
ANTI-MONEY LAUNDERING AND ANTI-TERRORIST FINANCING CONSULTATION RELEASED

*By Terrance S. Carter and Nancy E. Claridge**

A. INTRODUCTION

The Minister of Finance recently launched a consultation aimed at updating Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime.¹ The consultation paper, now released for public consultation and consideration, puts forward several proposals intended to strengthen Canada's anti-money laundering ("AML") and anti-terrorist financing ("ATF") legislative framework which is administered through the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA").² The Government suggests it is seeking to maintain the balance between the need to deter and detect money laundering and terrorist financing activities and protecting the privacy rights of Canadians, as well as recognizing the need to minimize the compliance burden on the private sector. The current PCMLTFA prescribes record keeping and reporting duties in a compliance regime for financial entities, which may draw charities into the ambit of the PCMLTFA, either as entities required to report or as subjects of such reports.

Comments from the public, which are due by March 1, 2012, will provide an opportunity for additional improvements to the PCMLTFA to be identified and ensure that the implications of the proposals are fully considered. The consultation document is available at <http://www.fin.gc.ca/activty/consult/pcmltfa-lrpcfate-eng.asp>.

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¹ Department of Finance Canada, "Minister of Finance Launches Consultation to Update Anti-Money Laundering and Anti-Terrorist Financing Regime" (21 December 2011) online: <<http://www.fin.gc.ca/n11/11-142-eng.asp>>.

² SC 2000, c 17 ["PCMLTFA"].

This *Anti-Terrorism & Charity Law Alert* summarizes the information contained in the proposals released by Finance Canada. The consultation paper and comments will serve to inform the Parliamentary review of the PCMLTFA that will be conducted in early 2012 by the Standing Senate Committee on Banking, Trade and Commerce. In this regard, charities and non-profit organizations will want to carefully review the PCMLTFA and the proposals contained in the full consultation paper.

B. BACKGROUND ON THE PCMLTFA³

The PCMLTFA was originally enacted in 1991 and overhauled in 2000 for the purpose of combating organized crime in furtherance of Canada's international obligations (particularly its commitments to the Financial Action Task Force on Money Laundering ("FATF")⁴), but after the events of September 11, 2001, it was amended again through Part IV of the *Anti-terrorism Act* which expanded its scope to include terrorist financing.⁵ The amended PCMLTFA received Royal Assent on December 14, 2006, and was fully in force in 2008.

The basic provisions of the PCMLTFA include the financing of terrorist activities and require certain transactions to be reported to the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"), a government agency. This is important for charities because it gives significantly increased powers to government agencies to identify and investigate charities and their directors. FINTRAC is currently allowed to disclose additional information to domestic and foreign law enforcement and intelligence agencies, and Canada Revenue Agency ("CRA") is currently allowed to disclose to FINTRAC, Royal Canadian Mounted Police, and Canadian Security Intelligence Service information about directors and officers suspected of being involved in terrorist financing activities. In this regard, the level of information sharing and collecting among federal agencies is increased and highlights the greater focus on, and investigation of, charities and possible their possible links to terrorism.

³ For more detailed information on the PCMLTFA, see <http://www.carters.ca/pub/article/charity/2011/tsc1006.pdf>.

⁴ The FATF is the key inter-governmental body whose purpose is the development and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing. See the consultation paper at page 7 for more information.

⁵ Bill C-25, *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act*, 1st Sess, 39th Parl, 2006, (royal assent 14 December 2006), SC 2006, c 12.

C. PROPOSALS

The proposals are regulatory in nature and address several deficiencies identified by the FATF in its 2008 evaluation of Canada's AML/ATF Regime.⁶ The key areas include:

1. Strengthening client due diligence ("CDD") standards;
2. Closing gaps in Canada's AML/ATF Regime;
3. Improving compliance, monitoring and enforcement;
4. Strengthening information sharing in the Regime;
5. Introducing a list of potential countermeasures; and
6. Updating reporting requirements.

For purposes of this *Bulletin*, a full discussion of all of the proposals cannot be completed. Below is a brief summary of each of the six key areas.

1. Strengthening CDD Standards

The obligation is for reporting entities to ascertain the identity of their clients and to keep records of that identification information, as well as the steps taken to acquire such information. The proposals in this area are intended to improve the capacity of reporting entities to know their customers, increase their ability to identify transactions potentially related to money laundering or terrorist financing, and assist reporting entities to comply with their obligations under Canada's AML/ATF Regime.

2. Closing Gaps

Among the proposals for closing the gaps in the current legislation is the possible elimination of the electronic funds transfer ("EFT") threshold. Currently, reporting entities are required to report to FINTRAC any EFTs of \$10,000 or more entering or leaving Canada. The elimination of this threshold would thus require financial entities, casinos and money services businesses to report *all* ETFs entering or leaving Canada. Many other proposals for this key area are discussed in the full consultation report.

3. Improving Compliance, Monitoring and Enforcement

The Government is considering requiring reporting entities to document and keep records of any "reasonable measures" they are required to take under the PCMLTFA. This information would be

⁶ See FATF/GAFI, online: <http://www.fatf-gafi.org/document/58/0,3343,en_32250379_32236963_40199098_1_1_1_1,00.html>.

provided to FINTRAC for monitoring and compliance of reporting entities within the requirements of the PCMLTFA. Another proposal is to provide for the Minister of Finance to have the authority to unilaterally change the information requirements contained in reporting and registration forms.

4. Information Sharing

Currently FINTRAC may only disclose information in ways specifically permitted in the PCMLTFA. More specifically, they may only report to specific law enforcement and government agencies designated by legislation and the type of information that may be disclosed is limited to “designated information”, as specified in the PCMLTFA. One of the proposals in this key area is to expand the information contained in FINTRAC disclosures to enhance the critical identifiers and investigative links that law enforcement and intelligence agencies can use in investigations.

Two proposals in this key area deal with information sharing to detect and deter the funding of terrorism through registered charities. One consideration is to allow the Canada Border Services Agency (“CBSA”) to disclose to CRA Charities Directorate the cross-border seizure reports related to forfeited currency or monetary instruments suspected to be linked to the activities of a charity. This information would assist CRA with their determination of a charity’s registration status. The second consideration is to clarify the conditions under which FINTRAC can disclose to CRA the related activities of a charity in order to facilitate its ability to provide proactive disclosures. Currently, FINTRAC may disclose designated information to CRA only if there are reasonable grounds to suspect that the information is relevant to determining whether a registered charity has ceased to comply with its registration requirements or whether a person or entity is eligible to be registered.

5. Potential Countermeasures

Presently, the Minister of Finance has the authority to issue directives that require reporting entities to take countermeasures in respect of transactions originating from or destined to designated foreign jurisdictions and foreign entities. Proposals in this key area call for regulations that would prescribe a list of specified countermeasures that reporting entities will be required to take when the Minister has issued a directive, include the definition of the term “foreign entity” in order to provide more guidance as to the types of entities that may form the subject of a directive, and allow for administrative monetary penalties to be issued to reporting entities that are in violation of a directive or regulation.

6. Reporting Requirements

It is proposed that the current reporting requirements be broadened to include the requirement to report suspicious transactions encompassing activities conducted for the purpose of a financial transaction. Thus, reporting entities would be required to submit a suspicious transaction report if, for example, an account application were considered suspicious.

D. CONCLUDING COMMENTS

The consultation report contains a number of vague recommendations that will require further investigation during the consultation process. The report also raises a number of concerns related to privacy issues, administrative burdens and creating regulations that do not appear on their face to correspond with the potential threat posed by various entities and individuals in Canada.

The consultation report notes that following the recent FATF evaluation, Canada remains in the “top tier” of FATF members in terms of compliance with the FATF standards. However, while the consultation report does not offer any empirical evidence to suggest Canada’s current AML/ATF regime fails to meet its obligations to the FATF, G20, United Nations, IMF and World Bank, the recommendations consistently suggest increased regulation and information sharing, without any corresponding protections in relation to due process rights and administrative efficiencies.

Although only two recommendations are directly related to registered charities, the entire consultation report should be reviewed by charities who need to become proactive in understanding the law and its impact on their operations. The consultation paper contains numerous and stringent consequences to the charity sector, as well as to its directors and officers personally, that mandate further discussion. This consultation by the Finance Minister is open to anyone; therefore, organizations that are active in this area will want to coordinate their efforts in response to the consultation invitation.