

New laws in Bermuda combat money laundering and terrorist financing



BACKGROUND PRE-2008

Bermuda has long-standing obligations to have effective procedures in place regarding anti-money laundering and anti-terrorist financing (“AML/ATF”) to detect and prevent such activity. The offence of money laundering was included in the Proceeds of Crime Act 1997 and obligations to combat terrorist financing set out in The Anti-Terrorism (Financial and Other Measures) Act 2004. The original obligations on regulated institutions were established in the Proceeds of Crime (Money Laundering) Regulations 1998 (the “1998 Regulations”) which were supported by guidance notes issued in January 1998.

2008 & NEW REGULATIONS

Following the International Monetary Fund Review in mid-2007, Bermuda’s Legislature finalized and passed a number of new legislative initiatives, namely:

- The Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 (the “Regulations”) came into effect on 1 January 2009, and repealed the 1998 Regulations; and
- The Proceeds of Crime Regulations (Supervision and Enforcement) Act 2008 (the “Act”), established a new regulatory regime, designating the Bermuda Monetary Authority (the “Authority”) as the supervisory body for

securing compliance with the Regulations by relevant institutions and also details the obligations and powers related to this duty.

IMPACT UPON FUNDS & INVESTMENTS

Institutions subject to the Regulations are now termed “AML/ATF Regulated Financial Institutions” and the Authority is now required to monitor all AML/ATF Regulated Financial Institutions for compliance with the Regulations. The Regulations require that the Authority establish, maintain and publish a register of AML/ATF Regulated Financial Institutions comprising “licensed persons” and “non-licensed persons”. A “licensed person” means a person who is for the time being licensed under a relevant regulatory Acts which includes, amongst others, those AML/ATF Regulated Financial Institutions that:

- carry on investment business within the meaning of section 3 of the Investment Business Act 2003 (the “IBA”);
- carry on the business of a fund administrator within the meaning of section 2(2) of the Investment Funds Act 2006 (the “IFA”); and
- are the operator of an investment fund within the meaning of section 2 of the IFA.

Both the IFA and IBA are deemed by the Authority to be “Regulatory Acts”. Non-licensed persons are any

AML/ATF Regulated Financial Institutions which are not licensed under any of the Regulatory Acts, and include, for example, companies which may be exempted or excluded from registering under the IBA or the IFA.

AML/ATF Regulated Financial Institutions falling within the scope of the Act that are not licensed, registered or authorized under any of the Regulatory Acts are required to be registered. The Authority has made the decision to treat the term “authorised” under the IFA as being synonymous with “licensed” (a defined term under the Regulations), and to extend the authorisation granted to an investment fund to include its operator. The IFA defines “operators” in relation to (i) a unit trust to mean the trustee; (ii) a mutual fund company to mean the company; and (iii) a partnership fund to mean the general partner.

Therefore Bermuda investment funds, and by extension their operators, who are either exempted under, or excluded from, the IFA are deemed to be “non-licensed persons”. This includes, for example, the operators of an investment fund which is exempt from authorization under Section 7 of the IFA, or operators of private or excluded funds under Section 6. A financial Institution which carries on investment business within the meaning of section 3 of the Investment Business Act but is exempt from licensing pursuant to the operation of the Investment Business (Exemptions) Order 2004 is similarly obliged to be registered.

Pursuant to the Regulations, AML/ATF Regulated Financial Institutions are required to appoint a Reporting Officer who is responsible for receiving disclosures from others within the institution that have a knowledge or suspicion that a person is engaged in money laundering, and submitting, where appropriate, a suspicious activity report to the Financial Intelligence Agency. They must also appoint a Compliance Officer who is responsible for monitoring the institution’s compliance with Bermuda’s anti-money laundering and anti-terrorist financing legislation, related regulations and guidance notes.

While it is possible to delegate these responsibilities to another entity, it is in the interests of the delegating

institution to ensure that outsourcing does not result in reduced standards or requirements being applied (including ensuring that the provider of the outsourced services has in place satisfactory AML/ATF systems, controls and procedures, and that those policies and procedures are kept up-to-date to reflect changes in Bermuda requirements). Delegating institutions cannot contract out of their legal responsibilities and always remain responsible for systems and controls in relation to the delegated activities.

GUIDANCE NOTES

In March 2009, pursuant to the Act (as well as the Proceeds of Crime Act 1997 and the Anti-Terrorism (Financial and Other Measures) Act 2004), the Authority produced and issued the “*Guidance Notes for AML/ATF Regulated Financial Institutions on Anti-Money Laundering & Anti-Terrorist Financing (AML/ATF)*” (the “Guidance Notes”).

The purpose of the Guidance Notes is to set out what is expected of AML/ATF Regulated Financial Institutions and their staff in relation to the prevention of money laundering and terrorist financing, but allows them some discretion as to how they apply the requirements of Bermuda’s AML/ATF regime in the particular circumstances of the institution, and its products, services, transactions and customers, by tailoring the information to meet their particular business risk profile.

The Courts of Bermuda, or the Authority, as the case may be, in determining whether a person is in breach of a relevant provision of any of the aforementioned Acts or Regulations relating to AML/ATF activities, is required to consider whether a person has followed any relevant guidance issued by the Authority and approved by the Minister of Justice, which includes the Guidance Notes. Departures from the Guidance Notes (and the rationale for so doing), should be documented, and institutions should be prepared to justify any departures (for example to the Authority).

DEADLINE FOR REGISTRATION

The Regulations require all “non-licensed persons” to register with the Authority if they wish to carry on

business activities in Bermuda. The deadline for registration is 30 June 2009, after which it is an offence for an AML/ATF Regulated Financial Institution to continue to carry on business if it is not appropriately registered.

Any applicable companies formed after 1 January 2009 must include this application for registration as part of their standard incorporation and registration process.

Should you have any questions or requests for further information please contact:

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