registration and application procedures for MSBs which would potentially include expanding the list of offences that would make an applicant ineligible for registration.

Identification Methods: The Department proposes enhancing and strengthening identification methods. While the 2016 amendments to *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* introduced more flexibility, there is still a reliance on physically viewing and validating identification documents to ensure they are original, valid and current. The Department emphasizes the need for continuous progression towards principles-based requirements for a nimbler framework and leveraging technology solutions.

Exemptive Relief and Development of Guidance: To foster innovation and encourage start-ups to operate in a supervised environment without having to comply with all the regulatory requirements that may otherwise apply, the Department is considering exemptive relief and administrative forbearance. The Department is also considering implementing a consultation process for the development of guidance issued by FINTRAC.

Administrative Monetary Penalties: The Department is seeking views on how to address issues related to administrative monetary penalties ("AMPs") and has put forward as potential measures publicly naming an AMP recipient and including a formula in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations* for how AMPs should be calculated to increase transparency and provide more clarity.

5. Administrative Definitions and Provisions

The Department is also seeking views on how to address technical issues related to the administration and operation of the Act and clarify requirements that would assist reporting entities in meeting their obligations related to electronic reporting of cross-border movements of currency and monetary instruments, evaluating correspondent relationships, defining reporting entities and removing the alternative to large cash transaction reporting.

Comments and Next Steps

This consultation will be welcomed by many reporting entities who currently labour under what is a heavy and uncertain regulatory environment. Reporting entities will be pleased that the serious and well-founded representations they and their professional advisors have made to the Department have been heard. There is now an opportunity and process for important reforms to be made to achieve an enhanced level of practicality and effectiveness in Canada’s AML/ATF regulatory regime. It is also encouraging that there is implicit recognition that important reform of FINTRAC is necessary to meet the evolving needs of the financial sector, especially in so far as exemptive relief, administrative forbearance and the consultation process with respect

to the development of guidance. These changes are essential for Canada to remain competitive in efforts to maximize the benefits of fintech for all Canadians.

As noted above, the Department is seeking input from stakeholders by April 30, 2018. We would be happy to assist reporting entities and other interested stakeholders with preparing submissions to the Department. Feel free to contact any of the lawyers listed below if you would like to know more about the Finance Paper or would like any assistance in preparing a submission to the Department.

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