CHARTERED PROFESSIONAL ACCOUNTANTS CANADA

ANTI-MONEY LAUNDERING/ANTI-TERRORIST FINANCING (AML/ATF) DEVELOPMENTS

Risky Business: Non-compliance with AML Requirements

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1. Executive summary

New anti-money laundering and anti-terrorist financing (AML/ATF) requirements came into force on June 1, 2021. These changes will impact Chartered Professional Accountants (CPAs) engaged in activities covered by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) and its regulations. To keep CPA Canada members apprised of recent legislative and regulatory changes affecting the profession, CPA Canada is publishing a short series of articles identifying some of the key requirements and developments that accountants and accounting firms[1] should be aware of.

In addition to regulatory changes, all reporting entity sectors including accountants and accounting firms are now facing greater risks if found to be in non-compliance with the anti-money laundering and anti-terrorist financing legislation[2] (AML/ATF legislation). Since 2019 there have been some important changes to the AML/ATF legislation and the *Criminal Code* to deter non-compliance with the legislation and associated regulations.

There are **three important factors in the AML/ATF landscape that have increased the risks and consequences of non-compliance**:

1. **The scope of regulatory changes** associated with the AML/ATF legislation that came into force since 2019 and, for accountants and accounting firms especially, the changes that came into force on June 1, 2021. The amendments to the AML/ATF legislation have significant implications for the updating of accountants' and accounting firms' compliance programs with changes to rules about "know your client," beneficial ownership information, business relationships, politically exposed persons and heads of international organizations, record-keeping, reporting of large virtual currency transactions, among other requirements. Accountants and accounting firms need to implement those changes as soon as possible and consider the public notices[3] that the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) has issued. Failure to develop and implement an effective compliance program and apply the new regulations could expose you or your firm to serious consequences.

1 In this article, the expression "accountants and accounting firms" refers to the definitions of accountants and accounting firms that are found in subsection 1(2) of the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations. "Accountant means a chartered accountant, a certified general accountant, a certified management accountant or, if applicable, a chartered professional accountant." "Accounting firm means an entity that is engaged in the business of providing accounting services to the public and has at least one partner, employee or administrator that is an accountant."

2 Obligations for accountants and accounting firms are included in the PCMLTFA and its regulations (collectively referred to in this article as "AML/ATF legislation")

3 FINTRAC, *Notice on forthcoming regulatory amendments and flexibility, updated December 2, 2021*; FINTRAC, *Implementation of Regulatory Amendments*, January 22, 2021; FINTRAC, *Notice on the assessment of obligations coming into force on June 1, 2021*, September 28, 2021; FINTRAC, *Regulatory amendments in force as of June 1, 2021*, June 1, 2021; and FINTRAC, *Update to reporting entities on expectations as of December 1, 2021*, December 2, 2021.

2. The **issuance and publication** of an administrative monetary penalty (AMP) for a violation of the AML/ATF legislation. FINTRAC has the authority to impose an AMP when it finds non-compliance with the AML/ATF legislation. AMPs have existed since 2008 but in 2019 a new provision was added which requires FINTRAC to publish the name of the reporting entity,[4] the nature of the violation and the amount of the penalty when one is imposed, creating a reputational risk. An effective AML/ATF compliance program is key to mitigating these risks.

3. The change of the definition to Section 462.31 of the *Criminal Code* that lowers the threshold for law enforcement and prosecutors to pursue money-laundering charges by adding a "**recklessness**" provision to the definition of money laundering. The exposure to risk for accountants and accounting firms becomes greater if there is failure to meet due diligence standards in meeting the AML/ATF legislation and *Criminal Code* requirements. The consequences of a prosecution and conviction for money laundering are significant.

2. Background

In 2016, the Financial Action Task Force (FATF), the inter-governmental standard-setting body for AML/ATF, evaluated Canada's AML/ATF regime.[5] Canada rated well on a number of the FATF's 40 recommendations, however some high-level deficiencies against the international standards were noted that affect accountants and accounting firms, as part of a larger group of reporting entities called Designated Non-Financial Businesses and Professions (DNFBPs).

In addition, a significant area of concern by the FATF of Canada's regime was the low number of prosecutions and convictions for single-charge money-laundering cases.[6] The Department of Finance in 2018[7] and law enforcement[8] recommended a change by adding a "**recklessness**" clause to the *Criminal Code* to facilitate the investigation and eventual prosecution of money laundering offences by professional money launderers.

4 A **reporting entity** for purposes of the AML/ATF legislation is defined in section 5 of the PCMLTFA and the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations. It includes persons and entities such as banks, credit unions, cooperatives, trust and loan companies, life insurance companies, securities dealers, money services businesses, accountants and accounting firms, B.C. notaries, dealers in precious metals and stones, real estate brokers, real estate representatives and developers, casinos, etc.
5 Financial Action Task Force (FATF), Anti-money laundering and counter-terrorist financing measures, September 2016
6 FATF, Anti-money laundering and counter-terrorist financing measures, September 2016: Paragraph 138 "…As professional money launderers are mostly involved in ML (rather than PPOC) cases, the fact that Canada only led 35 prosecutions and obtained 12 convictions of single-charge ML cases in the last five years is a concern…"
7 Finance Canada, *Reviewing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime*, February 7, 2018
8 A/Commander Joanne Crampton, RCMP, *FINA Committee Meeting February 26, 2018, evidence*, at 1605.

Finance Canada's discussion paper,[9] released prior to the five-year mandatory review of the PCMLTFA by the House of Commons Standing Committee on Finance, described the need for that change to the *Criminal Code* offence in the following way:

> "Section 462.31 of the *Criminal Code* requires that prosecutors establish knowledge or belief that all or part of the property or proceeds was obtained or derived, either directly or indirectly, as a result of the commission of a designated offence [in] Canada or an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence. Establishing knowledge of the specific offence is a significant challenge that may contribute to Canada's relatively low rate of successful convictions of money laundering. Other countries, such as the United Kingdom and Australia, have other types of offence standards where the knowledge component (or *mens rea*) of the offence is different, such as suspicion or recklessness (showing no regard for the danger or consequences or acting carelessly)."[10]

To address the vulnerabilities identified in the 2016 FATF evaluation, the proposals put forward in the five-year mandatory review of the PCMLTFA in 2018 and the evolving landscape of money laundering (ML)/terrorist financing (TF) risk in Canada, a revision to the *Criminal Code*'s definition of money laundering was made in 2019 as well as other legislative and regulatory measures linked to the PCMLTFA.

New regulations affecting accountants and accounting firms including the identification of beneficial ownership information and politically exposed persons, heads of international organizations, their family members and close associates came into force on June 1, 2021. For further information on these topics, refer to previous CPA Canada articles in the Anti-Money Laundering/Anti-terrorist Financing (AML/ATF) Developments series on New "Know Your Client" AML/ATF Rules for CPAs and New AML/ATF Requirements Associated with Record Keeping and Reporting to FINTRAC.

Other changes advanced by the Department of Finance in its 2018 discussion paper[11] concerned the AMP provisions of the PCMLTFA focused on **public naming** of the **recipients of AMPs** issued by FINTRAC, clarifying that **confidentiality orders** under the PCMLTFA was to serve as a precaution to avoid the disclosure of financial intelligence information and not to protect any and all information related to a reporting entity, and indicating a need for more **transparency and clarity in the calculation of AMPs**. As of June 21, 2019, the PCMLTFA provides for the mandatory publication of the nature of the violation, the name of the person or entity and the amount of the applicable

9 Finance Canada, *Reviewing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime*, p. 35, February 7, 2018
10 Ibid.
11 Finance Canada, *Reviewing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime*, p. 42, February 7, 2018

penalty, and prohibits the Federal Court from preventing the public disclosure of that information in an appeal of the AMP. In 2019, FINTRAC also issued a new AMPs policy that clarifies:

- what it defines as "harm"
- how it takes into account the violators' compliance history and non-punitive adjustment
- how it calculates penalties[12] [13]

FINTRAC also published a series of guides on how it assesses harm done for various violations (e.g., suspicious transaction violations, record-keeping violations, know your client, etc.).[14]

The risk environment for not complying with AML/ATF legislation for all reporting entity sectors, including accountants and accounting firms, has increased as a result of changes to the *Criminal Code*, the PCMLTFA and its associated regulations.

3. Administrative monetary penalties and offences under the AML/ATF legislation

The AML/ATF legislation identifies two sets of sanctions that may be applied to reporting entities:

- AMPs[15] – FINTRAC has the legislative authority to apply AMPs against an entity and a person where significant non-compliance has been identified; or
- criminal-type offences – FINTRAC may disclose and refer cases of non-compliance to law enforcement to pursue criminal charges when it suspects that the information would be relevant to the investigation or prosecution of an offence of the AML/ATF legislation[16]

A person or an entity cannot be issued an AMP and also be convicted of an offence under the AML/ATF legislation.[17] These two actions are mutually exclusive.

12 FINTRAC, *Administrative monetary penalties policy*, August 29, 2019
13 FINTRAC, *Penalties calculation examples*, August 29, 2019
14 FINTRAC, *Penalties for non-compliance*, August 29, 2019
15 Part 4.1 of the PCMLTFA
16 PCMLTFA subsection 65(1)
17 PCMLTFA subsection 73.12

3.1 Administrative monetary penalties

The purpose of an AMP is to encourage future compliance. While an AMP is not intended to be punitive, the financial and reputational risk of an AMP for a reporting entity is an unavoidable consequence.

> "The purpose of FINTRAC's administrative monetary penalties (AMPs) program is to encourage future compliance with the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (the Act) and its regulations, and to promote a change in behaviour. The AMP program supports FINTRAC's mandate by providing a measured and proportionate response to particular instances of non-compliance. FINTRAC is committed to working with reporting entities (REs) to help them achieve compliance. AMPs are not issued automatically in response to non-compliance, as typically other compliance actions are taken to change behaviour before a penalty is considered."
> Administrative monetary penalties policy

When could FINTRAC issue an AMP?

FINTRAC may issue an AMP[18] and serve a notice of violation when it has reasonable grounds to believe that a reporting entity has violated a requirement of the AML/ATF legislation. The legislation and regulation together provide that FINTRAC is to consider the following when determining the amount of the AMP to impose:

- AMPs are meant to encourage compliance rather than punish[19]
- the harm done by the violation
- the history of compliance by the person or entity with the AML/ATF legislation
- any other criteria that may be prescribed by regulation[20]

18 FINTRAC, *Administrative monetary penalties policy*, August 29, 2019
19 PCMLTFA subsection 73.11 "Except if a penalty is fixed under paragraph 73.1(1)(c), the amount of a penalty shall, in each case, be determined taking into account that **penalties have as their purpose to encourage compliance with this Act rather than to punish**, the harm done by the violation and any other criteria that may be prescribed by regulation." [emphasis added]
20 At the time of drafting there were no additional criteria prescribed by the regulation.

What is FINTRAC's process for imposing an AMP?[21]

The process that FINTRAC follows before imposing an AMP is two-fold.

1. FINTRAC assesses the non-compliance by considering:
   - the severity of the non-compliance – understanding the extent and the root cause of the non-compliance
   - the impact on FINTRAC's intelligence mandate and on the achievement of the objectives of the PCMLTFA
   - other factors such as the reporting entity's or the person's compliance history with the AML/ATF legislation

2. FINTRAC decides how to address the non-compliance.

What happens after FINTRAC completes its compliance assessment?[22]

Following the completion of a compliance assessment, and depending on the extent of the non-compliance identified, FINTRAC may decide:

- to take no further action
- to conduct follow-up compliance activities
- to issue an AMP to encourage a change in behaviour, or
- to disclose relevant information to law enforcement for investigation and prosecution of non-compliance offences under the AML/ATF legislation

FINTRAC has indicated[23] that AMPs are not issued automatically in response to non-compliance. AMPs are one tool that is available to FINTRAC and are used to address repeated non-compliant behaviour.[24] AMPs may also be used when there are significant issues of non-compliance or a high impact on FINTRAC's intelligence mandate or on the objectives of the AML/ATF legislation. An AMP is generally used when other compliance options have failed.[25]

21 FINTRAC, *Administrative monetary penalties policy*, August 29, 2019
22 Ibid.
23 Ibid.
24 Ibid.
25 Ibid.

3.2 Categories of violations[26]

The *Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations* (PCMLTFAMPR)[27] list the non-compliance violations that could be the basis of an AMP and classifies the violations as minor, serious or very serious. The AMP regulations categorize violations by degree of importance, and assign the following penalty ranges:

- minor violations – $1 to $1,000 per violation
- serious violations – $1 to $100,000 per violation
- very serious violations – $1 to $500,000 per violation[28]

The limits above apply to each violation, and multiple violations can result in a total amount that exceeds these limits.

3.3 AMP process[29]

The AMP process begins with the issuance of a notice of violation and continues as outlined below:

- **notice of violation**
  - FINTRAC must issue a notice of violation no more than two years from the date when the non-compliance became known to FINTRAC.
  - In some cases, FINTRAC may exercise its discretion to offer to enter into a compliance agreement with the reporting entity, which will include specific terms and conditions.
  - The notice provides information on the right to make written representations to FINTRAC's director and chief executive officer (CEO), up to 30 days after receiving the notice of violation.
- **payment of penalty**
  - Upon receipt of a notice of violation, a person or entity can pay the penalty by completing the remittance form and submitting it with the payment in Canadian funds to FINTRAC.
  - If a reporting entity pays the penalty indicated in the notice of violation, the reporting entity is deemed to have committed the violations specified, and the AMP process ends.
- **representations to FINTRAC's director and CEO[30]**
  - A reporting entity may request a review of a notice of violation. This can be done by making written representations on the violations or the penalty or both at the same time, to the director and CEO of FINTRAC, within 30 days of receiving the notice of violation.

26 Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations (PCMLTFAMPR), section 5
27 PCMLTFAMPR
28 Please note that FINTRAC's *Administrative monetary penalties policy* states that the penalty amount for a very serious violation is as follows: $1 to $100,000 per violation for an **individual** and $1 to $500,000 per violation for an **entity**.
29 FINTRAC, *Administrative monetary penalties policy*, August 20, 2019
30 FINTRAC, *Reviews and appeals*, September 21, 2021

- If a reporting entity requests a review, FINTRAC's director and CEO will decide whether there is proof on a balance of probabilities that the reporting entity committed the violation or not; and may impose the penalty proposed in the notice of violation, a lesser penalty or no penalty. The director and CEO will issue a notice of decision to communicate the decision and the rationale for it.

- **failure to pay or make representations and notice of penalty**
  - If a reporting entity receives a notice of violation and does not pay or make representations to FINTRAC's director and CEO within 30 days, the reporting entity will be deemed to have committed the violation and FINTRAC will impose the penalty in respect of it.
- **notice of decision and right of appeal**
  - A reporting entity that receives a notice of decision from FINTRAC's director and CEO has 30 days to exercise its right of appeal to the Federal Court of Canada. The AMP process ends when a reporting entity pays the penalty imposed in the notice of decision or does not appeal the director and CEO's decision within 30 days.
  - Should the director and CEO not issue a notice of decision within 90 days of receiving the representation for review, a person or entity may appeal the proposed penalty to the Federal Court within 30 days.
- **Federal Courts**
  - The Federal Courts of Canada have the power to confirm, set aside or change a notice of decision issued by FINTRAC's director and CEO. As long as the AMP is before the Federal Court, the Federal Court of Appeal, or the Supreme Court of Canada, the AMP process is considered to be ongoing.
- **public notice**

  FINTRAC must make public, as soon as feasible, the name of the reporting entity, the nature of the violation or default, and the amount of the penalty imposed in the following cases:
  - a reporting entity pays the penalty issued in a notice of violation
  - a reporting entity neither pays the penalty issued in a notice of violation nor makes representations to FINTRAC's director and CEO
  - a reporting entity receives a notice of decision indicating that a violation has been committed
  - a reporting entity enters into a compliance agreement with FINTRAC
  - a reporting entity does not comply with a compliance agreement

  AMPs imposed by FINTRAC are published on the public notice page.[31]

31 FINTRAC, *Public notice of administrative monetary penalties*

- **collection of penalties**
  - The penalty amount is due 30 days after the notice of violation or notice of decision is received by the reporting entity. Interest begins to accrue on the day after the penalty was due. Any penalty that becomes payable is an outstanding debt to the Crown. FINTRAC will pursue outstanding AMP payments.

3.4 Voluntary self-declaration of non-compliance[32]

FINTRAC has a policy of relief when a reporting entity comes forward to self-disclose non-compliance with the AML/ATF legislation. Its policy on voluntary self-declaration of non-compliance is explained on its website.[33]

FINTRAC encourages compliance with the AML/ATF legislation and recognizes that when reporting entities periodically review their program, conduct ongoing risk assessment or quality control activities, they may come across instances where they have not met all of the requirements of the AML/ATF legislation. FINTRAC indicates these shortfalls may be in relation to reporting, client identification, record keeping or effectively implementing an area of the reporting entity's compliance program.

Unreported transactions still have intelligence value to FINTRAC and need to be reported, while other shortfalls need to be addressed without delay. The ultimate goal of the regulatory regime is to enhance compliance, not to impose penalties.[34] Therefore, FINTRAC has implemented a policy to encourage reporting entities to voluntarily declare their non-compliance in order to resolve the issues they identify. The information that must be included in a voluntary self-declaration of non-compliance must be made in writing. The information required is specified on FINTRAC's website.

FINTRAC advises that when the voluntarily declared non-compliance issue is not a repeated instance of a previously voluntarily disclosed issue, and when this declaration has not been made after a reporting entity has been notified of an upcoming examination, FINTRAC will work with the reporting entity to resolve the issue and will not propose enforcement actions, such as an AMP related to the submission.[35]

32 FINTRAC, *Voluntary self-declaration of non-compliance*, November 2020
33 Ibid.
34 Ibid.
35 Ibid.

3.4.1 What FINTRAC's assessment manual indicates on voluntary self-declarations of non-compliance[36]

If an accountant or accounting firm identifies non-compliance **after a FINTRAC examination** has started, they should inform the FINTRAC officer immediately and send a voluntary self-declaration of non-compliance to FINTRAC. FINTRAC considers the date on which it notified the accountant or accounting firm of the examination to be the start of the examination (e.g., notification call).[37]

When FINTRAC receives a voluntary self-declaration of non-compliance on an issue that was not previously voluntarily disclosed **before a FINTRAC examination has started**, it will not consider enforcement actions, such as an AMP.[38]

However, if FINTRAC receives a self-declaration **during an examination**, it will assess the non-compliance as part of the examination, work with the reporting entity to correct it and determine if the non-compliance warrants an enforcement action. For example, if the accountant or accounting firm did not submit a financial transaction report to FINTRAC when required and then submits it after the notification date, FINTRAC will consider that the accountant or accounting firm did not meet its requirement to submit the report. In addition, there may be situations where compliance program documents (for example, compliance policies and procedures) are created or adjusted after the notification date. In such cases, FINTRAC may determine that the accountant or accounting firm did not meet the compliance program requirements.[39]

36 FINTRAC, *Assessment Manual*
37 Ibid.
38 Ibid.
39 Ibid.

4. PCMLTFA-related offences

The PCMLTFA identifies criminal-type offences[40] for persons or entities that knowingly contravene the prescribed sections of the AML/ATF legislation. For general offences and offences related to contravention of a directive, the offences call for:

a. on summary conviction, a fine of not more than $250,000 or to imprisonment for a term of not more than two years less a day, or to both; or
b. on conviction on indictment, a fine of not more than $500,000 or to imprisonment for a term of not more than five years, or to both.

For offences related to reporting and regulations, every person or entity that contravenes section 7 or 7.1 or any regulation made under subsection 11.49(1) is guilty of an offence and liable:

a. on summary conviction, to a fine of not more than $1,000,000 or to imprisonment for a term of not more than two years less a day, or to both; or
b. on conviction on indictment, to a fine of not more than $2,000,000 or to imprisonment for a term of not more than five years, or to both.

5. Recklessness under subsection 462.31 of the *Criminal Code*[41]

Subsection 462.31(1) of the *Criminal Code* was amended on June 21, 2019, to include the words "**or being reckless as to whether**." The subsection now reads:

> 462.31(1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that, **or being reckless as to whether**, all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of (a) the commission in Canada of a designated offence; or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence. [Emphasis added].

40 PCMLTFA, Part 5
41 *Criminal Code*

What does this mean for accountants and accounting firms?

Accountants and accounting firms are described globally as "gatekeepers"[42] to the financial system and may be vulnerable to those who would want to abuse the profession to advance criminal pursuits, such as through tax evasion or money laundering. This amendment to the *Criminal Code* **lowers the threshold of accountant involvement in money laundering required to lay criminal charges**, using the concept of recklessness. The threshold has gone from "knowing or believing" to the concept of "being reckless," thus facilitating law enforcement's efforts to investigate and for prosecutors to charge and pursue a conviction for money laundering.

To be "reckless" is to be aware that there is a danger that conduct could bring about the result prohibited by criminal law, and nevertheless persist, despite the risk. So, for example, it is now an offence for an individual aware of a risk that property may be proceeds of crime to carry out the prohibited activity. If an accountant is aware there is a risk that proceeds may have been obtained or derived from money laundering and deals with the proceeds in any manner, the accountant could be charged with a criminal offence. Recklessness involves knowledge of a danger or risk but proceeding with the course of conduct such that it creates a risk that the prohibited result will occur. Recklessness is a subjective concept in that it is found in the attitude of someone who sees the risk and who takes a chance. However, a judge can draw an inference from evidence that it was evident property was from proceeds of crime and that someone was therefore reckless by proceeding with the conduct that led to the result prohibited by law.

All of this means that **the stakes are now higher** for accountants and accounting firms in ensuring that they know their clients, conduct proper risk assessments, and implement and maintain an effective compliance program to prevent being misused by those with criminal pursuits and to limit the risks of running afoul of the *Criminal Code*'s new money laundering provision.

42 FATF, *Guidance for A Risk-Based Approach Accounting Profession*, June 2019