

STATEMENT OF PRINCIPLES

Barristers and Accountants AML/ATF Board

4/29/2012

**STATEMENT OF PRINCIPLES
BARRISTERS AND ACCOUNTANTS AML/ATF BOARD**

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Statement of Principles

1. Introduction

The Barristers and Accountants AML/ATF Board (“the Board”) is a statutory body established pursuant to Section 25A of the Bermuda Bar Act 1974 and Section 8A of the Institute of Chartered Accountants of Bermuda Act 1973. The Board, as the professional body designated by the Minister of Justice under Section 4(1) of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008 (the “Act”) to be the supervisory authority for independent professionals regulated by it, has in the exercise of its powers under Section 5 of the Act and in conjunction with the Bermuda Bar Council and the Council of the Institute of Chartered Accountants of Bermuda, herein set forth a Statement of Principles in accordance with which it is acting or proposing to act:

- (a) in exercising its power to issue directives under Section 30H of the Act to regulated professional firms that fail to comply with a requirement of the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorism Financing) Regulations 2008 (“AML/ATF Regulations”) in the provision of legal or accountancy services to other persons when participating in financial or real property transactions concerning specified activities;
- (b) in exercising its powers in relation to regulated professional firms to obtain information, to require the attendance of persons and to require production of documents under Sections 30D-30F of the Act;
- (c) in exercising its powers –
 - (i) to impose penalties on regulated professional firms under Section 30I of the Act; and
 - (ii) to publish decisions to do so under Section 30K of the Act; and
- (d) in applying any amounts paid to it by way of penalties under Part 4A in accordance with the duty in Section 30M (1) of the Act.

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References herein to Sections and Parts are unless otherwise indicated, references to Sections and parts of the Act.

2. Enforcement Measures: General

2.1 Where the Board in the course of its supervision identifies breaches of the AML/ATF Regulations by a regulated professional firm, the Board would normally seek remedial action by the firm before resorting to the use of its enforcement powers under the Act. The Board would work with the firm to assist it in implementing corrective measures and would give advice in relation to any perceived weaknesses in its systems and controls. In circumstances where such actions fail to remedy identified deficiencies, or where the alleged breaches are so serious as to warrant the immediate exercise of enforcement powers, then the Board would not hesitate to do so.

2.2 The powers at the disposal of the Board are the power to issue directives and the power to levy a civil penalty on all regulated professional firms.

3. Issue of Directives to a Regulated Professional Firm

3.1 The Board may issue directives to any regulated professional firm that fails to comply with a requirement of the AML/ATF Regulations requiring that firm when carrying out specified activities involving financial or real estate transactions in accordance with Section 30(H) of the Act.

In addition to issuing directives regarding the conduct of specified activities by the regulated firm, the Board would take into account any other disciplinary proceedings or relevant actions being undertaken by either the Bermuda Bar Council or the Institute of Chartered Accountants of Bermuda or a competent authority when deciding to exercise its power to issue directives.

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The Board would not lightly embark on such a course of action, except in cases where it has serious concerns as to the manner in which the business is being conducted which may classify it as representing a high risk category and it will be important to restrict the business being undertaken by the firm in order to safeguard against the firm being used for money-laundering and terrorist financing activities.

Where the Board has issued directives to a firm and restricted its business activities and that firm applies to have the directive withdrawn or varied, the Board will consider all the merits of that application in light of the circumstances which existed at the time the directive was issued and whether or not the firm, having been found to be at risk for money-laundering and/or terrorist financing has taken any remedial steps to implement more robust measures to prevent such threats from occurring or if it pays no heed to the Board requests for remedial action, but deliberately continues to flout the AML/ATF Regulations.

- 3.2 The Board is required to follow the procedures laid out at Sections 30(H) (3) (4) (5) of the Act once it issues a directive. These provide for the giving of a notice to a regulated professional firm of the reasons for the giving of the directive, the duration of the effect of the directive, particulars of the provisions of sub sections (4)(5) and the particulars of the rights of appeal conferred by Section 30(H)(6).

If, having considered any representations, the Board decides to refuse an application under subsection (4) or grants the application in part it would give the firm concerned, notice of its decision.

4. Civil Penalties

- 4.1 In relation to the exercise of its powers to impose civil penalties for specified breaches of the AML/ATF Regulations, the Board is authorized to levy a maximum fine of

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\$250,000.00 but the circumstances in which the maximum amount would be levied would be rare and exceptional.

- 4.2 The Board will consider all the circumstances of a suspected breach when determining whether or not to impose a fine. Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive and not all of these factors may be applicable in a particular case; and there may be other factors, not listed, that are relevant.

5. Factors Relevant to a Decision to Impose a Penalty

- 5.1 The factors that the Board will take into account in determining whether or not to impose a fine, include the following:

- (1) The nature, seriousness and impact of the suspected breach, including:
 - (a) whether the breach was deliberate or reckless;
 - (b) the duration and frequency of the breach;
 - (c) whether the breach reveals serious or systemic weaknesses of the management systems or internal controls relating to all or part of a firm's business;
 - (d) the nature and extent of any money-laundering or terrorist financing facilitated, occasioned or otherwise attributable to the breach; and
 - (e) whether there are a number of smaller issues, which individually may not justify enforcement action, but which do so when taken collectively.

- (2) The conduct of the firm after the breach, including:
 - (a) the degree of co-operation the firm showed during the investigation of the breach;
 - (b) any remedial steps the firm has taken in respect of the breach;
 - (c) the likelihood that the same type of breach (whether on the part of the firm under investigation or others) will recur if not action is taken;
 - (d) whether the firm concerned has complied with any requirements of the Board; and

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- (e) the nature and extent of any false or inaccurate information given by the firm and whether the information appears to have been given in an attempt to knowingly mislead the Board.

- (3) The compliance history of the firm including:
 - (a) whether the Board has taken any previous action resulting in adverse findings against the firm;
 - (b) whether the Board has previously requested the firm to take remedial action and the extent to which such action has been taken; and
 - (c) whether the firm has previously undertaken not to do a particular act or engage in particular behavior.

- (4) Conduct consistent with the Board's guidance:
The Board will not take action against a firm for conduct that it considers to be consistent with guidance or other materials published by the Board which was current at the time of the conduct in question.

- (5) Action taken by the Board in previous similar cases.

- (6) Action taken by other regulatory authorities:
Where other regulatory authorities propose to take action in respect of a breach which is under consideration by the Board, the Board will consider whether the other regulatory authority's action would be adequate to address the Board's concerns, or whether it would be appropriate for the Board to take its own action.

6. Factors Relevant to a Decision on the Amount of the Fine

- 6.1 Any fine imposed by the Board must be appropriate. Section 30I (2) of the Act defines this to mean, "effective, proportionate and dissuasive." The Board will consider all the relevant circumstances of a case when it determines the level of a financial penalty.

- 6.2 The Board will not apply a tariff of penalties for different kinds of breach. This is because there will be very few cases in which all the circumstances of the case are essentially the same and because of the wide range of breaches in respect of which the Board may impose a financial penalty. The Board considers that, in general, the use of a

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tariff for particular breaches would inhibit the flexible and proportionate use of its powers.

6.3 The following factors may be relevant to determining the appropriate level of financial penalty to be imposed on firms. The list of factors outlined is not exhaustive and not all of these factors may be relevant in a particular case, and there may be other factors not included below, that are relevant.

(1) Deterrence:

When determining the appropriate level of penalty, the Board will have regard to the principal purpose for which it imposes a financial penalty, namely to encourage a high degree of compliance with the AML/ATF Regulations and deterring persons from committing breaches.

(2) The nature, seriousness and impact of the breach in question:

The Board will consider the seriousness of the breach in relation to the nature of the regulation breached. The following considerations are among those that may be relevant:

- (a) The duration and frequency of the breach;
- (b) Whether the breach revealed serious or systemic weaknesses in the firm's procedures or of the management systems or internal controls relating to all or part of an firm's business;
- (c) The nature and extent of any money-laundering or terrorist financing facilitated, occasioned or otherwise attributable to the breach.

(3) The extent to which the breach was deliberate or reckless:

The Board will regard as more serious a breach which is deliberately or recklessly committed. The matters to which the Board may have regard in determining whether a breach was deliberate or reckless, includes the following:

- (a) Whether the breach was intentional, in that the firm intended or foresaw the potential or actual consequences of its actions;
- (b) Whether the firm has not followed its own internal procedures and/or Board guidance, the reasons for not doing so; and
- (c) Whether the firm has given no apparent consideration to the consequences of the behavior that constitutes the breach.

(4) Whether the person on whom the penalty is to be imposed is a sole practitioner:

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When determining the amount of a financial penalty to be imposed on an individual operating as a sole practitioner, the Board will take into account that an individual will not always have the resources of a larger firm or body corporate; that enforcement action may have a greater impact on a sole practitioner; and further, that it may be possible to achieve effective deterrence by imposing a smaller penalty on an individual than on a body corporate. The Board will also consider whether the status, position and/or responsibilities of the individual are such as to make a breach committed by the individual more serious and whether the penalty should therefore be set at a higher level.

- (5) The size, financial resources and other circumstances of the firm on whom the penalty is to be imposed:
- (a) The Board may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the firm was to pay the level of penalty appropriate for the particular breach. The Board regards these factors as matters to be taken into account in determining the level of a financial penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty;
 - (b) The purpose of a penalty is not to render a firm insolvent or to threaten the firm's solvency; where this would be a material consideration, the Board will consider having regard to all other factors, whether a lower penalty would be appropriate; this is most likely to be relevant to a firm with lower financial resources; but if a firm reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the Board will take account of those assets when determining the amount of a penalty;
 - (c) The degree of seriousness of a breach may be linked to the size of the firm; for example, a systemic failure in a large firm with a high volume of business over a protracted period, may be more serious than breaches over similar periods in a firm with a smaller volume of business;
 - (d) The size and resources of a firm may also be relevant in relation to mitigation, in particular what steps the firm took after the breach had been identified; the Board will take into account what it is reasonable to expect from a firm in relation to its size and resources, and factors such as what proportion of a firm's resources were used to resolve a problem.
- (6) Difficulty of detecting the breach:

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A firm's incentive to commit a breach may be greater where the breach is, by its nature, harder to detect. The Board may, therefore, impose a higher penalty where it considers that a firm committed a breach in such a way as to avoid or reduce the risk that the breach would be discovered, or that the difficulty of detection (whether actual or perceived) may have affected the behavior in question.

(7) Conduct following the breach:

The Board may take the following factors into account:

- (a) the degree of co-operation the firm showed during the investigation of the breach by the Board, or any other regulatory authority; and where a firm has fully co-operated with the Board's investigation, this will be a factor tending to reduce the level of financial penalty;
- (b) any remedial steps taken since the breach was identified, including whether these were taken on the firm's own initiative or that of the Board or another regulatory authority;
- (c) whether the firm concerned has complied with any recommendations made by the Board relating to the breach.

(8) Compliance history of the firm:

The Board may take the previous compliance record and general compliance history of the firm into account. This will include:

- (a) whether the Board has taken any previous enforcement action against the firm;
- (b) whether the firm has previously undertaken not to do a particular act or engage in particular behavior;
- (c) whether the Board has previously requested a firm to take remedial action and the extent to which that action has been taken;
- (d) the general compliance history of the firm, including whether the Board has previously brought to the firm's attention, issues similar or related to the conduct that constitutes the breach in respect of which the financial penalty is imposed; a firm's compliance history could lead to the Board imposing a higher penalty, for example where the firm has committed similar breaches in the past; in assessing the relevance of a firm's compliance history, the age of a particular matter will be taken into account, although a long-standing matter may still be relevant.

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- (9) Other action taken by the Board:
Action that the Board has taken in relation to similar breaches by other firms may be taken into account. As stated, the Board does not operate a tariff system; however, the Board will seek to apply a consistent approach to determining the appropriate level of financial penalty.
- (10) Action taken by other regulatory authorities:
Considerations could include, for example:
- (a) action taken or to be taken against a firm by other regulatory authorities which may be relevant where that action relates to the breach in question;
 - (b) the degree to which any remedial steps required by other regulatory authorities, have been taken (and whether taken promptly).
- (11) The Board's Guidance Notes and other published materials:
- (a) a firm does not commit a breach by not following the Board's guidance notes. However, where a breach has otherwise been established, the fact that guidance had raised relevant concerns may inform the seriousness with which the breach is to be regarded by the Board when determining the level of penalty;
 - (b) the Board will consider the nature of the guidance when deciding whether it is relevant to the level of penalty and, if it is, which weight to give it in relation to other relevant factors.

7. AML/ATF Enforcement Measures

7.1 Breaches of the AML/ATF Regulations could attract civil or criminal penalties. It is the expectation of the Board that the normal enforcement action for breaches of the AML/ATF Regulations would be by way of civil penalties and not by way of criminal penalties. A determining factor may be whether breaches of the AML/ATF Regulations are associated with any criminal conduct such as fraud, money laundering or terrorist financing.

8. Publication of Decision

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- 8.1 Under Section 30K of the Act, the Board is empowered to publish its decision to impose a civil penalty on a firm. In the event that the Board decides to publish such a decision, it would notify the firm in question of this before publication.
- 8.2 If the Board decides to publish its decision, it would publish its decision on its website and, if appropriate, in the Official Gazette.
- 8.3 The Board will publish the following particulars of the decision:
- (a) the name of the firm concerned;
 - (b) the provisions of the AML/ATF Regulations that have been breached;
 - (c) a summary of the facts of the breach, as they appear in the decision notice;
 - (d) the relevant dates; and
 - (e) the amount of the penalty.
- 8.4 In exercising its discretion to publish a decision to impose a penalty, the Board will have regard, amongst other things, to the matters set out in paragraph 8.5 below. But in all cases, the Board will consider whether it is in the public's interest not to publish its decision.
- 8.5 Those matters are:
- (a) the deterrent effect of publication;
 - (b) the protection of the reputation of Bermuda as a sound and well-regulated financial centre;
 - (c) the protection of clients and potential clients of the firm concerned; and
 - (d) the extent to which publication of the decision will assist and inform other firms and the public generally about the relative gravity of the conduct and the penalty felt appropriate for that conduct.
9. **Exercise of Powers to Obtain Information, Right of Entry and Entry to Premises By Order**
- 9.1 Supervision involves the receipt and analysis of a variety of regular and ad hoc financial and other information from firms. The Board's standard reporting arrangements are kept under review, agreed with firms from time to time and amended in the light of developments. Such reports and information are routinely provided by firms on a voluntary basis.

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- 9.2 Certain matters are, however, the subject of specific statutory requirements. Section 30D of the Act provides formal powers for the Board by notice in writing to require from a firm, such information as it may reasonably require for the performance of its functions under the Act, to produce documents, and for its officers to attend before the Board to answer questions. It is anticipated that formal use of such powers will be infrequent, as the Board is hoping to be able to rely on the willingness of firms to provide information voluntarily. In particular circumstances, however, the Board must consider whether to make use of these powers – notably, for example, where it has material concerns about the accuracy or completeness of information provided by a firm.
- 9.3 Section 30E of the Act provides the Board with specific powers to enter the business premises of firms for the purpose of inspecting the premises, observing the carrying on of business, inspecting and taking copies of any recorded information and for requiring any person on the premises to provide an explanation of any recorded information. These powers enable the Board to do spot-checks on premises of firms.
- 9.4 Under Section 30F of the Act, the Board has the power to apply to a judge of the Supreme Court for an ex parte order to enter premises where documents or information is held. The Board may apply for an ex parte order where it has reasonable grounds for believing that if a firm were required to provide information or produce documents, the firm would fail to comply with such a request. The Board may also apply for such an ex parte order when it believes that if such a request were made, that information or documentation would be removed, tampered with or destroyed.

10. Applying Penalty Amounts Against Cost of AML/ATF Supervision

- 10.1 The Board's budget is met from fees based on the firms it regulates. The Board does not receive any funds from the public purse. The amount each firm pays is determined by Bar Council and the Institute of Chartered Accountants.
- 10.2 Further, under Section 30M of the Act, firms are required to pay to the Board penalties levied on them for breaches of the AML/ATF Regulations and the Board is required to apply such amount of penalties towards the cost of supervising firms and securing their compliance with AML/ATF Regulations.

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- 10.3 Monies received in respect of any penalties levied on firms will be offset against the costs of supervising them.
- 10.4 If the total penalties received exceed the cost of supervision in any year, then the excess amount will be carried forward and offset against the cost of the next year and, if relevant, any subsequent year.