

NOVEMBER 5, 2001

New Federal Anti-Money Laundering Legislation:

How It Affects You and How It Affects Us As Your Lawyers

Recent world events have changed many people's outlooks and we all have become more alert and attentive to anything suspicious. Even before September 11, 2001, international business transactions and cross-border movement of funds had become the subject of greater scrutiny, following the establishment of an inter-governmental financial action task force on money laundering back in 1989. This organization produced a series of recommendations which have been implemented in over 50 countries. The Federal Government of Canada has introduced legislation to significantly strengthen Canada's existing anti-money laundering regime, based on these recommendations.

The *Proceeds of Crime (Money Laundering) Act* ("Act")¹ was passed in the summer of 2000. A newly created independent government agency, the Financial Transactions and Reports Analysis Centre of Canada ("FinTRAC") was established at that time to receive and analyze data to assist in the detection and deterrence of money laundering and to facilitate the investigation and prosecution of money laundering offences (soon to be expanded to terrorist activity financing offences as well). To accomplish this, the legislation imposes reporting, record keeping and identification requirements on entities and professionals that are susceptible to being used for these types of offences.

The record keeping, client identification and reporting requirements apply to:

- persons engaged in the business of dealing in securities, including portfolio management and investment counselling;
- financial institutions, including authorized foreign banks, credit societies, and savings and credit unions that are regulated by provincial legislation;
- federally and provincially regulated life companies and trust and loan companies;
- casinos;
- people in the business of foreign exchange dealing;
- various business professionals, such as legal counsel, accountants, real estate brokers and sales representatives; and
- employees of these persons or entities.

There are three types of transactions that invoke the record keeping and reporting obligations under the Act:

¹ S.C. 2000, c. 17. Proposed amendments to this Act (Bill C-36) have had second reading to incorporate terrorist financing activities as well. They are expected to be proclaimed in force before the end of November, 2001 under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

THE UPDATE

1. Suspicious transactions;
2. Large cash transactions (in excess of \$10,000.00); and
3. Cross-border transfers of currency or monetary instruments.

The legislation is to become effective in stages. The regulations relating to suspicious transactions become effective on **November 8, 2001**. Regulations relating to large cash transactions and cross-border transfers of currency or monetary instruments are still being drafted and are not expected to be implemented until some time next year.

All clients are encouraged to consider whether their business or activities are subject to these requirements. The obligations to report, identify and maintain records arise when certain prescribed activities (or “triggering activities”) take place, in the course of which a transaction occurs, such as:

- the receipt or payment of funds, other than for certain exempt purposes;
- the purchase or sale of securities, real property or business assets; and
- the transfer of any funds or securities by any means (the definition of funds is broad and includes cash, currency, securities, negotiable instruments and other financial instruments, in any form, that indicate the person’s title or interest in them).

If you are subject to the Act and you (or your client, if you are a professional) are involved in a triggering activity then you must consider whether it is a large cash, suspicious or cross-border transaction. There are very specific record keeping and reporting requirements pertaining to the three types of transactions that must be complied with, and procedures that must be implemented in order to ensure compliance.

Large Cash Transactions

Large cash transaction records must be maintained in respect of cash of \$10,000.00 (Cdn.) or more received in the course of a single transaction, unless it is received from certain exempt financial or public bodies. Two or

more cash transactions done consecutively within 24 hours that total \$10,000.00 or more are considered to be a single transaction. Large cash transaction records must be maintained which identify things such as the name of the person or entity who holds the account for deposit or from whom the cash originated and various other details about the receipt of the funds, the source of the funds and the transaction.

Suspicious Transactions

A suspicious transaction could be any financial transaction in respect of which there are reasonable grounds to suspect it may be related to the commission of a money laundering offence or terrorist financing activity (once the Act is amended). There is no threshold amount and there is no requirement that funds be exchanged in the form of cash. These transactions must be reported if and when they are completed. FinTRAC has published guidelines to assist in identifying these types of transactions.

Cross-Border Transactions

The regulations pertaining to the reporting of these types of transactions are still being developed. They will cover transfers of currency or other monetary instruments in excess of a prescribed amount into or out of Canada.

Impact on Dealings with Lawyers

Even if you are satisfied that the Act does not apply to you or you have already met your own requirements, it is important that you appreciate that we, as your lawyers, are affected by the Act.

Lawyers are among the groups of professionals to whom the Act applies. This means that, after November 8, 2001, law firms will be required to report to FinTRAC any suspicious transactions that the lawyers or staff become aware of in the course of a retainer that involves any of the triggering activities. For all intents and purposes, the Act prohibits lawyers and their staff from disclosing the fact that a suspicious transaction report has been made or the contents of that report. Law firms will be obliged to provide the prescribed information to FinTRAC, even if it otherwise might be confidential. The reports are designed not to cover privileged communications but will inevitably include information received in the course of the retainer (not all of which is necessarily privileged, even though it may be confidential). Goodmans will only report information

that absolutely must be reported under the Act, by strictly and carefully complying with the prescribed form and manner of transaction reports and records.

Certain of the provisions of the Act not yet in force will give FinTRAC the power to enter a law firm's premises and seize documents (including electronically entered documents) and give customs officials the power to seize a law firm's mail going outside or coming into Canada (if they reasonably believe it contains cash or monetary instruments in excess of the prescribed threshold amount). Law firms can assert privilege over documents in their offices that are believed to be privileged. Goodmans will assert solicitor and client privilege if it believes any documents subject to inspection or seizure at our offices may be protected by solicitor and client privilege and steps will be taken to contact the client in such event to determine whether the client wishes to waive privilege. The privilege can only be maintained beyond 14 days by making a court application, and then, only if a judge is satisfied that the document is privileged. No costs can be awarded in favour of the client on such an application, even if privilege is established. The protection of privilege is not as secure in cross-border transactions because the Act gives broad powers to customs officers to conduct searches of cross-border mail and courier packages with no opportunity to assert privilege beforehand.²

Goodmans remains committed to protecting the confidentiality of all our clients' business and affairs to the greatest extent possible. If you have any questions about how our compliance obligations might affect you or about your own compliance obligations, we encourage you to contact us directly.

If you have any questions about your own business and activities and whether you need to be concerned about compliance with the Act, we would be pleased to assist you in evaluating your particular circumstances and, if necessary, developing the appropriate compliance procedures. You can also get guidance, assistance and direction directly from FinTRAC at: www.fintrac.gc.ca or at 234 Laurier Avenue West, Ottawa, Ontario K1P 1H7, 1-866-FinTRAC(346-8722) or via e-mail at info@FINTRAC.gc.ca.

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² Certain lawyers' associations are challenging the legislation but those challenges will not be resolved until sometime after November 8, 2001.

All Updates are available at www.goodmans.ca. Requests for additional copies of this communication or changes of address should be directed to Sandy Mitchell at smitchell@goodmans.ca. This Update is intended to provide general comment only and should not be relied upon as legal advice. ©Goodmans LLP, 2001.

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