



Legal and Regulatory Update

Anti-Money Laundering Update: New Domestic and European Draft Legislation Published

Over the past few days, two pieces of draft legislation have been published in the area of anti-money laundering / counter terrorist financing.

On 31 January 2013, the Department of Finance published the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2013 (the “**Bill**”) proposing changes to national legislation.

On 5 February 2013, the European Commission (the “**Commission**”) adopted two legislative proposals:

- A directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the “**Fourth AML Directive**”); and
- A regulation prescribing the information which must accompany transfers of funds (which updates the existing 2006 regulation in this area).

This note considers the proposals contained in both the Bill and the Fourth AML Directive and how, if implemented, these proposals will impact on and change existing legislative obligations for entities who are “designated persons” pursuant to the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the “**AML Act**”), which transposed the Third Anti-Money Laundering Directive in this jurisdiction.

The Bill

The purpose of the Bill is to make changes necessary in order to better align the existing provisions in the AML Act with international standards, in particular, those recommended by the Financial Action Task Force (“**FATF**”).

What’s new?

If enacted, the Bill will update the AML Act, with the following key changes being proposed:-

- **Customer Due Diligence (“CDD”)**
 - **Simplified CDD** - designated persons will be required to “*take such measures as are necessary to establish*” and satisfy itself that a customer or product is one to which simplified CDD can be applied, prior to applying simplified CDD.
 - **Politically Exposed Persons (“PEP”)** – designated persons will be required to monitor customers to check whether they become a PEP during the course of a business relationship. If a designated person becomes aware or has reasonable grounds to believe that a customer has become a PEP (or an immediate family member / close associate of a PEP), it must apply the PEP provisions to that customer before continuing the business relationship. Enhanced monitoring obligations are also proposed for PEPs.

- **Enhanced CDD** – the current discretion whereby a designated person can opt to (or not to) apply enhanced CDD to a customer to whom enhanced CDD will not ordinarily apply is to be removed so that where there are ‘reasonable grounds’ to believe that there is a heightened risk of money laundering or terrorist financing, it will be mandatory for a designated person to apply enhanced CDD.
- **Policies and procedures**

The Bill proposes introducing additional requirements which oblige designated persons to adopt policies and procedures in relation to:

 - the measures which will be taken to keep CDD documents and information up to date;
 - the circumstances in which enhanced CDD measures are to be applied and the additional measures which will be taken; and
 - how the designated person will deal with risks arising in the context of using new technology, new products or new practices.
- Interestingly, the proposals which were published in the Heads of Bill last year creating statutory obligations in relation to the appointment of and the required level of seniority / duties imposed on a money laundering reporting officer or compliance officer are not included in the published Bill. This is a welcome development in our view, given the implications and potential liability that might result for such individual were those significant statutory responsibilities to be imposed.
- Other proposals have been made to amend the thresholds applicable for occasional transactions including clarification that for the purposes of the Act, there is an occasional transaction when the relevant threshold is met rather than when it is exceeded. The proposed thresholds are:-
 - for an occasional fund transfer (as defined in Regulation 1781/2006 – ‘wire transfer’), a threshold of €1,000;
 - for gambling business in a private members club, a threshold of €2,000; and
 - for all other occasional transactions, a threshold of €15,000.

The Fourth AML Directive

The Commission’s proposed Fourth AML Directive takes account of the latest recommendations of FATF and seeks to introduce a more targeted and focussed risk-based approach to the prevention of financial crime, in order to facilitate and assist Member States in tailoring systems to deal with money laundering and terrorist financing risks. The Fourth AML Directive (and the proposed regulation) is designed to update existing European legal rules in addressing the ‘constantly evolving’ threats associated with money laundering and terrorist financing.

What’s new?

Key legislative changes which are proposed in the Fourth AML Directive include:

- **Customer due diligence (“CDD”):**

Beneficial owners – The proposals aim to clarify the mechanisms for identification of beneficial owners. Obligations will be imposed directly on Member States to ensure that domestic legislation requires corporate or legal entities established in their jurisdiction to hold adequate, accurate and current information on their beneficial ownership and that designated persons have access to that information. Similar provisions are proposed in respect of trustees' disclosure of their status.

Simplified CDD – It is proposed to change the current approach whereby simplified CDD is permitted where there is a "specified product" or a "specified customer". Instead, each decision on when and how to apply simplified CDD must be justified on the basis of risk, with a list of the minimum factors which must be considered when making such decision set out in the Appendix to the Fourth AML Directive.

Enhanced CDD (PEPs) – the Commission proposes that the definition of PEPs be extended so that it will also include domestic PEPs, and families and close associates of those PEPs. This is in line with FATF recommendations.

- **Risk Assessments / Policies and Procedures**

The proposals include positive obligations on designated persons to conduct risk assessments; to document and keep these up to date; and to obtain approval from senior management for the policies and procedures which that designated person proposes to put in place to deal with identified risks.

It is also proposed that the three European Supervisory Authorities (EBA, EIOPA and ESMA) will, two years after implementation of the proposed Fourth AML Directive, provide an opinion on the risks affecting the internal market so as to assist both Member States and entities in conducting their own risk assessments.

- The draft legislation also contains proposals designed to formalise the role of national financial intelligence units ("**FIUs**") and to enhance cross border cooperation between FIUs in relation to exchange of information, tracing, freezing, confiscation and repatriation of illegal assets.
- Finally, it is proposed that the Fourth AML Directive will apply to the wider gambling sector (previously scope was limited to casinos).

What action is required?

The Bill is likely to become law at some stage this year, and so designated persons will need to review existing policies and procedures and make the necessary revisions and enhancements to fully take account of the proposals.

Getting ready for these changes will present a challenge for many designated persons. Existing CDD policies will require review and amendment. A particular challenge will arise when designing policies and procedures dealing with how CDD documents and information will be kept up to date, in particular, determining what a designated person will be expected to do to in order to comply with the proposed legislation. This is an aspect of the Bill which, if enacted, would benefit from further guidance.

In addition to reviewing existing policies and procedures, designated persons will also need to consider and develop policies and procedures which will adequately deal with risks arising in the context of new

technology, products and practices. Staff training will need to be updated to take account of any provisions enacted.

The pace at which the European proposals will progress will be slower, with the proposed Fourth AML Directive text proceeding for review and consideration by the European Parliament and Council of Ministers. The Commission intends to organise an open hearing on 15 March 2013 to provide a public forum for debating the proposals (the location has not yet been confirmed). Once finalised and adopted at European level, the Fourth AML Directive must be transposed into domestic legislation within a period of two years.

Next steps

As well as reviewing existing policies and procedures, if you are a designated person under the AML Act you should at this stage have received the Central Bank of Ireland’s ‘Dear CEO’ letter issued last October.

One of the key issues identified in the ‘Dear CEO’ letter was the inability of members of boards and senior management of designated persons to demonstrate that they had fully considered the implications of the AML Act, aligned their business models accordingly and otherwise adequately prepared for the commencement of the 2010 Act. The letter also outlined the Central Bank’s expectation that that boards and senior management “... must appropriately anticipate changes to the legislation and international standards and future-proof systems and processes accordingly...”. There is also a statutory obligation in the AML Act to ensure that staff are instructed on the law relating to money laundering and terrorist financing.

How can we help?

If you will be affected by these changes, our Regulatory Risk Management and Compliance team at Matheson can conduct a review of your current policies and procedure and make recommendations or otherwise advise on the changes which might be necessitated by the Bill. We can also provide advice and assistance to you and otherwise give assurance that you are ready for the proposed changes to the AML Act.

In addition, and given the evolving landscape in this area, Matheson will be hosting a client breakfast briefing on AML requirements and responsibilities, with a focus on both national and European proposals, shortly after Easter. We will contact you closer to the time to confirm the date.

In the meantime, if you have any queries in relation to the subject matter referred to in this summary note, we would be delighted to speak with you further and, in this regard, please contact one of the following or your usual contact at Matheson:

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