PROCEEDS OF CRIME (MISCELLANEOUS AMENDMENT) ACT 2021, LEGISLATIVE AMENDMENTS

February 2021

This newsletter is not a substitute for seeking professional advice and has no legal standing.

This newsletter only covers substantive amendments as a result of the Proceeds of Crime (Miscellaneous Amendments) Act 2021, and readers are advised to seek their own professional advice on the application of legislation and compliance with the same.

This newsletter covers amendments made to legislation made by the Proceeds of Crime (Miscellaneous Amendments) Act 2021 (8 of 2021) passed by Parliament on the 5th February 2021 (the "Act") and published on 9th February 2021 which is the date the Act came into force.

Prior to the publication and enactment of the Act, HM Government of Gibraltar engaged in extensive consultation with industry. This newsletter outlines the final version of the Act as published.

The Act amends the following pieces of legislation.

- Charities Act
- Chemical Weapons (Sanctions) Order 2019
- Companies Act
- Democratic People's Republic of Korea Sanctions Order 2018
- Financial Services Act 2019
- Friendly Societies Act
- Gambling Act 2005
- Insolvency Practitioners Regulations 2020
- National Coordinator for Anti Money Laundering and Combatting Terrorist Financing Regulations 2016
- Private Foundations Act 2017
- Proceeds of Crime Act 2015
- Register of Ultimate Beneficial Ownership Regulations 2017
- Sanctions Act 2019
- Supervisory Bodies (Powers Etc) Regulations 2017
- Terrorism Act 2018
- Terrorist Asset-Freezing Regulations 2011
- Trustees Act

For the purposes of this newsletter, the amendments will be covered in subject order and not all amendments made are covered by this newsletter.

The changes to the legislative framework were required to address certain deficiencies identified in the Mutual Evaluation Report of Moneyval published in December 2019[1].

[1] https://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-gibraltar-2019.html

REGULATION AND SUPERVISION

Proceeds of Crime Act 2015

The Proceeds of Crime Act ("POCA") is the main piece of legislation which has been amended by the Act due to the fact that it is through POCA that regulatory adherence to the FATF standards is generally achieved.

Throughout the Act numerous textual amendments are made to reflect that, where previously mention was made to Money Laundering (ML) and Terrorist Financing (TF), and it had been implicit that this term also included Proliferation Financing (PF), all three terms are now explicitly mentioned. This removes any ambiguity that POCA not only covers ML and TF, but also PF. This approach has been carried across other relevant enactments.

To this effect, revised definitions of TF and PF have been inserted into POCA as Sections 1ZA and 1ZB.

Beneficial Owner Definition

The definition of Beneficial Owner (BO) has changed in structure to make clearer who the legislation is referring to when addressing the BO term. The end result is the same as before, but the new wording is an easier to understand definition, which follows a hierarchical structure required under FATF standards, ultimately concluding with the senior managing official where no UBO can be clearly identified.

Listed Entity

A new definition for Listed Entity has also been inserted to make the reading of the BO easier and clearly defines who is meant by a Listed Entity. It is also made clear that when a BO is itself a Listed Entity (s11(4B)) there is no need to identify and verify the identity of any shareholder or beneficial owner of the Listed Entity, and it shall be necessary only for the relevant financial business to record the Listed Entity's entry in the public register of the regulated market in which the Listed Entity's shares are trading, and to retain a copy of such entry.

Revised Relevant Financial Businesses (RFB)

Section 9 of POCA has been expanded to include a redefinition of the Art Market Participant and Art Freeport Operators given they are supervised by distinct Supervisory Authorities.

Customer Due Diligence Measures

Sections 10 and 11 of POCA have seen major revisions in order to clarify what the legal and regulatory requirements are. Previously, some of the CDD measures were only contained in the Guidance Notes issued by the Supervisory Authorities but the Act has consolidated these. This also ensures consistency of approach between RFBs in different sectors.

s.10 now splits out the CDD requirements into 10 separate mandatory requirements entailing:

- identifying the customer,
- identifying all beneficial owners,
- understanding the ownership and control structure of the customer
- understanding and obtaining information on the purpose and intended nature of the customer's business or occasional transaction,
- verification of identity of customers and beneficial owners using reliable and independent sources,
- the verification of source of funds and wealth of customers and beneficial owners,
- seek additional specific information for corporates, trusts, foundations and similar legal arrangements,
- determining whether a customer, or its beneficial, owner is a PEP,
- conducting ongoing monitoring; and
- keeping records of the above as well of any difficulties encountered during the process.

All of these had already been requirements under POCA and the Guidance Notes but are now consolidated into a single section of the Act.

Materiality considerations

RFBs continue to be required under S11 to review their existing CDD documentation on a risk-based approach but an amendment also requires "materiality" to be taken into consideration. The Supervisory Authorities will be clarifying regulatory expectations as to how materiality considerations can be met in their updated Guidance Notes.

Ceasing CDD when risking Tipping Off

S11(5A) of POCA has been amended to permit an RFBs to stop conducting CDD if this risks tipping off the customer. An automatic requirement to submit a disclosure to the GFIU comes in to play in these circumstances.

Record Keeping, Ongoing Monitoring Requirements and Transaction Monitoring

The legislative requirements for ongoing monitoring of a customer's transactions have been expanded and there is now also a need to match the actual transaction activity with the known business of the customer (S12(2)) and risk profile and to keep CDD records up to date. These were previously contained in the Guidance Notes.

Amendments to S25 also clarify the extent of the record keeping requirements as including information obtained under s10 (as amended).

In respect of transactions, the amendments made to S25(2)(b) also clarify that the transaction records that need to be kept to also include the supporting evidence and records of all transactions, both domestic and international, including account files and business correspondence, and results of any analysis undertaken, as well as any other information that may reasonably be necessary to identify such transactions.

The records must be kept under S25(2A) to an evidentiary level that will permit the reconstruction of individual transactions and RFBs (S25(5) and (6)) have to be able to produce these "without delay".

A firm's risk assessment and the National Risk Assessment

S16 of POCA has been amended to make it clearer that when conducting their own risk assessment, RFBs must take into account the risks identified in the National Risk Assessment (NRA) published by the National Coordinator for AML/CFT and PF.

The same applies before applying Simplified CDD, Enhanced CDD and on the payout of any life assurance policy.

Simplified CDD cannot be performed if ML/TF or PF is known or suspected.

Removal of any preferential treatment to EU states not based on NRA risk

The amendments remove the automatic treatment as low risk that was afforded previously to EEA states or institutions based in the EU. In its place, firms must take into account the risks identified in the NRA to form their own view geographic risk.

Correspondent Banking

S17A has been removed and instead S19 has been amended tightening up controls in respect of correspondent banking relationships as well as treating all countries and territories outside Gibraltar equally. This includes an obligation for a financial or credit institution to determine that the respondent bank is not subject to any ML/TF or PF investigation or regulatory action as well as satisfying itself that the respondent does not permit its accounts to be used by shell banks.

Supervisory Authorities may also direct correspondents to review, amend or terminate correspondent relationships involving high-risk countries.

Politically Exposed Persons

The CDD requirement in S10(j) makes an obligation for an RFB to make a determination whether a customer, or its beneficial, owner is a PEP and removes any ambiguity that could have existed for RFBs to choose whether to conduct the exercise on a risk-based approach.

The requirement to determine if a Politically Exposed Person (PEP) is connected to a customer is also extended in S20 to an existing as well as proposed customers and the BO of the customer or proposed customer (S20(1) and (1)(b)).

S26(2)(c) also expands the application of a risk-based procedure not only to determine if customer or BO of a customer is a PEP but also whether such persons are family members or persons known to be close associates of PEPs.

Source of income or wealth for existing customers

A new provision under Section 10(f) POCA, as read with amended Section 20(1)(b) POCA clarifies that firms should establish the source of funds/wealth involved in that business relationship even for clients already on-boarded, and not just for new customers.

Overseas Branches and Subsidiaries

S21 has been extensively revised to make clear the obligations of RFBs who operate overseas branches or subsidiaries in respect of the application of Gibraltar equivalent requirements concerning CDD, ongoing monitoring and record-keeping. This is subject to what foreign law allows and RFBs must inform Supervisory Authorities if they become aware of any impediments to applying Gibraltar standards to branches or subsidiaries, and mitigate the ML/TF and PF risks accordingly.

Additional requirements regarding policies, procedures and procedures exist under S26(1B) for overseas branches and subsidiaries. These include;

- policies and procedures to combat ML/TF and PF as noted in s26(1) (see below)
- policies for sharing information on CDD
- provision, at group level, of customer, account and transaction information including unusual activities and analysis
- safeguarding confidentiality of information exchange
- provision of information from group level to branches and subsidiaries where relevant and appropriate to the management of the risk of ML, TF and PF (including compliance, internal audit or AML/CFT and PF).

Reliance on third parties for CDD

Where a RFB relies on a third party for CDD information S23 no longer permits the assumption that that person is regulated; this has to be positively confirmed by the RFB. Consideration also has to be given to geographic risk of that third party (again, using the NRA).

The new S25(6A) includes a requirement that the third party is tested at intervals to ensure that they have;

- consistent policies and procedures,
- the information and relevant documents and can provide them without delay,

- no obstacle to providing the required information or documents.

New Technologies

Consideration of risks when adopting new technologies or delivery mechanisms is mandated under the revised S25A(1). This was previously covered by the Guidance Notes.

Policies and Procedures

S26 of POCA has seen substantive amendments. Although the policies required under s26(1) have not changed, these are required to be proportionate the nature and size of the RFB (S26(1ZA)). RFBs are also required to monitor these policies, controls and procedures and to enhance them whenever a higher risk is identified.

S26(1A) also requires that as part of this monitoring, RFBs have to undertake an independent audit function for the purposes of testing the policies, controls and procedures. The scope and depth of the audit, as well as guidance on the independence will be issued by the Supervisory Authorities.

RFBs are also required by a new S26(2)(e) to have polices and procedures that allow for full and speedy responses to requests from the GFIU, a law enforcement authority or a Supervisory Authority, including requests for records to be kept under the record keeping sections.

Terrorism Act 2018

The offence of Proliferation Financing (PF) has been inserted as a new s38A into the Terrorism Act, and carried across to POCA and other enactments.

Supervisory Bodies (Powers Etc) Regulations 2017

The scope and frequency of on and off-site supervision conducted by the Supervisory Authorities will be governed more closely by the risks of the RFBs as well as those identified in the NRA.

Financial Services Act 2019

Minor amendments relating to the definition of Controller have been introduced to bring in the concept of a BO by cross-referencing this to the POCA definition for consistency purposes.

The Board of Charity Commissioners and the Registrar of Friendly Societies have been added to the list of Domestic Authorities with which the Financial Services Commission can exchange information.

Gambling Act 2005

Amendments made to the Gambling Act provide that, as is established practice already, when a licence is been granted or renewed, consideration must now be given to the fitness and propriety of the licence holder, shareholders, directors, executive managers or interested persons. ML/TF and PF have all been cross-referenced with POCA and the Terrorism Act 2018.

Insolvency Practitioners Regulations 2020

The Insolvency Practitioner Regulations require Insolvency Practitioners to obtain adequate, accurate and current information on the company/legal entity/arrangement to which the appointment relates including newly defined “basic information” and “beneficial ownership information” (S9(2A)). The concept of BO is cross-referred back to the POCA definition for consistency

National Coordinator for Anti Money Laundering and Combatting Terrorist Financing Regulations 2016

The Role of the NCO has been expanded to also include, the already existing duties of the NCO, that policy and operational decisions taken as a result of advice or a report provided under these Regulations are reflected in any relevant strategies implemented to mitigate the risks of ML/TF and PF affecting Gibraltar.

COMPANIES, TRUSTS AND FOUNDATIONS

Trustees Act

Section 61(1) Trustees Act has been amended to ensure that all trustees of a Gibraltar Trust must obtain adequate, accurate and current information on settlors, trustees, beneficiaries and protectors. This was already the case for those regulated entities who are licensed by the FSC. Section 61(2) creates an obligation for all trustees of Gibraltar trusts to hold basic information on all entities providing a service to the trust, where provision of that service constitutes “relevant financial business” for the purposes of section 9(1) POCA. Information under these subsections must be kept for 5 years in a form that allows their inspection.

Further amendments require, under s61B, that trustees disclose their trustee status to an RFB as well as information on its settlors, trustees, beneficiaries and protectors, and any person with effective control over the trust. Trustees will be required to update the information provided when it changes (subsection (2)).

The new section 62A ensures that flee clauses cannot be abused by providing that they shall have no effect where they have the potential to either:

a. facilitate a criminal offence;

b. frustrate an ongoing criminal investigation;

c. frustrate the prevention or the combatting of money laundering, terrorist financing, proliferation financing or tax evasion.

Companies Act

The maximum amount that could be applied to various penalties and fines have been increased.

Register of Ultimate Beneficial Ownership Regulations 2017

Nominee Shareholdings

RUBOR has been amended as follows:

- new definitions of "nominator", "nominee" and "nominee arrangement", added in Regulation 3(1)
- new Regulation 6A inserted
- new Regulation 8B inserted
- new Regulation 26ZA inserted

The amendments now ensure that nominee shareholders must obtain and hold adequate, accurate and current information on their nominator (R6A(2)), notify the company of the nominee arrangement and provide the company with details of the nominator (R6A(3)) within 15 days of the nominee arrangement or changes thereto. Nominees must also notify the company of the termination of the nominee arrangement (R6A(6)).

Under Regulation 8B, the company must then submit that information to the Registrar (R8B(1) within 30 days.

There is a 180 day period for compliance with these requirements for corporates that were in existence at the time the Act came into force. Otherwise, compliance for new incorporations is 30 days.

The Register is subject to inspection by competent authorities and FIUs (R26ZA(1)).

Amendments to Regulations 42 and 45 ensure that both the nominee and the company are subject to civil and criminal sanctions if they default on their obligations to disclose.

Directors

RUBOR has been further amended as follows:

- new definitions of "appointor" and "appointors" added in Regulation 3(1)
- new Regulation 6B inserted
- new Regulation 8C inserted
- new Regulation 26ZB inserted

The amendments now ensure that directors must identify their appointors, obtain and hold adequate and accurate information on them (R6B(1)) and provide that information to the company (R6A(3)). Directors must do this every time they are re-appointed (R6B(6)) within 15 days of the appointment or change.

Under Regulation 8C, the company must then submit that information to the Registrar (R8C(1) within 30 days.

There are 180 days provided for compliance with these new requirements in the case of corporates that were in existence at the time the Act came into force and 30 days for all new incorporations.

Amendments to Regulations 42 and 45 ensure that both the director and the company and subject to civil and criminal sanctions if they default on their obligations to disclose.

It should be noted that details of the existence of nominee arrangements and appointors are not subject to public inspection but are available to the GFIU and law enforcement agencies upon request.

Private Foundations Act 2017

Amendments to section 12(2) of this Act ensures that an overseas foundation must register the same information with the Registrar as Gibraltar foundations.

INTERNATIONAL SANCTIONS

Sanctions Act 2019

The obligation to freeze relevant assets under subsection applies whether the relevant assets are owned or held solely by the person to whom the international sanctions apply or jointly with another person and includes benefits of every kind.

Chemical Weapons (Sanctions) Order 2019, Sanctions Act 2019, Democratic People's Republic of Korea Sanctions Order 2018, and Terrorist Asset-Freezing Regulations 2011

The powers to act against assets has been expanded to include those owned, held or controlled jointly by designated persons notwithstanding that the other person may not also be a designated person.

NPO SECTOR

Charities Act and Friendly Societies Act

Both of these Acts have seen similar changes made to both. The changes made insert new parts that give both the Board of Charities Commissioners (the Commissioners) and the Registrar of Friendly Societies (the Registrar) greater powers to request information (information gathering powers) and conduct their activities as oversight bodies for those two sectors (investigatory powers).

New offences cover failures to comply with requests made in the exercise of these requirements, where a relevant person cannot show reasonable excuse, as well as situations where false or misleading information is given intentionally or recklessly.

Also introduced is the concept of "relevant persons" subject to these requirements, with a corresponding meaning in each Act. Such persons not only include friendly societies and charities, but also:

- their officers, trustees, charity trustees, agents or servants, and employees (where applicable);
- persons who have or at any time have had any direct or indirect proprietary, financial or other interest in or connection with the society or charity (as the case may be);
- those involved (directly or indirectly) with transactions considered to be of material significance by the Commissioners or the Registrar.

The powers of the Commissioners and of the Registrar have also been extended to the sharing of information (including confidential information) for the prevention of ML/TF and PF. The concepts of "foreign authority", "domestic authority", "foreign registrar" and "foreign commissioners" are defined and used within these Acts in order to facilitate international information exchange and regulatory cooperation.

Safeguards have also been introduced so that the Commissioners and the Registrar can refuse to exchange confidential information where they are not satisfied that the person or body requesting the information is subject to confidentiality provisions which are at least equivalent to those in under Gibraltar law. Likewise, they can refuse to provide assistance to foreign counterparts where:

- the request is not made in accordance with any cooperation agreement or similar arrangement;
- in respect of the same person and the same action, proceedings have been initiated or a criminal penalty has been imposed;
- there are grounds of public interest or essential national interest. These grounds are to be determined by the Minister with responsibility for financial services, or Minister with responsibility for finance (as the case may be).

Further safeguards are also in place to preserve legal privilege over information, and provide a mechanism for appeals to the Supreme Court for decisions made by the Commissioners or the Registrar.

The Schedules to each Act provide for the Commissioners and the Registrar to develop policies to mitigate against the particular vulnerabilities of the charitable sector to financial crime, including the rollout of educational and outreach programmes, and relevant as guidance on best practice.

This newsletter has been published by;

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