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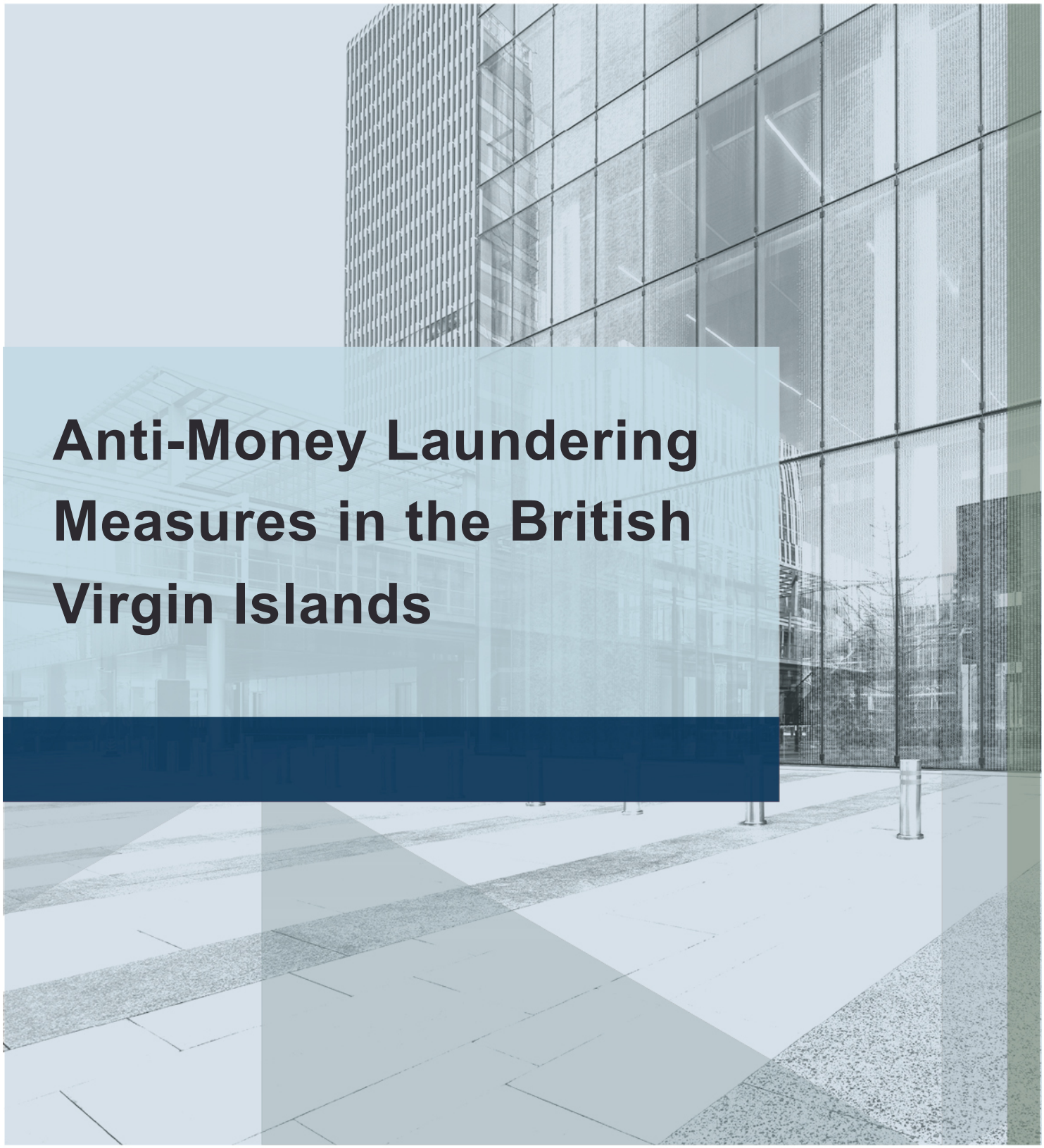

Anti-Money Laundering Measures in the British Virgin Islands

Preface

This publication has been prepared for the assistance of those who are considering the law of the British Virgin Islands ("BVI") as it pertains to anti-money laundering measures. It deals in broad terms with the requirements of BVI law. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice on BVI law in respect of any specific scenarios, matters or concerns.

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1. INTRODUCTION

The Proceeds of Criminal Conduct Act (the "PCCA") is the primary legislation in the British Virgin Islands ("BVI") intended to effectively combat the activity of money laundering. Growing out of the "forty plus nine" recommendations formulated by the Financial Action Task Force ("FATF"), the PCCA had the objective of developing and improving the BVI's legal systems and mechanisms to counter the laundering of drug trafficking money and other criminal proceeds. As the debate over the need to more effectively combat money laundering around the globe continued, the legislature of the BVI kept pace, updating its legislation as needed and fostering a compliance culture in the territory's financial services industry. Significant amendments serve to make BVI's anti-money laundering legislative regime a model for other jurisdictions.

2. INDUSTRY SPECIFIC LEGISLATION

The activities of banks and trust companies in BVI are regulated generally by the Banks and Trust Companies Act and the regulations promulgated thereunder. This legislation requires that entities proposing to carry out banking or trust business be licensed by the FSC. Entities so licensed fall under the regulatory oversight of the FSC and must comply with detailed regulations and standards that reflect industry best practice. In certain respects, these obligations overlap with and reinforce the jurisdiction's generally applicable anti-money laundering measures.

Similarly, insurance companies fall under the Insurance Act, while mutual funds and private investment funds operate under the Securities and Investment Business Act and the regulations promulgated thereunder. Entities licensed under these laws operate under the oversight and regulation of the FSC, as do those entities falling under the Company Management Act.

A detailed discussion of the regulation of these types of entities is beyond the scope of this publication. However, clients and interested persons should be aware that this additional layer of regulation may impact on anti-money laundering and compliance issues for these types of entities. Please feel free to consult any of our BVI attorneys for specific advice on these matters.

3. LAWS AND REGULATIONS OF GENERAL APPLICATION

Specific legislation has been enacted in BVI which, taken together as a package, forms a comprehensive anti-money laundering and anti-terrorist financing regime. The primary legislation, as mentioned above, is the PCCA, under which there are the Anti-Money Laundering Regulations and the Anti-Money Laundering and Terrorist Financing Code of Practice. In addition, the FSC has published certain guidance notes and advisories which are of practical use in establishing and maintaining suitable anti-money laundering mechanisms in different types of industries. Finally, there are a number of laws, treaties and orders which supplement the primary anti-money laundering legislation, particularly with respect to enforcement and international co-operation. Each is discussed in turn below.

3.1. Proceeds of Criminal Conduct Act

The PCCA, as originally enacted, created the core money laundering offences. It also contained provisions for the making and enforcement of confiscation orders and established certain investigatory

and co-operative powers to enhance enforcement efforts. By way of legislative amendment, the Joint Anti-Money Laundering Co-ordinating Committee (recently renamed as the National Anti-Money Laundering and Terrorist Financing Coordinating Council) (the "Committee") was established. The Committee is made up of representatives from the financial and legal sectors, the government, and law enforcement. The primary function of the Committee was to develop and issue guidelines for detecting and dealing with money laundering activities, and in the intervening years the Committee has been instrumental in ensuring that the BVI's anti-money laundering legislative regime remains on par with the highest of international standards. As a reflection of those efforts, in 2008 the legislature enacted the Proceeds of Criminal Conduct (Amendment) Act, 2008, which significantly amended virtually every section of the primary legislation. The current iteration of the PCCA is broader and more comprehensive than the original, and strives to reflect the approach advocated by the FATF and other international agencies concerned with the prevention and detection of money laundering.

(a) **The Money Laundering Offences**

Under the PCCA, five primary money laundering offences are defined as: (i) acquisition, possession or use of proceeds of criminal conduct; (ii) assisting another to retain the benefit of criminal conduct; (iii) concealing or transferring proceeds of criminal conduct; (iv) tipping off; and (v) failing to disclose a suspicion.

(i) **Acquisition, possession or use of proceeds of criminal conduct**

A person commits an offence if he acquires, transfers or uses any property or has possession of it which, in whole or in part, directly or indirectly represents the proceeds of his own criminal conduct. It is also an offence for a person who, knowing or suspecting that any property, in whole or in part, directly or indirectly, represents the proceeds of someone else's criminal conduct, to acquire, transfer or use that property or have possession of it.

(ii) **Assisting**

A person commits an offence if he enters into or is otherwise concerned in an arrangement which he knows or suspects facilitates, whether by concealment, removal from the BVI, transfer to nominees or other means, the acquiring, retention, use or control of proceeds of criminal conduct by or of himself or by or on behalf of another person.

(iii) **Concealing**

A person commits an offence if (i) he conceals or disguises any property which is, or in whole or in part directly or indirectly represents, the proceeds of criminal conduct or (ii) knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly, represents another person's proceeds of criminal conduct, he conceals or disguises that property or, in each case, he converts or transfers that property or removes it from the BVI.

(iv) **Tipping Off**

A person commits an offence if he knows or suspects that an investigation is or is about to be conducted into money laundering and he discloses information to any other person which is likely to prejudice that investigation or proposed investigation. It is also an offence if a person knows or suspects that a disclosure of suspicion is being or has been made and he leaks information likely to prejudice any investigation which might be conducted following the disclosure. This offence extends to disclosures which would prejudice a confiscation investigation as well as a money laundering investigation. Separate offences exist for interfering with documents and other materials relevant to an investigation.

(v) **Failure to Disclose**

A person commits an offence if he knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering if (i) the information on which his knowledge or suspicion is based, or which gives reasonable grounds for such knowledge or suspicion, came to his attention in the course of his trade, profession, business or employment and (ii) he does not disclose the information as required by the law as soon as it is reasonably practicable after it comes to his attention.

(b) **Defences**

For each of the foregoing offences, statutory defences have been crafted to protect those who obtained information about money laundering in privileged circumstances. It is also a defence in those cases where it is another person's proceeds of criminal conduct in question that one intended to report the activity but had not yet done so with reasonable excuse.

(c) **Enforcement**

The PCCA contains extensive and comprehensive provisions with respect to investigations into alleged money laundering, as well as provisions pertaining to the seizure, detention, forfeiture and confiscation of the proceeds of criminal conduct.

3.2. The Anti-Money Laundering Regulations

The Anti-Money Laundering Regulations, 2008 (the "Regulations") are promulgated under the PCCA and apply to regulated persons. "Regulated person" is defined as a person carrying on "relevant business". Relevant businesses are briefly described as follows:

(a) banking or trust business;

(b) insurance business;

(c) company management business;

(d) investment business or business as a mutual fund or a private investment fund;

(e) trust or company service providers carrying on certain activities relating to the formation or administration of legal persons;

(f) remittance service providers;

(g) financing or money services business;

(h) advising on capital structure, industrial strategy, advice and services related to mergers and the purchase of undertakings, money broking, safekeeping and administration of securities and lending or financial leasing;

(i) providing legal, notarial or accounting services relating to the buying and selling of real estate, the managing of client money, securities or other assets, the management of bank, savings or securities accounts, the organisation of contributions for the creation, operation or management of companies, and the creation, operation and management of legal persons or arrangements or the buying and selling of business entities;

(j) acting as a real estate agent;

(k) dealing in certain precious metals when such transaction involves accepting a cash payment of $15,000 or more;

(l) casino operations when a transaction involves accepting a cash payment of $3,000 or more.

In conducting relevant business, a relevant person is required to maintain client identification procedures, keep "know your client" and suspicious transaction records, establish internal reporting procedures for suspicious transactions, and have in place internal controls and communication procedures which are appropriate for the purposes of forestalling and preventing money laundering. Such businesses are also required to appoint a money laundering reporting officer and have in place adequate training for staff on their obligations under the law with respect to money laundering. The Regulations describe in some detail the exact nature of these requirements and the form that the procedures should take.

3.3. The Anti-Money Laundering and Terrorist Financing Code of Practice

The Anti-Money Laundering and Terrorist Financing Code of Practice (the "Code") was promulgated by the FSC in 2008 pursuant to the exercise of powers granted to it under the PCCA after consultation with the Committee. In 2012 the Code underwent consolidation and revision to keep pace with industry best practices. The Code is subsidiary legislation, and whilst written in the manner typically encountered with guidance notes, has the force of law and is enforceable against any person to whom it applies. It is the Code that provides the 'nuts and bolts' for relevant businesses to follow in carrying out their mandate under the PCCA and the Regulations. It addresses in great detail the requirements of the law as they pertain to internal systems and controls, and requires that relevant businesses provide to the FSC a copy of such internal policies for approval. The Code, whilst mandatory, in many respects offers guidance, and favours a 'risk based approach' to establishing internal policies, subject

to certain minimal requirements enumerated with precision in the lengthy document. The Code creates a series of administrative offences, with related penalties, that flow from the failure to have in place adequate policies, internal systems and controls. Different aspects of the Code are crafted with different types of businesses in mind, and it is therefore not practical to attempt to summarise it here. Any of our BVI attorneys would be pleased to advise on the aspects of the Code relevant to any of our clients in particular.

3.4. Related Legislation

The Drug Trafficking Offences Act, 1992 and the Drug Trafficking Offences (Enforcement of Overseas Confiscation Orders) Order, 2017 establish machinery for the registration by the High Court of external confiscation orders made by the courts of designated countries. Under section 7 of the Criminal Justice (International Co-operation) Act, 1993 (read with the Criminal Justice (International Cooperation) (Enforcement of Overseas Forfeiture Orders) Order, 2017), the provisions for confiscation and restraint apply to a broader range of offences. Under this Act, provision is made for facilitating cooperation with other countries in criminal proceedings and investigations.

Mutual legal assistance treaties allow generally for the exchange of evidence and information in criminal and ancillary matters. The Mutual Legal Assistance (United States of America) Act, 1990 gives effect in the BVI to the Mutual Legal Assistance Treaty concerning the Cayman Islands agreed between the UK and the USA in 1986 (the “Treaty”). This law facilitates the provision, on a reciprocal basis, of legal assistance in criminal matters between the USA and the BVI, with the objective of enhancing the investigation, prosecution and suppression of criminal offences and allows for the sharing of assets with that country. Virtually identical legislation is in place in the other Caribbean Overseas Territories.

For the purposes of the Treaty, a criminal offence is either conduct which satisfies the dual criminality test, that is, it is conduct which is punishable by imprisonment of more than one year in both the BVI and the USA, or it is one of a number of specifically listed offences which include insider trading and fraudulent securities practices. With the exception of certain civil and administrative proceedings relating to narcotics, the Treaty does not extend to civil matters. Conduct which relates directly or indirectly to the regulation, imposition, calculation or collection of taxes is excluded from the Treaty with the exception of tax fraud and the wilful or dishonest making of false statements to government tax authorities (for example, by submitting a false tax return).

4. CONCLUSION

The government and private sectors of the BVI have both emphasised the need to combat, at an international level and in a co-operative way, money laundering and terrorist financing, and the persons who would seek to use the jurisdiction to further their criminal endeavours. As such, the BVI has embraced effective, measured anti-money laundering regulation which reflects the highest standards in the world. Having received a largely positive assessment from the FATF assessment team in 2008, even before the most recent raft of legislative and policy enhancements, it is fully expected that the BVI will continue to be considered a model for other jurisdictions to follow with respect to anti-money laundering and terrorist financing efforts.