PROCEEDS OF CRIME LEGISLATIVE AMENDMENTS

March 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 various amendments made to the Proceeds of Crime Act 2015 as well as subsidiary legislation made in relation to that Act. Readers are advised to seek their own professional advice on the application of legislation and compliance with the same.

This newsletter covers legislative changes made by the following pieces of legislation:

- Proceeds of Crime Act 2015 (Amendment) Regulations 2021;
- Proceeds of Crime Act 2015 (Relevant Financial Business)(Registration) Regulations 2021;
- Financial Services (Specified Regulatory Decisions)(Amendment) Regulations 2021;
- Proceeds of Crime Act 2015 (Transfer of Virtual Assets) Regulations 2021;
- Proceeds of Crime Act 2015 (Amendment No.2) Regulations 2021; and
- Proceeds of Crime Act 2015 (Relevant Financial Business) (Registration) (Amendment) Regulations 2021

These were published and came into force on 22, 29 and 30 March 2021.

PROCEEDS OF CRIME ACT 2015 (AMENDMENT) REGULATIONS 2021

A number of amendments to the Proceeds of Crime Act (the Act) have been made via Regulations to update a number of provisions to ensure compliance with the Financial Action Task Force (FATF) standards.

Virtual Assets and Virtual Asset Service Providers

Section 7 has been expanded to include a definition of "DLT", which matches the Financial Services Act 2019 (FSA19) definition, as well as to add the following definition of "virtual assets":

> *"means a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes, but does not include–*
>
> *(a) digital representations of fiat currencies; or*
>
> *(b) financial instruments specified in paragraph 46 of Schedule 2 to the Financial Services Act 2019."*

This definition replicates the FATF definition of "Virtual Assets".

Following a gap analysis between the FATF definition of "virtual asset service providers" (VASPs) and the Distributed Ledger Technologies (DLT) business activities falling within the FSA19, a new S9(1)(q) has been inserted into the Act to catch certain VASP activities which were deemed to fall outside the scope of FSA19 DLT regime. The new insertion ensures that all activities falling within the FATF definition of VASPs are now regulated activities under Gibraltar law, and within the regulatory and supervisory ambit of the GFSC. The existing Sections 9(1)(j) and (p), and the new Section 9(1)(q), together ensure that under Gibraltar law, all VASPs are deemed Relevant Financial Businesses (RFBs), and therefore subject to the provisions of POCA.

The new Section 9(1)(q) brings the following within the scope of the Act:

> *"persons that, by way of business, exchange, or arrange or make arrangements with a view to the exchange of–*
>
> *(a) virtual assets for money;*
>
> *(b) money for virtual assets; or*
>
> *(c) one virtual asset for another."*

For the purposes of paragraph (q) above, "money" means–

(a) money in sterling;

(b) money in any other currency, or

(c) money in any other medium of exchange,

but does not include a virtual asset.

Please see the next section of this newsletter on the new registration requirements for certain RFBs.

Occasional Transactions for Virtual Assets (S11(1)(g))

Any VASP captured under S9(1)(j), (p) or (q) of the Act that enters into a business relationship has to conduct Customer Due Diligence in the same manner as any other RFB under the Act (S11(1)(a)).

The de minimis threshold of €15,000, which triggers a requirement for CDD to be carried out in respect of occasional transactions, is reduced to €1,000 in the case of virtual asset transactions (newly inserted S11(g)). This lower limit also applies to linked transactions which, when aggregated, equal or surpass €1,000. There continues to be an overarching requirement to conduct full CDD, irrespective of transaction value, where ML, TF or PF is known or suspected (S11(1)(c)).

Timing of verification (S13)

As a result of recent changes to S10 and S11, the timing of verification of CDD has been clarified to include all CDD measures in S10 (meaning of CDD measures) having to be carried out when the duty under S11(1) (application of CDD measurers) is triggered.

High Risk Third Country (S23)

Clarification is also provided that references in S23(1A) to high-risk third countries are linked to the EU listing of high-risk countries. This is in addition to the existing obligation under S23(1C) to have regard to the level of country risk posed by any country identified within Gibraltar's National Risk Assessment (NRA) as being high-risk. The concept of a "third country" remains unchanged in S183(5A).

Developing Technologies (S25A)

The requirement to identify and assess risks of ML, TF and PF has been clarified as also being applicable in respect of developing technologies, for both new and existing products and business practices, prior to the launch of these, effectively expanding the number of risk factors to be considered when identifying and assessing ML/TF/PF risk.

Convicted Persons (S30(3))

The list of RFBs where specific mention is made to prevent persons convicted of a relevant offence or their associates from holding a management function in, or being a beneficial owner of, those businesses has been extended in S30(3) to include estate agents and letting agents (S9(1)(h)), all controlled activities (S9(1)(j), as read with FSA19), DLT firms involved in tokenised assets (S9(1)(p)) and those making arrangements with a view to exchange virtual assets (S9(1)(q)). These are in addition to RFBs previously caught under S30(3), which was limited to auditors, insolvency practitioners, external accountants and tax advisors (S9(1)(p)) and notaries and other independent legal professionals (S9(1)(i)). Other RFBs not specifically mentioned in s30(3) already have equivalent obligations built into the regulatory and legal framework covering their regulation and supervision.

Amendment to SBPR

Clarification is provided to remove any ambiguity that may have existed regarding the ability to exchange information between Supervisory Authorities and their counterparts and Law Enforcement Agencies as a result of different terminologies that may exist in other jurisdictions.

PROCEEDS OF CRIME ACT 2015 (RELEVANT FINANCIAL BUSINESS) (REGISTRATION) REGULATIONS 2021

These Regulations (RFBR Regs) impose an obligation on the following businesses to be registered with the Gibraltar Financial Services Commission (GFSC) for the purposes of AML/CFT and CPF supervision;

- external accountants;
- tax advisors;
- undertakings that receive, whether on their own account or on behalf of another person, proceeds in any form from the sale of tokenised digital assets involving the use of DLT or a similar means of recording a digital representation of an asset; and
- persons that, by way of business, exchange, or arrange or make arrangements with a view to the exchange of–

  (a) virtual assets for money;

  (b) money for virtual assets; or

  (c) one virtual asset for another.

This requirement only applies if a particular person (either a natural person or a firm) carrying out any of the above relevant financial businesses is not already subject to supervision by a supervisory authority specified in paragraphs (a) to (d) or (h) of Schedule 2 to the Act. Therefore, if an existing DLT firm is already caught for its DLT activity by the Financial Services Act 2019, there is no need for that business to undergo a separate registration process under these Regulations. Similarly, an Audit Firm that is subject to GFSC oversight will not need to seek a separate registration for its accountancy practice.

Accordingly, if a person is not already subject to supervision, it is now a criminal offence to conduct any of the above four activities without being registered; the offence is punishable with up to 2 years' imprisonment and/or a fine.

The GFSC will set out the registration process and forms that will be required in order to apply for registration under these Regulations and this process will require the applicant to satisfy the GFSC's Fit and Proper Test.

The RFBR Regs spell out the rights of the GFSC to refuse an application, including the imposition of conditions etc. in relation to the application as well as rights of appeal of the applicant. There is no right of appeal against an obligation/decision to refuse an application under R7(1) or R8(1), but decisions to suspend or cancel registrations may be appealed under R10.

The purpose of the RFBR Regs is to ensure that a supervisory authority has full oversight over the activities listed above which are already defined as relevant financial business under S9 of the Act. Powers granted to the GFSC under the RFBR Regs are in addition to the full set of regulatory powers available to the GFSC under the Supervisory Bodies (Powers Etc) Regulations 2017 (SBPR).

It is also worth noting that the GFSC's power in respect of this registration is only limited to AML/CFT and CPF and not the activity being conducted by the registrant. So, for example, the GFSC will not be conducting regulation and supervision of tax advisory or accountancy work, but instead be concerned with the AML/CFT and CPF systems and controls required to be maintained and applied under the Act. Where concerns arise, the GFSC may then use its powers under R9 to suspend or cancel a person's registration.

Transitional arrangements

Transitional arrangements are made under R12, providing for existing persons carrying on business as relevant financial businesses referred to in regulation 4(1) to apply for registration within a period of three months of the day on which the RFBR Regs come into operation, and continue their operations without being deemed to be in breach of the RFBR Regs or the Act, until such time as their application is determined.

FINANCIAL SERVICES (SPECIFIED REGULATORY DECISIONS) (AMENDMENT) REGULATIONS 2021,

These Regulations amend the Financial Services (Specified Regulatory Decisions) Regulations 2020 (SRD Regs) in order to make certain decisions under the RFBR Regs subject to the GFSC's Decision Making Committee (DMC) processes by making them "specified regulatory decisions" within the meaning of s24 FSA19.

Accordingly, in addition to the specified regulatory decisions listed in s24 FSA 19, specified regulatory decisions listed in the SRD Regs have been expanded further and now include:

- the decision to issue a decision notice under R8(5) RFBR Regs, where the GFSC decides to refuse an application;
- the decision to issue a decision notice under R9(3) RFBR Regs, where the GFSC decides to suspend or cancel a person's registration;
- the decision to suspend or cancel a person's registration with immediate effect under R9(5) RFBR Regs; and
- the decision to publish information under R9(7) RFBR Regs in respect of any action taken under R9(3) or R9(5) of those Regulations.

The DMC process is not invoked for positive registration considerations under the RFBR Regs.

PROCEEDS OF CRIME ACT 2015 (TRANSFER OF VIRTUAL ASSETS) REGULATIONS 2021 AND THE TRAVEL RULE

These Regulations (TR Regs) deal only with the so called "Travel Rule" of the FATF. The Regulations impose obligations on those RFBs under the Act that deal with the transfer of virtual assets, as defined in S7 of the Act.

A definition of VASP is included in these Regulations which replicates the FATF definition of the same. The only purpose of this definition is to define transactions between RFBs operating in Gibraltar and VASPs operating outside Gibraltar (and not therefore RFBs). It is important to note that this definition has no effect outside the TR Regs, and does not therefore affect Gibraltar's regulation of VASP activity under the FSA19 (and its DLT Framework) and the Act (see above points on how s9(1)(j) as read with the concept of "value" under FSA19, S9(1)(p) and S9(1)(q) of the Act now capture all VASP activity intended to be captured by the FATF definition).

The FATF definition of VASP which has been transposed verbatim into the TR Regs (for maximum alignment with FATF standards), captures any person who conducts, by way of business, one or more of the following activities or operations for on behalf of another person;

(a) exchange between virtual assets and fiat currencies;
(b) exchange between one or more forms of virtual assets;
(c) transfer of virtual assets;
(d) safekeeping or administration of virtual assets or instruments enabling control over virtual assets; or
(e) participation in and provision of financial services related to an issuer's offer or sale of a virtual asset.

The definition is convenient, as it highlights that RFBs may send or receive virtual assets to or from other RFBs or persons outside of Gibraltar. For avoidance of doubt, the obligations in the TR Regs apply to RFBs only, but capture situations where those RFBs are transacting with other RFBs, or situations where they are transacting with persons outside of Gibraltar and who are therefore not RFBs.

Originator Obligations (R4)

A RFB (known as the "Originator") which acts on its own behalf or on behalf of a customer (in either case, as "payer") that sends virtual assets to a VASP (irrespective of where the VASP is located) needs to obtain and send the following information immediately and securely to that VASP (known as the "Beneficiary");

(a) the payee's name;
(b) the payee's virtual asset account number;
(c) the payer's name;
(d) the payer's virtual asset account number;
(e) where the payee or the payer does not have a virtual asset account number, a unique transaction identifier; and
(f) at least one of the following–
    (i) the payer's address;
    (ii) the payer's national identity number;
    (iii) the payer's customer identification number; or
    (iv) the payer's date and place of birth.

Nothing in R4 makes it necessary to attach the above information to the transfer itself, and the information can be communicated separately so long as it occurs immediately and using a secure mechanism. The mechanism itself is also not defined in order to offer flexibility to Originator RFBs to use any appropriate technological solutions, as and when these start to become available. Accordingly, the TR Regs are technologically neutral.

The information requirements only apply to virtual asset transfers of €1,000 or above, using the concept of a "material transaction" as defined in R3(1). It should be noted that there are developing rules constantly evolving surrounding the Travel Rule and this €1,000 *de minimis* threshold has been adopted as an interim measure pending clarification. To maintain alignment with the evolving international standards, the regulations permit for this amount to be increased or decreased through an order made by the Government and published in the Gazette.

Beneficiary Obligations (R5)

An RFB (known as the "Beneficiary") that acts on behalf of a customer that receives virtual asset transfers (the "payee") from a VASP with a value of €1,000 or above, has a corresponding obligation to ensure that all the required information is received from the Originator at the time the virtual asset transfer is received. Additionally, the Beneficiary has the added obligation to verify that the payee's name and, where applicable, the payee's account number stated in the transfer match the Beneficiary's own records.

In the case where a Beneficiary receives a virtual asset transfer from a person other than a VASP (e.g. an unhosted wallet) the Beneficiary must obtain from the payee the name of the payer and at least one of the items listed in (f) above.

Beneficiaries also have to put in place risk-based policies and procedures for the purposes of determining what to do when the information required to be submitted is missing, incomplete or inconsistent with its own records. Here, the Beneficiary has to have systems in place to determine whether to continue with the execution of the virtual asset transfer, reject it or suspend the transfer and then determine what the appropriate follow-up action will be.

The appropriate follow-up action could be the implementation, under the transaction monitoring requirements of the Act, for post-event or real time monitoring, suspending the transfer until the missing or incomplete information is obtained or even considering whether an authorised disclosure under the Act should be made.

Intermediary institutions

The TR Regs make no separate mention of RFBs which may act as intermediaries in virtual asset transfers and this is because such institutions will act as both Beneficiary as well as Originator for the transactions and therefore the obligations to obtain and then submit the information, as well as check the information is consistent with its own records, will apply to the intermediary as if they were both Originator and Beneficiary.

Customer Due Diligence and Record-Keeping Requirements (R6)

An Originator may satisfy its Customer Due Diligence (CDD) requirements under S10 of the Act without necessarily having obtained some of the information required to be sent with a virtual asset transfer (e.g. the payer's place of birth). Notwithstanding this, the requirements imposed by the TR Regs require specific information to be obtained and sent immediately and securely with every virtual asset transfer with a value of €1,000 or above (until such time as that threshold

may be revised by the Government). The TR Regs therefore expand CDD measures to include all the information required to be sent as if these were required to be obtained under S10 of the Act (CDD Measures) and then kept under S25 of the Act (Record-Keeping).

In the same manner, all the information received by a Beneficiary needs to be kept as part of the record-keeping requirements of the Act.

It should be noted that these additional requirements only apply in the case of those institutions and customers involved in virtual asset transfers.

Offences and Penalties (R7)

Not complying with the requirements of the TR Regs is an offence punishable with a conviction of up to 2 years' imprisonment and/or a fine.

This newsletter has been published by;

The National Coordinator for Anti-Money Laundering and the Combatting of Terrorist Financing
HM Government of Gibraltar
40 Town Range
Gibraltar

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