

A BILL

entitled

PROCEEDS OF CRIME (ANTI-MONEY LAUNDERING AND ANTI-TERRORIST
FINANCING SUPERVISION AND ENFORCEMENT) AMENDMENT ACT 2018

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WHEREAS it is expedient to amend the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act, which amends the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 (the "principal Act"), may be

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cited as the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Amendment Act 2018.

Amends section 2

2 The principal Act is amended in section 2(1)—

(a) in the definition of “regulatory Acts”, by inserting the following—

“(i) Digital Asset Business Act 2018;”;

(b) by inserting in the appropriate alphabetical order the following—

“international sanctions” has the meaning given in section 5(1B);”.

Amends section 5

3 The principal Act is amended in section 5 as follows—

(a) in subsection (1), by deleting the words “and, in the case of the BMA, with AML/ATF Regulations”; and

(b) by repealing subsection (2)(d) and substituting the following—

“(d) directions,

and shall update such guidance to keep abreast of amendments to the laws and other developments in respect of matters set out in paragraphs (a) to (d) and developments in relation to best practices in compliance.”.

Amends section 7

4 The principal Act is amended in section 7(1)(c)(i), by inserting after the words “section 20” the words “or take other disciplinary measures set forth in Chapter 4 of Part 3”.

Amends section 9

5 The principal Act is amended in section 9 by inserting after subsection (3) the following—

“(4) A person who carries on business contrary to subsection (1) commits an offence and shall be liable—

(a) on summary conviction, to a fine of \$100,000 or imprisonment for two years or to both;

(b) on conviction on indictment, to a fine of \$250,000 or imprisonment for five years or to both.”.

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Amends section 10

6 The principal Act is amended in section 10(3)(e) by inserting after the word “test” the words “or non licensed AML/ATF regulated financial institutions”.

Amends section 11

7 The principal Act is amended in section 11(1)(d) by inserting after the word “test” the words “that is a non-licensed AML/ATF regulated financial institution”.

Amends section 11A

8 The principal Act is amended in section 11A as follows—

- (a) in subsection (1)—
 - (i) by inserting after the word “test” the words “or a non-licensed AML/ATF regulated financial institution”;
 - (ii) in paragraph (b), by inserting after the word “profession” the words “or financial institution”;
- (b) in subsection (2), by inserting after the words “the interests of the” the words “non-licensed AML/ATF regulated financial institution or”;
- (c) in subsection (3), in paragraphs (b) and (c) by deleting “FIA” and substituting the words “competent authority”.

Amends section 11B

9 The principal Act is amended in section 11B as follows—

- (a) in subsection (2), in subsection (3) (where they first appear) and in subsection (4), by inserting after the words “in relation to a” the words “non-licensed AML/ATF regulated financial institution or a”;
- (b) in subsection (3)—
 - (i) in paragraphs (a), (b) and (c), by inserting after the words “in the case of a” the words “non-licensed AML/ATF regulated financial institution or a”;
 - (ii) in paragraphs (d), (e)(iii), (f)(i) and (f)(ii) (where those words appear the second time), by inserting after the words “of the” the words “non-licensed AML/ATF regulated financial institution or”;
 - (iii) in paragraphs (e)(i) and (e)(ii), by inserting after the words “in the” the words “non-licensed AML/ATF regulated financial institution or”;
- (c) in subsection (4)—
 - (i) by inserting after the words “in relation to a” the words “non-licensed AML/ATF regulated financial institution or”;
 - (ii) by inserting after the words “of the”, wherever they appear, the words “non-licensed AML/ATF regulated financial institution or”.

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Amends section 12

10 The principal Act is amended in section 12(b), by inserting after the words “AML/ATF Regulations” the words “, directions or licence conditions”.

Repeals section 13A

11 The principal Act is amended by repealing section 13A.

Amends section 14

12 The principal Act is amended in section 14 by inserting after subsection (2) the following—

“(2A) Where a registered person fails to pay the annual prescribed fee, as provided in subsection (4)(a), it shall pay in addition to such fee a late penalty fee of an amount equal to ten per cent of the fee due for every month or part thereof during which the fee remains unpaid.”.

Amends heading to Chapter 4 of Part 3

13 The principal Act is amended by deleting the heading to Chapter 4 of Part 3 and substituting the following—

“DISCIPLINARY MEASURES”

Amends section 20

14 The principal Act is amended in section 20(1A)(a) by deleting “\$500,000” and substituting “\$10,000,000”.

Inserts sections 20A to 20I

15 The principal Act is amended by inserting after section 20 the following—

“Power to issue directives

20A (1) A competent authority may issue a directive to an AML/ATF regulated financial institution or regulated non-financial business or profession if —

- (a) it fails to comply with international sanctions obligations, or it fails to comply with a requirement of the AML/ATF Regulations, directions or licence conditions; or
- (b) the fit and proper test applies in respect of the AML/ATF regulated financial institution or business or profession by virtue of section 11A, and the test is not met.

(2) A directive under this section may be of unlimited duration or of a duration specified in the notice of the directive.

(3) A notice of a directive under this section shall—

- (a) specify the reasons for the giving of the directive;

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- (b) specify when the directive is to have effect;
- (c) give particulars of the provisions of subsections (4) and (5); and
- (d) give particulars of the rights of appeal conferred by subsection (6).

(4) An AML/ATF regulated financial institution or regulated non-financial business or profession to which a directive is issued under subsection (1) may apply to the competent authority to have it withdrawn or varied and the competent authority shall withdraw or vary the directive in whole or in part if it considers that there are no longer any grounds under subsection (1) which justify the directive or part of the directive concerned.

(5) If the competent authority refuses an application under subsection (4), or grants such an application only in part, it shall give notice in writing of that fact to the applicant.

(6) An AML/ATF regulated financial institution or regulated non-financial business or profession aggrieved by a directive issued under subsection (1), or a refusal to grant an application under subsection (5), or the granting of such an application only in part may, within one month after the day on which notice was served of the directive, refusal or grant, appeal to the appeal tribunal.

Restriction of licence

- 20B (1) Subject to section 20D, a competent authority may restrict a licence—
- (a) if it is satisfied of the matters specified in section 20C but it appears to it that the circumstances are not such as to justify revocation;
 - (b) in connection with the revocation of a licence—
 - (i) when giving the person notice that it proposes to revoke its licence;
 - (ii) at any time after such notice has been given to the person; or
 - (iii) at any time after the person has served a notice surrendering its licence with effect from a later date.
- (2) A competent authority may restrict a licence by imposing such conditions as it thinks desirable for the protection of the person's clients or potential clients, and may in particular—
- (a) require the person to take certain steps or to refrain from adopting or pursuing a particular course of action or to restrict the scope of its business in a particular way;
 - (b) prohibit the person from soliciting business either generally or from persons who are not already its clients;
 - (c) prohibit the person from entering into any other transactions or class of transactions;

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- (d) require the removal of any controller or officer;
- (e) specify requirements to be fulfilled otherwise than by action taken by the person.

(3) Any condition imposed under this section may be varied or withdrawn by the competent authority.

(4) A competent authority may on the application of a person vary any condition imposed on its licence or its registration.

(5) The fact that a condition imposed under this section has not been complied with shall, where the restriction has been imposed pursuant to paragraph (a) or (b) of subsection (1), be a ground for the revocation of the licence in question.

(6) For the purposes of this section, “controller”, “officer” and “senior executive” each have the meaning given to the term in the applicable regulatory Act.

Revocation of licence

20C (1) Subject to section 20D, a competent authority may revoke the licence of a person if the competent authority is satisfied that—

- (a) any of the minimum criteria in respect of a licence is not or has not been fulfilled, or may not be or may not have been fulfilled, in respect of the person;
- (b) the licensed person is no longer a fit and proper person;
- (c) the person has failed to comply with any obligation imposed on it by or under the AML/ATF Regulations;
- (d) it has been provided with false, misleading or inaccurate information by or on behalf of the person.

(2) Where the competent authority revokes a licence, the competent authority may issue such directives under section 20A as it considers appropriate in the circumstance.

Notice of restriction of licence

20D (1) Where a competent authority proposes to—

- (a) restrict a licence under section 20B;
- (b) vary a restriction imposed on a licence otherwise than with the agreement of the person concerned; or
- (c) revoke a licence under section 20C,

the competent authority shall give to the person concerned a warning notice under section 24A.

(2) Where—

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- (a) the ground for a proposal to impose, vary a restriction or for a proposed revocation is that it appears to a competent authority that the criterion of the minimum criteria is not or has not been fulfilled, or may not be or may not have been fulfilled, in the case of any person; or
- (b) a proposed restriction consists of or includes a condition requiring the removal of any person as a controller or an officer,

the competent authority shall give that person a copy of the warning notice but the competent authority may omit from such copy any matter which does not relate to him.

(3) After giving a notice under subsection (1) and taking into account any representations made under section 24A(3), the competent authority shall decide—

- (a) whether to proceed with the action proposed in the notice;
- (b) whether to take no further action;
- (c) if the proposed action was to revoke the person's licence, whether to restrict its licence instead;
- (e) if the proposed action was to restrict the person's licence or to vary the restrictions on a licence, whether to restrict it or to vary the restrictions in a different manner.

(4) Once the competent authority has made a decision under subsection (3), it shall forthwith give either a decision notice under section 24B or a notice of discontinuance under section 24C, as the case may be.

(5) The competent authority shall publish in the Gazette, in such form as it thinks fit, notice of every revocation of a licence under this Act.

Public censure

20E (1) Subject to this section, if a competent authority considers that a person has contravened a requirement imposed on it by or under AML/ATF Regulations, the competent authority may publish a statement to that effect.

(2) After a statement under this section is published, the competent authority shall send a copy of it to the person.

(3) If a competent authority proposes to publish a statement in respect of a person, it shall give the person a warning notice.

(4) A warning notice about a proposal to publish a statement shall set out the terms of the statement.

(5) If a competent authority decides to publish a statement (whether or not in the terms proposed), it shall without delay give the person concerned a decision notice.

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- (6) The decision notice shall set out the terms of the statement.

Prohibition orders

20F (1) A competent authority may make a prohibition order if it appears to the competent authority that an individual is not a fit and proper person to perform functions in relation to an AML/ATF regulated activity carried on by a person who is licensed or registered by the competent authority (a “regulated person”).

(2) In exercising its discretion to make a prohibition order under subsection (1), the competent authority must have regard (among other things) to such factors, including assessment criteria, as the competent authority may establish in a statement of principles.

(3) A person must ensure that no function of his, in relation to the carrying on of an AML/ATF regulated activity, is performed by an individual who is prohibited from performing that function by a prohibition order.

(4) The competent authority may, on the application of the individual named in a prohibition order, vary or revoke the prohibition order.

(5) The competent authority must publish a prohibition order that is in effect, and every variation of such order, in such manner as it considers appropriate to bring the order to the attention of the public.

(6) Any person who fails to comply with the terms of a prohibition order commits an offence and is liable—

- (a) on summary conviction, to a fine of \$50,000 or to imprisonment for two years or to both;
- (b) on conviction on indictment, to a fine of \$200,000 or to imprisonment for four years or to both.

Prohibition orders: procedures

20G (1) If a competent authority proposes to make a prohibition order, it must give the individual concerned a warning notice.

(2) If a competent authority decides to make a prohibition order, it must give the individual concerned a decision notice.

Injunctions

20H (1) If, on the application of a competent authority, the court is satisfied—

- (a) that there is a reasonable likelihood that any person will contravene a relevant requirement in the AML/ATF Regulations, international sanctions obligations, directions or licence conditions;
- (b) that there is a reasonable likelihood that a relevant person will contravene an AML/ATF requirement, directions or licence conditions, or that such contravention has taken place and that

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there is a reasonable likelihood that the contravention will continue or be repeated; or

- (c) that any person has contravened a relevant requirement and that there is a reasonable likelihood that the contravention will continue or be repeated,

the court may make an order restraining the contravention.

- (2) If on the application of the competent authority the court is satisfied—

- (a) that any person has contravened a relevant requirement; and
(b) that there are steps which could be taken for remedying the contravention,

the court may make an order requiring that person, and any other person who appears to have been knowingly concerned in the contravention, to take such steps as the court may direct to remedy it.

(3) In subsection (2), references to remedying a contravention include references to mitigating its effect.

(4) “Relevant requirement” in relation to an application by the competent authority means a requirement which is imposed by or under the AML/ATF Regulations, directions or licence conditions.

Winding up or dissolution on petition from the competent authority

20I (1) A competent authority may present a petition to the court for the winding up of a company or the dissolution of a firm which—

- (a) is or has been a licensed or registered person; or
(b) is carrying on, or has carried on, business in contravention of the provisions of the AML/ATF Regulations.

(2) On such a petition, the court may wind up the company or dissolve the firm if it is of the opinion that it is just and equitable that the company be wound up or the firm dissolved.

(3) Part XIII (Winding Up) of the Companies Act 1981 shall apply to the winding up of a company under this section.”.

Amends section 23

16 The principal Act is amended in section 23(1), by inserting after the word “penalty” the words “or other disciplinary measure”.

Inserts sections 24A to 24D

17 The principal Act is amended by inserting after section 24 the following—

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“Warning notices

24A (1) Where a competent authority proposes to impose a penalty or take other disciplinary measures specified in section 20E, 20F or 20G, the competent authority shall issue a warning notice.

(2) A warning notice must—

- (a) state the penalty or other disciplinary measure which the competent authority proposes to impose or take;
- (b) be in writing; and
- (c) give reasons for the fine or other disciplinary measure to be imposed or taken.

(3) The warning notice must specify a reasonable period (which may not be less than 28 days) within which the person to whom it is given may make representations to the competent authority.

(4) Where representations are made under subsection (3) to the competent authority, it shall take them into account in deciding whether to give a decision notice.

(5) The competent authority may extend the period specified in the notice.

Decision notices

24B (1) A decision notice must—

- (a) be in writing;
- (b) give reasons for the competent authority’s decision to impose the penalty or other disciplinary measure to which the notice relates;
- (c) give its decision; and
- (d) give an indication of the right to appeal the decision to the appeal tribunal.

(2) A decision notice shall be given within 90 days beginning with the day on which a warning notice under section 24A was given; and if no decision notice under subsection (1) is given within that period, the competent authority shall be treated as having at the end of that period given a notice of discontinuance under section 24C.

(3) A decision notice on the imposition of a penalty must state the date of payment.

(4) A decision notice shall state the day on which it is to take effect.

Notices of discontinuance

24C (1) If the competent authority decides not to impose a penalty or other disciplinary measure proposed in a warning notice, it must give a notice of discontinuance to the person to whom the warning notice was given.

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(2) A notice of discontinuance must identify the default alleged to have been committed and the penalty or other disciplinary measure which is being discontinued.

Contravention by body corporate

24D (1) Where a body corporate is in breach of AML/ATF requirements, direction or licence condition and that breach was committed with the consent or the connivance of an officer of the body corporate, the competent authority may impose a civil penalty against both the body corporate and the officer.

(2) "Officer" means a director, manager, chief executive, member of the committee of management, or a person purporting to act in such capacity."

Amends section 26

18 The principal Act is amended in section 26 by inserting after paragraph (aa) the following—

"(ab) to quash or vary a decision of a competent authority under section 20A, 20B, 20C, 20E, 20F or 20G;".

Amends section 30H

19 The principal Act is amended in section 30H(1), by inserting after the words "AML/ATF Regulations" the words ", directions or licence conditions".

Amends section 30I

20 The principal Act is amended in section 30I(1), by inserting after the words "subsection (3)" the words ", directions or licence conditions".

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EXPLANATORY MEMORANDUM

This Bill seeks to amend the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 (the “Act”) to further enhance the powers of competent authorities to ensure compliance with AML/ATF measures and to strengthen the legislative framework around the AML/ATF supervision of non-licensed AML/ATF regulated financial institutions.

Clause 1 provides a title for the Bill.

Clause 2 amends section 2 of the Act to insert a definition of “international sanctions”.

Clause 3 amends section 5 of the Act to ensure that the obligation to supervise for compliance with directions and licences applies generally to supervisory authorities (and not just the BMA) who supervise the non-financial sectors.

Clause 4 amends section 7 of the Act to capture the new disciplinary measures to be inserted by this Bill.

Clause 5 amends section 9 of the Act with respect to the supervision of non-licensed AML/ATF regulated financial institutions.

Clause 6 amends section 10 of the Act in relation to the supervision of non-licensed AML/ATF regulated financial institutions.

Clause 7 amends section 11 of the Act to permit a competent authority to refuse to register an applicant for registration under section 9, unless satisfied that the applicant is a fit and proper person.

Clause 8 amends section 11A of the Act to impose the fit and proper test on non-licensed AML/ATF regulated financial institutions.

Clause 9 amends section 11B of the Act to make persons associated with a non-licensed AML/ATF regulated financial institution subject to the fit and proper test.

Clause 10 amends section 12 of the Act to apply that section to the FIA.

Clause 11 repeals section 13A.

Clause 12 amends section 14 of the Act to make provision for payment of a late fee similar to the late fee included under other regulatory Acts.

Clause 13 amends the heading to Chapter 4 of Part 3 of the Act to refer to “Disciplinary Measures” to reflect the enhancement of measures available to competent authorities to ensure compliance with the provisions of the Act.

Clause 14 amends section 20 of the Act to increase of the level of civil penalties for persons supervised by the BMA to \$10 million.

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Clause 15 inserts sections 20A to 20I in the Act to enhance the powers of competent authorities (including the BMA) to take a range of disciplinary measures as follows:

- Section 20A provides for the giving of directives by a competent authority to a person regulated by it in the event of a failure to comply with a requirement set forth in the AML/ATF Regulations etc. This clause seeks to empower the competent authority to give such directives as appear to the competent authority desirable for ensuring compliance.
- Section 20B empowers a competent authority to restrict the licence of a person or impose conditions on the person's registration as specified in clause 20C in circumstances that do not justify revocation of the licence or registration.
- Section 20C provides for the revocation of a licence or registration in certain circumstances as specified in subsection (1)(a) to (d). These circumstances are where the person is no longer a fit and proper person or where the person contravenes a provision of the AML/ATF Regulations or fails to meet an obligation imposed by or thereunder and where a person fails to satisfy the minimum criteria with respect to the licence.
- Section 20D requires a competent authority to issue a notice in writing to a regulated person where the competent authority proposes to restrict the person's licence.
- Section 20E provides for public censure by the publication of a statement by a competent authority stating that such person has contravened a requirement imposed by or under the AML/ATF Regulations. This clause also sets out the public censure procedure. The competent authority must first give a warning notice, followed by a decision notice.
- Section 20F empowers a competent authority to prohibit certain individuals from performing functions in relation to any AML/ATF activity in respect of a regulated person if it appears to the competent authority that the individual is not a fit and proper person in consideration of the regulated activity. The competent authority may make a prohibition order, depending on the circumstances and after an assessment based on criteria established by the competent authority. A person who fails to comply with a prohibition order commits an offence. This clause imposes an obligation on regulated persons not to employ persons to perform functions that they are prohibited from performing. On the application of the person concerned, the prohibition order may be varied or revoked.
- Section 20G sets out the procedure for making prohibition orders. The competent authority must give a warning notice first, followed by a decision notice.
- Section 20H makes provision for the issuing of injunctions by the Supreme Court on the application of a competent authority.
- Section 20I provides for the winding-up of a company or dissolution of a firm that was a licensed or registered person, if the court considers that it is just and equitable to wind it up.

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Clause 16 amends section 23 of the Act to also provide for the application of the new disciplinary measures.

Clause 17 inserts sections 24A to 24D in the Act with respect to procedures where a competent authority intends to impose disciplinary measures as follows:

- Section 24A sets out a procedure for the issue of warning notices. A warning notice is the initial step in any disciplinary measure specified in Chapter 4 of this Part of the Act. The warning notice must set out the proposed action and the reasons for it and also give an indication of whether or not the competent authority proposes to publish its decision. The notice provides a period of not less than 28 days, to enable the regulated person concerned to make representations. The competent authority may extend this period.
- Section 24B sets out a procedure for the issue of decision notices. A decision notice informs the person concerned that the competent authority has concluded that it is appropriate to take the action in respect of which a warning notice has been issued. The decision notice must set out the particulars of the decision and the reasons for the action and inform the institution concerned of its right to appeal to the appeal tribunal. The competent authority is required to make a determination within 90 days after a warning notice is given and, if no decision notice is given within that period, the competent authority shall be treated as having discontinued the action.
- Section 24C requires the competent authority to give a notice of discontinuance to the person concerned if, following the issue of a warning notice, the competent authority decides not to proceed with the proposed action.
- Section 24D provides for liability where a breach is committed by a body corporate.

Clause 18 amends section 26 of the Act to confer additional powers on the appeal tribunal.

Clause 19 amends section 30H of the Act to require compliance with directions and licence conditions.

Clause 20 amends section 30I of the Act to require compliance with directions and licence conditions.