A review of the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2021

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Despite claims by some legislators that certain sections of the Proceeds of Crime and Anti-money Laundering Bill gazetted on 3 September 2021 seeking to amend the Proceeds of Crime and Anti-Money Laundering Act 2009 were unconstitutional, an affront to criminal law principles and procedures, and infringed on advocate-client confidentiality, the Bill was passed by Parliament and assented by the President as the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2021 earlier this month.

The Amendment Act has introduced four key changes to the Proceeds of Crime and Anti-Money Laundering Act 2009 (the "**Act**"). This legal alert will discuss each amendment before briefly discussing the likely impact of the amendments on the client-advocate relationship.

1. **Inclusion of legal professionals in the scope of professionals with reporting obligations under the Act**

The first key change made to the Act relates to the definition of *"designated non-financial businesses or professions"*. The definition has been amended to include advocates, notaries and other independent legal professionals who are sole practitioners, partners or employees within professional firms.[1]

Following this amendment, legal professionals are now subject to the reporting obligations identified under section 48 of the Act and are required to monitor complex, unusual, suspicious, large or other transactions and to report any transactions that constitute or may be related to money laundering.

The transactions must relate to the legal professionals preparing or carrying out their clients' instructions in the following situations:

(a) buying and selling of real estate;
(b) managing of client money, securities or other assets;
(c) management of bank, savings or securities accounts;
(d) the organisation of contributions for the creation, operation or management of companies; and
(e) creation, operation or management of buying and selling of business entities.

[1] Proceeds of Crime and Anti-Money Laundering Act 2009, section 2.

Though this amendment has been welcomed in most quarters, it remains to be seen whether the Cabinet Secretary will provide regulations or guidelines limiting the level of reporting required from legal professionals.

2. **Power of the Financial Reporting Centre (FRC) to freeze suspicious accounts for five working days without a court order as they conduct investigations on the source of money.**

The FRC is a body corporate whose main objective is to assist in the identification of the proceeds of crime to combat money laundering. How the FRC operates under the Act has been amended by the inclusion of a new section (section 44A) which provides that, if the FRC has reasonable grounds to suspect that a transaction or a proposed transaction may constitute money laundering and related activities or the proceeds of crime or proceeds of unlawful activities or property which is connected to the proceeds of crime or unlawful activities in any manner as provided for under the Act, it may in writing direct the reporting institution or person not to proceed with the transaction or proposed transaction or any other transaction in respect of the funds or property affected by that transaction or proposed transaction for a period of five (5) working days to allow the FRC to investigate the transaction.

In effect, this means that the FRC can without a Court Order freeze bank accounts or real estate transactions or any other kind of transaction if it reasonably suspects that a transaction or a proposed transaction may constitute money laundering and related activities or that the funds in a bank account are proceeds of crime.

3. **Asset Recovery Advisory Board**

The third amendment made to the 2009 Act is the establishment of the Asset Recovery Advisory Board. Subject to regulations to be gazetted by the Cabinet Secretary, the Board when constituted shall be responsible for advising and overseeing the Asset Recovery Agency on the exercise of its powers and performance of its functions. Additionally, it will oversee the administration of the Asset Recovery Agency and its expenditure.

Whilst taking into account regional and gender balance, the Board shall consist of the Attorney-General, the Principal Secretary in the Ministry responsible for finance, the Governor of the Central Bank of Kenya, the Director-General of the National Intelligence Service, the Director of Criminal Investigations, the Director-General of the FRC, the Director of the Asset Recovery Agency and three professionals nominated by Institute of Certified Public Accountants of Kenya, the Law Society of Kenya and the Estate Agents Registration Board.

4. **Deletion of reference to the Deputy Director of the FRC in the Act**

The amendment deleted all references to the position of Deputy Director of the FRC in the Act.

In accordance with the submission for memoranda published by the National Assembly on 18 November 2021 calling for public participation, the amendment is consistent with the current practice in Kenya of not providing for positions of Deputy Chief Executives of State Corporations in law.

Likely impact of the amendments on client-advocate relationship

The amendments above show a commitment by the Kenyan government to implement global measures to prevent money laundering and terrorist financing and to strengthen the current legislation in place.

There is no requirement in the Act for the Cabinet Secretary to publish regulations or guidelines relating to the level of reporting required from legal professionals. However, the interpretation of Recommendation 23 in the Financial Action Task Force (FAFT) 2013 Report '*Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals*', legal professionals in Kenya may not be required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege. Nevertheless, clients should expect heightened due diligence requirements from their lawyers.

On their part, legal practitioners in the absence of regulations and guidelines from the Cabinet Secretary will rely heavily on the FAFT Report and the Law Society of Kenya *Anti-Money Laundering Guidance for Legal Practitioners* which in addition to providing due diligence guidelines to lawyers, provides examples of suspicious activities that they ought to be aware of. Some of the red flags identified are:

a. the client's willingness to pay fees without the requirement for legal work to be undertaken;
b. significant private funding with transfers structured to avoid the threshold reporting requirements;
c. transactions are aborted after receipt of funds and there is a request to send the funds to a third party;
d. client's acting through intermediaries and avoiding personal contact without good reason. This includes, attempts to disguise the real owner or parties to the transaction;
e. a disproportionate amount of private funding which is inconsistent with the socio-economic profile of the individual;
f. provisions of false or counterfeited documents;
g. mortgages repaid significantly prior to the initial agreed maturity date with no logical explanation.
h. last-minute unexplained changes in instructions;
i. creation of complicated ownership structures where there is no legitimate or economic reason and
j. involvement of structures with multiple countries where there is no apparent link to the client or transaction or no other legitimate or economic reason.

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