

# Legislative Brief

## The Prevention of Money Laundering (Amendment) Bill, 2008

The Bill was introduced in the Rajya Sabha on October 17, 2008.

The Bill was referred to the Parliamentary Standing Committee on Finance (Chairperson: Shri Ananth Kumar), which submitted its report on December 19, 2008.

### Recent Briefs:

[The Representation of the People \(Second Amendment\) Bill, 2008](#)  
November 28, 2008

[The Constitution \(One Hundred and Eighth Amendment\) Bill, 2008](#)  
September 23, 2008

**Kaushiki Sanyal**  
kaushiki@prsindia.org

December 19, 2008

### Highlights of the Bill

- ◆ The Prevention of Money Laundering (Amendment) Bill, 2008 seeks to amend the Prevention of Money Laundering Act, 2002.
- ◆ India is working towards membership to the Financial Action Task Force (FATF), an inter-governmental body. This Bill conforms to several requirements of this body.
- ◆ Money laundering applies only to offences listed in the schedule. The Bill adds several offences to this list. It also includes a new category of offences with cross border implications.
- ◆ The Bill amends the provisions related to attaching a property or searching a person. These actions may now be performed only after completion of investigation.
- ◆ The Act requires banks and other specified institutions to maintain record of clients and transactions and furnish them to the prescribed authority. The Bill includes full fledged money changers, money transfer service providers, and casinos under its reporting regime.

### Key Issues and Analysis

- ◆ India does not adhere to certain key recommendations of FATF such as rendering mutual legal assistance to countries and requiring real estate agents, dealers in gems and metals, lawyers, etc. to report transactions.
- ◆ Money laundering is an offence only if it is related to any activity connected with the proceeds of crime specified in the scheduled offences. The Second Administrative Reforms Commission points out that the list excludes offences related to fraud and organised crime. It also does not include certain offences under the Immoral Traffic (Prevention) Act, 1956.
- ◆ The Bill does not include the Foreign Exchange Management Act, 1999 in its list of scheduled offences under which over and under invoicing and hawala transactions are an offence.
- ◆ The Parliamentary Standing Committee on Finance recommended that international guidelines on money laundering should be taken into account, certain definitions should be made more comprehensive and India should take necessary steps to become a member of FATF.

## PART A: HIGHLIGHTS OF THE BILL<sup>1</sup>

### Context

Money laundering is the process by which a person conceals or disguises the identity or the origin of illegally obtained funds so that they appear to have originated from legitimate sources.<sup>2</sup>

The need for a strategy to control money laundering became accepted globally in mid-1980s due to increasing trend of drug related offences. In 1996, the International Monetary Fund estimated that the aggregate size of money laundering in the world was 2-5% of the global Gross Domestic Product.<sup>3</sup> Various UN Conventions such as the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 1990 Political Declaration and Global Programme of Action, and the 1998 UN General Assembly Political Declaration on Global Drug Control called for member states to put mechanisms in place to combat drug-trafficking and money laundering. India is a signatory to these UN declarations.<sup>4</sup> The 1989 Basle Statement of Principles outlined basic procedures that banks had to follow in order to check money laundering.

The Financial Action Task Force (FATF) on Money Laundering is an inter-governmental body set up by G-7 in 1989 to establish international standards for combating money laundering and terrorist financing. Currently, 34 countries are members of FATF. FATF has issued a set of 40 recommendations on money laundering and nine Special Recommendations on terrorist financing. These aim to improve national legal systems, enhance the role of the financial sector and intensify cooperation against money laundering. India has observer status in FATF and is working towards becoming a member.<sup>5</sup>

In order to fulfil its international obligations, India enacted the Prevention of Money Laundering Act, 2002 (PML Act), which came into force in 2005.<sup>6</sup> This Act seeks to prevent money laundering and to provide for the confiscation of property related to money laundering.

The Prevention of Money Laundering (Amendment) Bill, 2008 seeks to (a) make it mandatory for full fledged money changers, money transfer service providers, etc. to record transactions; (b) include provisions to combat financing of terrorism; and (c) introduce new category of offences with cross border implications.

### Key Features

#### Regulatory Framework under PML Act

- The PML Act states that an offence of money laundering has been committed if a person is a party to any process connected with the proceeds of crime and projects such proceeds as untainted property. "Proceeds of crime" means any property obtained by a person as a result of criminal activity related to certain offences listed in the schedule to the Act. A person can be charged with the offence of money laundering only if he has been charged with committing a scheduled offence.
- The penalty for committing the offence of money laundering is rigorous imprisonment for three to seven years and a fine of upto Rs 5 lakh. If a person is convicted of an offence under the Narcotics Drugs and Psychotropic Substances Act (NDPS), 1985 the term of imprisonment can extend upto 10 years.
- The Adjudicating Authority, appointed by the central government, shall decide whether any of the property attached or seized is involved in money laundering. An Appellate Tribunal shall hear appeals against the orders of the Adjudicating Authority and any other authority under the Act.
- Every banking company, financial institution and intermediary shall maintain a record of all transactions of a specified nature and value, and verify and maintain records of all its customers, and furnish such information to the specified authorities.

#### Key Amendments in the Bill

- The Bill amends the PML Act by (a) adding some definitions; (b) increasing the period for which property can be provisionally attached; (c) allowing property to be attached or searched only after a scheduled offence is investigated; (d) making it mandatory for banks to maintain records of identity of its clients for 10 years; and (e) adding reciprocal arrangement related to property with other countries.
- The PML Act includes a schedule of offences divided into Part A and B. The charge of money laundering shall apply to offences listed in Part B only if the proceeds are above Rs 30 lakh. The Bill adds new offences to Part A and B. It also adds Part C, which includes all offences in Part A and B if they have cross border implications, and certain offences related to property from the Indian Penal Code (IPC). There is no threshold value for offences under Part C.

**Table 1 : Comparison of Prevention of Money Laundering (Amendment) Bill, 2008 and the 2002 Act**

2002 Act	2008 Bill
<b>Definitions</b>	
New definition introduced in the Bill.	"Offence of cross border implications" means commission of a scheduled offence (a) inside India where money is remitted outside; and (b) outside India where money is remitted to India.
New definition introduced in the Bill.	"Payment system operator" means any person who operates or maintains a payment system involving the use of credit card or any other system enabling payment between a payer and a beneficiary.
New definition introduced in the Bill.	"Authorised person" means an authorised dealer, money changer, or any person authorised to deal in foreign exchange. It also includes any person authorised by the Reserve Bank of India conducts service related to international money transfer.
New definition introduced in the Bill.	"Designated business or profession" means conducting activities for playing games of chance for cash or kind, including casinos.
"Financial institution" as defined in the Reserve Bank of India Act, 1934 and includes chit fund company, housing finance institution and a non banking financial company.	Adds "authorised person" and "payment system operator" to the definition of "financial institution".
"Non banking financial company" as defined in the Reserve Bank of India Act, 1934.	Adds "designated business or profession" to the definition of "non banking financial company".
<b>Power to Attach Property and Search Premises or Persons</b>	
Property may be attached provisionally for 90 days.	90 days changed to 150 days.
Search of a person or premise or attachment of property may be done only after (a) police investigation is completed; or (b) cognizance taken under the Narcotics Drugs and Psychotropic Substances Act (NDPS), 1985.	Search of a person or attachment of property may be done after (a) police investigation is completed; or (b) cognizance taken under any of the scheduled offences.  Search of a premise may be done after (a) filing a police report to the Magistrate that there is suspicion of an offence; or (b) cognizance taken under any of the scheduled offences.
<b>Obligation of Banking Companies and Financial Institutions</b>	
All records shall be maintained for 10 years after the end of transaction between the client and company.	All records related to transactions shall be maintained for 10 years from the date of transaction between the client and company. All records related to identity of clients shall be maintained for 10 years from the end of transaction between client and the company.
<b>Appellate Tribunal</b>	
The members of Appellate Tribunal can be removed after an inquiry, made by a person appointed by the President of India, proves that the member was misbehaving or incapacitated.	Adds a proviso that states the Chief Justice has to be consulted before removal of a member who was appointed on the recommendation of the Chief Justice.
<b>Reciprocal Arrangement with Contracting State</b>	
No provision for reciprocal arrangement.	If any property in India is confiscated after a request from a contracting state (any country which has an arrangement with India), the central government may either return such property to the contracting state or compensate that state by disposal of property on mutually agreed terms.
<b>Scheduled Offences</b>	
Part A includes offences under Indian Penal Code (IPC) and NDPS Act, 1985.	Adds new offences under IPC and NDPS Act, 1985 to Part A such as counterfeiting currency notes, contravention related to manufactured drugs and preparations. Adds offences from the Explosive Substances Act, 1908 and the Unlawful Activities (Prevention) Act, 1967.
Part B includes offences under IPC, the Wildlife (Protection) Act, 1972, the Immoral Traffic (Prevention) Act, 1956, and the Prevention of Corruption Act, 1988. The value involved has to be above Rs 30 lakh.	Adds new offences to existing Acts in Part B. Adds offences from the Explosives Act, 1884, the Antiquities and Arts Treasures Act, 1972, the Securities and Exchange Board of India Act, 1992, the Customs Act, 1962, the Bonded Labour System (Abolition) Act, 1976, etc.  Adds Part C which includes all offences in Part A and B when they have cross border implications and offences against property specified in the IPC. No threshold on value involved.

Sources: The Prevention of Money Laundering Act, 2002; The Prevention of Money Laundering (Amendment) Bill, 2008; PRS.

## PART B: KEY ISSUES AND ANALYSIS

We examine the Bill from two perspectives: (a) whether India's law fulfils international guidelines on money laundering; and (b) whether measures to tackle money laundering in the Bill addresses the specific issues related to India.

### Fulfilment of international guidelines

India has applied to be a member of FATF, and currently has the status of an observer. Table 2 lists some recommendations of FATF that have not been incorporated by India either in the Act or the Bill.

**Table 2: Key recommendations of FATF not complied by India**

Legal Systems
<ul style="list-style-type: none"> <li>Criminalise money laundering as per the UN Convention against Transnational Organised Crime, 2000 (not ratified by India)</li> </ul>
Definitions
<ul style="list-style-type: none"> <li>"Designated categories of offence" should include fraud</li> <li>"Designated non-financial business" (DNFB) should include real estate agents, dealers in precious stones and metals, lawyers, notaries and other independent legal professionals and accountants</li> </ul>
Measures to be taken by financial and non-financial businesses
<ul style="list-style-type: none"> <li>All DNFB need to comply with provisions related to suspicious transactions, customer due diligence and record keeping requirements</li> <li>Financial institutions should not enter into a banking relationship with shell banks and guard against entering into relationships with foreign financial institutions that permit their accounts to be used by shell banks. "Shell bank" means a bank incorporated in a jurisdiction in which it has no physical presence and which is not affiliated with a regulated financial group</li> <li>Countries should consider applying the FATF recommendations to businesses and professions other than designated non financial businesses, that pose a money laundering or terrorist financing risk</li> <li>Financial institutions should give special attention to business relationships with persons from countries which do not or insufficiently apply the FATF recommendations</li> <li>For cross border correspondent banking, in addition to due diligence measures, financial institutions should gather sufficient information about a respondent institution, assess its anti money laundering and terrorist financing controls, document the responsibilities of each institution, etc</li> </ul>
International cooperation
<ul style="list-style-type: none"> <li>Countries are encouraged to ratify and implement other relevant international conventions, such as the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the 2002 Inter-American Convention against Terrorism</li> <li>Countries should render mutual legal assistance even in the absence of dual criminality</li> </ul>

Sources: The Prevention of Money Laundering Act, 2002; The Prevention of Money Laundering (Amendment) Bill, 2008; The 40 Recommendations, FATF, 22, Oct, 2004; PRS.

The Asia Pacific Group on Money Laundering (an international organisation affiliated with FATF) also evaluated India in 2005.<sup>7</sup> Table 3 lists the key criticisms of the PML Act which have not been addressed in the Bill.

**Table 3: APG's key criticisms of PML Act which have not been incorporated in the Bill**

<ul style="list-style-type: none"> <li>The scheduled offences in the Act do not include all serious offences or even the 20 designated categories of offences set out in FATF recommendations. The scheduled offence contains a threshold for the value of property involved in the offence.</li> <li>India has not undertaken a comprehensive risk assessment of money laundering or the financing of terrorism.</li> <li>Property of corresponding value cannot be seized where there is no direct link to the crime itself.</li> <li>The report points to the low number of convictions under the various Acts.</li> <li>There is no unified set of customer due diligence standards for the financial sector.</li> <li>There are no explicit legal gateways allowing for regulatory co-operation with foreign counterparts in any of the Acts governing the operations of the Reserve Bank of India, the Securities Exchange Board of India or the Insurance Regulatory and Development Authority. All employees of these agencies, as public servants, are covered by the Official Secrets Act.</li> <li>Money laundering is not a stand alone offence, and therefore a conviction for a scheduled offence is required before there can be a conviction for money laundering. If a third party has laundered the proceeds of crime, unless that third party is charged with criminal activity relating to a scheduled offence, he cannot be charged with the offence of money laundering. This requirement will cause difficulties in securing convictions for money laundering.</li> </ul>
--

Sources: Asia Pacific Group Mutual Evaluation Report on India, March 2005; PRS.

### Recommendations of Second Administrative Reforms Commission

According to the Act, money laundering is an offence only if it is related to any activity connected with the proceeds of crime specified in the list of scheduled offences. Proceeds of crimes not related to the scheduled offences are outside the ambit of the Bill. The Eighth Report of the Second Administrative Reforms Commission points out that this list does not contain some offences related to fraud and organised crime. It also does not include some offences under the Immoral Traffic (Prevention) Act, 1956.<sup>8</sup> Some of these offences have not been included in this amendment Bill.

## Specific channels of money laundering

Money laundering can take place through over invoicing of exports, under invoicing of imports, investment through shell companies and extensive use of hawala channels in the transmission of money.<sup>9</sup> The Bill does not include the Foreign Exchange Management Act, 1999 in its list of scheduled offences under which over and under invoicing and hawala transactions are an offence.<sup>10</sup> In the U.S., the Patriot Act of 2001 makes money laundering through hawalas an offence.<sup>11</sup>

## Laws related to money laundering in other countries

Strategies used by various countries to tackle money laundering include effective legal framework and tax systems, sound financial institutions, efficient tracking and monitoring systems to identify irregular financial transactions.<sup>12</sup> Table 4 describes the key laws related to money laundering in some countries.

**Table 4: Money laundering laws in other countries**

	Laws	Description
USA	Patriot Act, 2001; Money Laundering and Financial Crimes Strategy Act, 1998; Annunzio-Wylie Anti-Money Laundering Act, 1992; Money Laundering Control Act, 1986; Bank Secrecy Act, 1970	The Acts establish requirements for record keeping by individuals, banks and other financial institutions, establish money laundering as a federal crime; introduce civil and criminal forfeitures for Bank Secrecy Act violations, criminalise the financing of terrorism, prohibit financial institutions from engaging in business with foreign shell banks, require financial institutions to have due diligence procedures, provide the Secretary of the Treasury with the authority to impose "special measures" on jurisdictions or transactions that are of "primary money laundering concern"
UK	Money Laundering Regulations 2007; Proceeds of Crime Act of 2002; and Terrorism Act of 2000	The Acts criminalize both actions relating to criminally acquired property and the failure to disclose suspicious transactions that may indicate money laundering. The Regulations create a regime of due diligence, record keeping, and reporting that the institutions are required to comply with and also establish penalties (both civil and criminal) for noncompliance.
Germany	Section 261 of Criminal Code, 1998; Money Laundering Act of 25 October 1993	The Acts penalise any person who hides an object derived from a specified unlawful act, makes its obligatory for institutions or casino to report any financial transaction that serves the purpose of money laundering.
Australia	The Anti Money Laundering and Counter Terrorism Financing Act, 2006	The Act covers the financial sector, gambling sector and bullion dealing and any other professionals or businesses that provide particular 'designated services'. The Act imposes a number of obligations on businesses when they provide these designated services such as customer due diligence, reporting, and recordkeeping.
Malaysia	Anti Money Laundering Act, 2001	The Act criminalises money laundering stating that any person who engages in a transaction that involves proceeds of any specified unlawful activity commits an offence. It also provides for investigation, freezing, seizure and forfeiture of the proceeds of money laundering and terrorist financing offences, suspicious transactions reporting, record keeping and the establishment and functions of the Financial Intelligence Unit.

Sources: Financial Crimes Enforcement Network, US Department of Treasury; Money Laundering Regulations 2007, Office of Fair Trading, UK; Germany: Report on the Observance of Standards and Codes -- FATF Recommendations for Anti-Money Laundering and Combating the Financing of Terrorism, International Monetary Fund Country Report, July 2004; Anti- Money Laundering, Australian Government Attorney General's Department; Asia Pacific Group Mutual Evaluation Report on Malaysia, 25 July, 2007; PRS.

## Recommendations of Parliamentary Standing Committee

The Parliamentary Standing Committee on Finance which examined the 2008 Bill submitted its report on December 19, 2008. The key recommendations of the Committee are listed below.

- The Committee believes that enacting the PML Bill, 2008 is an essential step to strengthen the country's legal framework for preventing money laundering and counter financing of terrorism.
- Apart from plugging other avenues generating illegal funds such as hawala, etc., international guidelines should be taken into account for effective enforcement of anti-money laundering law.
- In order to comprehensively cover money transfer service providers, full fledged money changers and international payment gateways, the definitions of "authorised person" and "payment system operator" need to be aligned with the definitions of the Payment and Settlement System Act, 2007.
- The government should consider expanding the ambit of the law to cover FATF recommended DNFBs such as gold or gem dealers, lawyers, real estate agents, etc.

- Since it is difficult to track the transfer of funds and financing of terrorist activity in the absence of bilateral agreements with other countries, the Committee recommends that MoUs for mutual co-operation should be concluded with other countries.
- Enforcement agencies should strengthen their machinery to keep abreast of the emerging trends of money laundering and terror funding. This includes having appropriate software especially with regard to suspicious transactions, strong reporting instruments to monitor transactions, quarterly audit to verify Know Your Customer information, etc.
- Inclusion of “prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control” may deprive investors of refund of shares. The Bill may have a specific provision to make the proceeds from such offence not liable to confiscation and to enable refund of such proceeds.
- An appropriate threshold may be fixed with regard to possession of counterfeit currency to protect genuine bank dealings.
- Adequate safeguards should be put in place to ensure that the enforcement authorities use their power of search and seizure in a judicious manner so that it does not result in any undue harassment of individuals.
- Only a sitting or retired judge of the Supreme Court or High Court should be eligible for appointment as Chairperson of the Appellate Tribunal. Other than Chartered Accountants, similar professionals such as Company Secretaries should be eligible to become members of the Tribunal.
- The government must take necessary steps to become full-fledged member of FATF to enable sharing of information and multi-lateral intelligence.

---

#### Notes

1. This Brief has been written on the basis of the Prevention of Money Laundering (Amendment) Bill, 2008, which was introduced in the Rajya Sabha on October 17, 2008. The Bill was referred to the Parliamentary Standing Committee on Finance (Chairperson: Shri Ananth Kumar), which submitted its report on December 19, 2008.
2. “Model legislation on money laundering and financing of terrorism”, UN Office on Drugs and Crime and International Monetary Fund, Dec 1, 2005.
3. “Annual Report 2006-07,” Financial Intelligence Unit – India, Department of Revenue, Ministry of Finance, Govt of India.
4. Department of Revenue, Ministry of Finance, Sept 23, 2008, [http://finmin.nic.in/the\\_ministry/dept\\_revenue/Adjudicating\\_authority/index.html](http://finmin.nic.in/the_ministry/dept_revenue/Adjudicating_authority/index.html)
5. “Annual Report 2007-2008”, Financial Action Task Force, Paris.
6. The Political Declaration and Global Programme of Action, annexed to the resolution S-172/2, adopted by the General Assembly of the UN on February 23, 1990 and the Political Declaration adopted by the Special Session of the UN General Assembly held on 8<sup>th</sup> to 10<sup>th</sup> June, 1998, Preamble of the Prevention of Money Laundering Act, 2002.
7. “APG Mutual Evaluation Report on India: Against 2003 FATF 40 Recommendations and 9 Special Recommendations,” Asia Pacific Group on Money Laundering, March 2005.
8. “Combating Terror: Protecting by Righteousness,” 8<sup>th</sup> Report of Second Administrative Reforms Commission, Govt of India, June 2008.
9. “The Economic Crime Including Money Laundering; Its Legal and Financial Implications” Resource Material Series No. 67, UNAFEI, Dec 2005.
10. Foreign Exchange Management Act, 1999.
11. Sec 405 of Title IV of USA Patriot Improvement and Reauthorization Act, 2005.
12. Vaithilingam, S., Nair, M., Mapping Global Money Laundering Trends: Lessons from the Pace setters, Research in International Business and Finance (2008).

**DISCLAIMER:** This document is being furnished to you for your information. You may choose to reproduce or redistribute this report for non-commercial purposes in part or in full to any other person with due acknowledgement of PRS Legislative Research (“PRS”). The opinions expressed herein are entirely those of the author(s). PRS makes every effort to use reliable and comprehensive information, but PRS does not represent that the contents of the report are accurate or complete. PRS is an independent, not-for-profit group. This document has been prepared without regard to the objectives or opinions of those who may receive it.

