

BHP Billiton Diamonds Inc.



BHP Billiton Diamonds Inc.
Suite 800, Four Bentall Centre
1055 Dunsmuir Street
PO Box 49223
Vancouver B.C. Canada V7X 1L2
Tel (604) 605 8666 Fax (604) 681 5736
bhpbilliton.com

DELIVERED By Facsimile: (613) 943-8436

Diane Lafleur
Director, Financial Sector Division
Department of Finance
140 O'Connor Street
Ottawa, Ontario, K1A 0G5

September 27, 2005

Dear Madam;

Re: Response to Proposal 2.3 in Consultation Paper – June 2005
“Enhancing Canada’s Anti-Money Laundering and Anti-Terrorist Financing Regime”

BHP Billiton Diamonds Inc. (BBDI) is the majority owner and designated Operator of the EKATI Diamond Mine located in the Northwest Territories of Canada (NWT). The mine has been in commercial operation since 1998.

BBDI sells rough diamonds to manufacturers resident in the NWT and exports the remainder of its production to Antwerp for sale internationally through its wholly-owned subsidiary, BHP Billiton Diamonds (Belgium) NV (Belgium NV), to various customers for manufacture into polished diamonds and resale. In addition, Belgium NV sells rough diamonds to Point Lake Marketing Inc. (PLMI), a wholly-owned subsidiary of BBDI operating in Canada, which arranges for the manufacture of polished diamonds that are subsequently sold at both the wholesale and retail levels.

Accordingly, this response is based on BBDI’s experience at all levels of the global diamond industry and addresses Proposal 2.3 and related Proposals in respect of the proposed addition of “Dealers in Precious Metals and Stones (DPMSs)” to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA)*.

A. BBDI'S POSITION:

We wish, at the outset, to state that BBDI supports the addition of DPMSs to the PCMLTFA and encourages the adoption of provisions that are clearly aligned with those already implemented by Belgium, for both uniformity of coverage and implementation within the industry. However, having had more than 18 months of operating experience with the Belgian legislation, we believe that certain improvements can be made when including DPMSs in the PCMLTFA that will facilitate more meaningful compliance, reduce paperwork and retention, and enhance both the client monitoring and reporting functions of the legislation.

Further, we believe that – save and except in the case where national security is at immediate and direct risk - an expedited appeal process should be established for access by those whose conduct or reputation may have been wrongly impugned by a report that was filed more as a defensive reaction to the legislation (out of fear of being prosecuted “after the fact”) or as a vendetta for past wrongs than because of a *bona fide* belief that the proposed transaction involved “suspicious” circumstances.

Our suggestions in each regard are detailed below.

B. BBDI'S SUBMISSIONS:

You have requested industry views on four specific elements. Our submissions on each, restricted in context to the diamond industry only, follow.

1. Segments of the Industry to be Included:

Subject to further explanation by the Federal Government as to how the sale or trade in rough or polished diamonds has been used as a mechanism to facilitate money laundering (the financing of terrorist activities having been documented), we believe that all segments of the diamond industry engaged in sale and purchase transactions should be included in the PCMLTFA, from the sale of rough by producers and traders, through the cutting and polishing (manufacturing) processes, to the retail sale of loose stones and jewellery to the consuming public. We include manufacturers because they often buy and trade in large quantities of rough stones in order to meet specific customer programs for polished diamonds and, if criminal elements wished to inflate value or to introduce or commingle stones of diverse origin, the manufacturing process is one step in the supply chain where such conversions could occur.

Caveat:

We do, however, also recognize that the legislation requires the making, and lengthy retention, of copious internal client and transaction records and reports that could prove to be quite costly for compliance by smaller dealers in gemstones and precious metals.

Accordingly, we support the U.S. approach of placing a monetary minimum on mandatory compliance with the PCMLTFA. We propose that such minimum be set at annual net sales of US\$50,000. Spot compliance audits could be conducted by: (i) Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) officers under their investigatory powers, (ii) review of the filed Compliance Questionnaires (proposed to be made mandatory by Proposal 6.14), or (iii) review of business income as reported under applicable tax legislation.

2. **Transactions to be Covered and Method of Reporting:**

Based on average product unit cost in the industry, we recommend that Cdn.\$10,000 (in a single or related transaction) be adopted as the minimum transaction level at which mandatory record-keeping and reporting obligations of suspicious transactions should apply to DPMSs whose net sales exceed the proposed annual minimum, and further that application of the mandatory compliance criteria be expressly extended to capture not only cash transactions or electronic fund transfers but also diamond trades and exchanges made for other untraceable, criminal commodities.

Method of Reporting:

To ensure the consistency and sufficiency of reports by Dealers (not all of which possess the expertise and staffing needed to manoeuvre between the provisions of the various Acts and Regulations referenced in the PCMLTFA), the Government should consider developing and appending as a Schedule to Regulation SOR/2001-317 a fixed form of Report (**Report Form**) for use by DPMSs.

Subject to our comments below promoting the creation of a national registry of DPMSs participants, the Report Form should: (i) be marked "Confidential", (ii) state at the top the timeframe within which it must be filed, and (iii) contain the name, telephone contact (**not** voicemail), and e-mail/ mailing address of FINTRAC along with designated fields for the insertion of the following customer information:

- a) the name, address, birth date and passport or citizenship number of the contracting party (where an individual), or the full legal name, place and number of registration/incorporation, business number and operating address (where the contracting party is a partnership or corporate entity);
- b) the date and nature of the impugned transaction;
- c) the amount of the said transaction and manner of payment;
- d) the bank and account numbers provided;
- e) the reason(s) why the transaction was viewed as suspicious;
- f) the state of the transaction at the time of the report;
- g) the remaining steps, if any, required to complete the transaction;
- h) if the transaction was aborted by either party, the reason given;
- i) if the transaction has been completed, the date and place of completion and the disposition of the product and proceeds;

- j) the history of prior dealing between the parties;
- k) the references, if any, obtained and checked by the reporting party before commencing commerce with the reported party;
- l) an internal contact name, telephone number and e-mail address of the reporting entity for purposes of reply or further inquiries from FINTRAC.

We recommend that the Report Form emphasize - at the outset - the need for good faith, due diligence and accuracy in its completion and the fact of immunity from civil or criminal repercussions only when proper care has been exercised in filing the report. While reporting timelines set out in section 5 of SOR/2002-184 are sufficiently long to facilitate proper internal due diligence before any report is filed, we are concerned that, in the absence of such precautionary note, the legislation may initially encourage “defensive” reporting in an effort to avoid possible prosecution whenever the nature of a proposed transaction is in doubt.

3. **Range of Client Identification and Reporting Required:**

Client identification has proven to be a most arduous and time consuming task for vendors of diamonds in Belgium, as most have dozens of customers, each using different banks, some providing “corporate status” or other personal records in the original language of issuance (without the requirement for accompanying translations), and each being subject to the vagaries of the industry (which can result in smaller customers being financially viable one month and insolvent the next), thereby necessitating frequent customer background checks for proper compliance with the legislation – especially given the emphasis in the Consultation Paper on “ongoing due diligence”. Further, the required retention of such records for 5 years or more – even in electronic form - can be prohibitive when added to the retention obligations imposed by other statutes (such as the *Income Tax Act*). The result is that the principle of “Know Your Own Customer” is becoming increasingly difficult and expensive for industry participants to achieve on a timely and cost-effective basis, especially in the face of privacy legislation and the attendant reluctance of banks to release customer information.

Proposed DPMSs National Registry:

In lieu of introducing yet a further level of compliance for FINTRAC to monitor (in the form of the “Agents or Introducers” suggested by Proposal 1.8), we believe that a better means of alleviating the preceding problem, while at the same time earning the Government extra income, would be to create a national electronic data bank or registry of authorized DPMSs to which producers and suppliers of stones could refer prior to concluding any proposed transaction (similar to the registry system outlined in Proposal 3.1 for Money Service Businesses). DPMSs seeking to sell, trade or acquire rough or polished diamonds could be required to register - for a set annual or bi-annual fee - by providing to the Government copies of:

- a) their constating documents and CRA-assigned business number,
- b) their business address, telephone number and principle contact person,
- c) notarial confirmation that they remain in good standing and are solvent (as defined by applicable Companies' legislation or generally accepted accounting principles),
- d) the names and contact details of the owner (including date of birth and citizenship information where a sole proprietorship), partners or the directors and beneficial owners (in the case of a corporation),
- e) the name and business locations of all related or subsidiary companies,
- f) the name of all individuals who are authorized to bind the entity, and
- g) the contact information for their primary banker and a "comfort letter" regarding past dealings and current financial/credit rating;

with each registrant having an obligation to immediately update the register with any change in posted information on risk of being de-registered. The creation of such a registry would reduce the amount of information required to be collected and entered on the Report Form (thereby encouraging timely reporting) and would also assist FINTRAC in performing its own due diligence following the filing of a report. Dealings with DPMSs not listed in the registry would require full direct compliance with all client identification requirements specified in the legislation.

In further support of the proposed registry system, we note that Belgium NV has reported problems in obtaining required banking information on its customers due to privacy legislation, making it difficult for the Company to determine if the proposed transaction is "in the ordinary course" or "suspicious" – especially if it is the first transaction engaged in with a particular customer. In lieu of requiring the collection by each DPMSs of detailed account information on every customer (many of which deal with several different suppliers and banks), we recommend that consideration be given to requiring all DPMSs registrants to file an annual "comfort letter" from their bank(s) as part of their required information, which letter should include advice regarding:

- a) the duration of past dealings,
- b) the existence of one or more accounts and their status (i.e. in good standing),
- c) the bank's knowledge of the customer's reputation in the industry, and
- d) the absence of any known financial or credit concerns.

Legislating the filing of such a letter would address the privacy concerns of the banks without undue disclosure of private account numbers and the like (which, if disclosed, could be used for other criminal activities such as identity theft).

If the concept of a national registry of approved DPMSs is rejected, we recommend that Guidelines be published for DPMSs identifying the types of customer information that will suffice as "due diligence" under the PCMLTFA, including whether the obtaining of a bank "comfort letter" (in the form above described) will qualify.

Additional “Customer” Information:

We question the proposed application to DPMSs of the need to obtain and record electronic funds transfers originator information, given the likely duplication of such information with that already collected and reported by banks and other financial institutions. If applied to DPMSs, it would be the direct obligation of each DPMSs to ascertain and record such information, as each could vary by transaction.

Retention/Conviction Timelines:

We recommend that the stipulated retention time for customer information in excess of that required by applicable tax legislation be reduced to the earlier of: 2 years following its collection (in the absence of any reported transactions since the date of collection), or 3 years from the date of collection where a report has been filed, thereby necessitating timely commencement of prosecution under the Act. Both the proposed extension of prosecution times for breach of the PCMLTFA in Proposal 6.15 to 5 years in the case of summary conviction and those already mandated for indictable conviction, we believe, impose an unfair burden on the industry and run contrary to one’s right to a timely trial.

Reporting Required:

With the proposed addition of DPMSs to the legislation, the question arises as to what activities might constitute “suspicious circumstances” in the purchase and sale of rough or polished stones. We believe that the following circumstances should at least trigger an internal due diligence review by the vendor before a report to FINTRAC is prepared:

- a) new players entering the diamond business with no prior history of involvement or using references from entities that are not established participants in the industry;
- b) the request for cash transactions (given that most sales are paid for by electronic fund transfers between banks) or advice that an established participant has new sources of funding;
- c) proposed payment by a third party, or delivery of the purchased diamonds to a third party, without reasonable explanation for the proposal (an acceptable explanation being, for example, that the third party has been retained by the purchaser to cut and polish the stones for it);
- d) a request for an unusual form of payment or unique credit terms that suggest a reduced need to carefully manage cash flow;
- e) unusual locations for offices that don’t appear to make any business sense;
- f) unusual comments from trade references about a party’s practices;
- g) a request that no record or report be made of the transaction; or
- h) the transaction appears to stray from standard industry practice or from the normal practice of that customer.

We recommend that the Government consider and publish examples of what it believes

would constitute “suspicious circumstances” within the industry to serve as a “Guideline” for the DPMSs (perhaps by way of addition to FINTRAC’s published Guideline 2: “Suspicious Transactions”).

To further encourage reporting, the legislation should clearly state that the reporting party either: (i) will not be subject to seizure of its product or of the cash paid in exchange therefor, or (ii) if seizure is necessary for investigative purposes, that the reporting party can secure its return - without cost or imposition of penalty - upon timely completion of the investigation and written application by the reporting party. Because seizure and retention of a large amount of product or cash could prove to be disastrous for smaller DPMSs, we believe that prosecution of a reported party under the PCMLTFA should be mandated to be expedited whenever a seizure has been made.

4. Compliance Mechanisms:

We support the proposed addition of “administrative and monetary penalties” (AMPs) to the punishments presently contained in Part 5 of the PCMLTFA, subject to: (i) granting the industry a reasonable period of time - following establishment of the proposed registry and publication of proposed Guidelines - within which to comply; and (ii) consideration of implementing a “first offence warning letter and compliance audit”, in lieu of any punitive remedy, where an attempted good faith implementation of compliance mechanisms has been established but found to be deficient. Perhaps the latter remedy could be tied to the proposed “enhanced educational efforts” and based on FINTRAC’s review of the compulsory completion of the Compliance Questionnaires recommended in Proposal 6.14.

We suggest that a minimum period of 12-18 months be accorded the DPMSs before enforcement of the revised legislation, as compliance therewith will require the development of an internal policies, the creation of new forms, the collection of additional information on customers, and the training of staff including one or more internal compliance officer(s). On this latter point, clarification is requested as to whether a compliance officer is required for each individual business entity or whether one officer conversant with all applicable legislation would suffice for a group of related entities (such as a parent corporation and its global subsidiaries).

Limitations on Disclosure:

Unless and until anti-money laundering & anti-terrorist legislation and compliance regimes are made uniform throughout the world, we believe that the proposed sharing of compliance-related information outlined in Proposal 3.3 is premature and would prove to be both confusing and prejudicial in application.

The proposed sharing of compliance and reported information outlined in the Consultation Paper raises additional concerns. Because compliance with the legislation will be new to most DPMSs impacted by the PCMLTFA and publication of failure to

comply is proposed in the AMPs, initial reporting may be unduly prolific until guidelines are established and the industry develops a greater familiarity with the legislation. This could lead to precautionary reporting, which ultimately could prove to contain unfounded suspicions. At present, the legislation prohibits any disclosure to others by the author of a report and provides for no right of appeal by the reported party. This raises the spectre of ruined reputations and damaged business interests without the impugned party having either knowledge or recourse as regards the report, made worse by the proposed disclosure to other local government departments and international law enforcement agencies and “foreign partners”.

Given the preceding circumstances and with the proviso that the report filed does not evidence a direct and imminent threat to national security, we recommend that FINTRAC be required - as part of its own investigative measures and prior to any disclosure of the report or its contents to other entities – to meet at a senior level (preferably in the presence of an independent, objective arbiter or ombudsman) with the impugned party to review the allegations and determine if they have any merit. We further submit that any and all subsequent sharing of reported information with international law enforcement agencies, other government departments (such as the Canada Border Services Agency, CRA and “foreign partners”) and industry regulatory bodies (whether local or international) should be made subject to the granting of a production order by a Canadian court of law upon adequate proof of both: (i) money laundering and/or terrorist activity on the part of the reported party, and (ii) the lawful need for the information by the applicant for AML/ATF investigation or prosecution purposes only.

Liability of Directors:

We do not support Proposal 6.16 and the passing of accountability for non-compliance violations from a defunct company to its directors unless it can be established that the directors knew and participated or acquiesced in such breach. If the directors approved, implemented and arranged for periodic monitoring of compliance programs, they should not be held personally liable for the acts or omissions of former employees in carrying out those programs. To provide otherwise would negate the statutory defence of due diligence established by the legislation and could unfairly subject the directors to the actions of disgruntled employees.

Advisory Committee:

In closing, we recommend direct industry participation in the proposed AML/ATF Advisory Committee through the appointment of a representative and publication of the Committee’s reports to all stakeholders (without identification or details of any individual incidents considered).

Please contact the undersigned if you have any questions or wish to discuss any point further. Communication in English is preferred.

Please note: We wish to have the preceding comments posted on the Department of Finance Canada website.

Thank you for providing this opportunity to comment on proposed enhancements to Canada's anti-money laundering and anti-terrorist financing regime.

Sincerely

BHP Billiton Diamonds Inc.

A handwritten signature in black ink, appearing to read "Graham Nicholls", written in a cursive style.

Per: Graham Nicholls
Vice President