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EXPECT THE BEST

First Administrative Monetary Penalties Imposed Under Federal Anti-Money Laundering Laws

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Five Canadian "money services businesses" – businesses involved in foreign exchange dealing, electronic funds transfer, and issuing and redeeming travellers' cheques – are the first entities to be assessed administrative monetary penalties for serious or very serious violations of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the "Act").

Under amendments to the Act that became effective December 30, 2008, the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"), the national financial intelligence unit that reports to the Minister of Finance, was given the power to assess administrative monetary penalties ("AMPs") for violations of the Act. Violations are classified as minor, serious and very serious, depending on the section of the Act that is contravened. FINTRAC is permitted to assess maximum penalties of $1,000 for a minor violation; $100,000 for a serious violation; $100,000 for a very serious violation committed by an individual, and $500,000 for a very serious violation committed by an entity. FINTRAC will make public AMPs imposed with respect to serious or very serious violations or where the total penalty assessed is $10,000 or more.

In determining what penalty is appropriate, FINTRAC will consider:

a) the fact that penalties are intended to encourage compliance with the Act rather than be punitive;

b) the harm caused by the violation; and

c) the history of compliance with the Act by the person or entity.

In November, 2009 FINTRAC assessed its first AMPs where the total penalty is over $10,000. It assessed a penalty of $12,750 against a money services business in Vaughan, Ontario that had committed eight violations of the Act, at least five of which were serious, including failure to develop and apply written compliance policies; failure to develop and maintain a written compliance training program for employees; failure to appoint a person responsible for implementation of a compliance program; failure to develop and apply policies and procedures to assess the risk of a money laundering or terrorist financing offence in the course of its activities; and failure to submit an application for registration to FINTRAC.

FINTRAC had previously assessed four AMPs against money services businesses that had each committed one violation of failing to register with FINTRAC. The penalties imposed ranged from $3,000 to $4,320.

The amounts of the AMPs that have been assessed are quite low given the maximum penalties available to FINTRAC. For example, failure to register as a money services business is classified as a serious violation, so the maximum AMP that could have been assessed against each of the money services businesses that committed one violation was $100,000. The maximum penalty FINTRAC could have assessed against the money services business that committed eight violations was in excess of $500,000, far higher than the $12,750 imposed.

FINTRAC has made it clear, however, that the notion of proportionality is fundamental in assessing AMPs. In a speech in April, 2009, FINTRAC Director Jeanne M. Flemming described how FINTRAC will determine the amount of the penalty. FINTRAC will assess the "harm" for each violation, which will be measured by the "degree to which the violation would obstruct Canada's ability to detect and deter money laundering and terrorist financing." The level of harm will then be used to establish the base penalty amount, which will also reflect the entity's compliance history. The penalties are designed to be "non-punitive and proportional". Accordingly, it is likely that the AMPs assessed will continue to be in amounts that are far lower than the maximum permissible. ■