Response ID ANON-Z596-YZCA-N

Submitted to AML/CFT Act review
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Tell us a bit about yourself

1 What age group are you in?

Not Answered

2 What is your ethnicity? (You can select more than one.)

Please specify:

Not Answered

Please specify:

Not Answered

Please specify:

Not Answered

Please specify:

3 If you're responding on behalf of an organisation or particular interest group, please give details below:

Organisation or special interest group details:

This submission is made by Simpson Grierson. Simpson Grierson is a national law firm. For general information about this law firm, please see the Simpson Grierson website at https://www.simpsongrierson.com/.

4 If you would like to be contacted in the future about AML/CFT work, please include your email address below. (Note you are not required to provide your email address. You can provide your submission anonymously.)

Email address:
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1. Institutional arrangements and stewardship

1.1 Are the purposes of the Act still appropriate for New Zealand's Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) regime?

Yes

If you answered 'no', what should be changed?:

If you think there are other purposes that should be added, please give details below::

1.2 Should a purpose of the Act be that it seeks to actively prevent money laundering and terrorism financing, rather than simply deterring or detecting it?

No

Please comment on your answer.:

Most reporting entities do not have the capability or resources for taking on this added responsibility.

1.3 If you answered 'yes' to Question 1.2, do you have any suggestions how this purpose should be reflected in the Act, including whether there need to be any additional or updated obligations for businesses?

Please share your comments below.:

1.4 Should a purpose of the Act be that it also seeks to counter the financing of proliferation of weapons of mass destruction?

Unsure

Please comment on your answer.:

We consider the purposes of the Act to be sufficient. However, we acknowledge the Financial Action Task Force recently issued its Guidance on Proliferation Financing Risk Assessment and Mitigation (FATF, 29 June 2021). Recommendation 1 concludes: “Countries should require financial institutions and designated non-financial businesses and professions (DNFBPs) to identify, assess and take effective action to mitigate their money laundering, terrorist financing and proliferation financing risks.” Accordingly, we support legislation appropriately providing for this. However, it is necessary to assess whether this should be done by incorporating an anti-PF regime into this Act; or rather by providing for PF by way of separate legislation. This is because ML/TF risks and PF risks are distributed differently, and so may require non-identical regimes.

1.5 If you answered 'yes' to Question 1.4, should the purpose be limited to proliferation financing risks emanating from Iran and the Democratic People’s Republic of Korea?

Yes

Please give reasons for your answer.:

If the Act's purposes are expanded to include combatting PF, then clearly limiting the risk assessment to those countries sanctioned by the UN for attempts to finance proliferation will limit the additional burden introducing this additional purpose would impose on reporting entities, and make for a more effective response to the identified risks.

No

Please comment on your answer.:

1.6 Should the Act support the implementation terrorism and proliferation financing targeted financial sanctions, required under the Terrorism Suppression Act 2002 and United Nations Act 1946?

Unsure

Please comment on your answer.:

We consider the purposes of the Act to be sufficient. To introduce a further blanket limb of compliance would have a significant impact on reporting entities. The other legislation in this area could continue to support the implementation of terrorism and PF targeted financial sanctions.

1.7 What could be improved about New Zealand’s framework for sharing information to manage risks?

Please share your comments below.:

1.8 Are the requirements in section 58 still appropriate?

Not Answered

Please comment on your answer.:

How could the government provide risk information to businesses so that it is more relevant and easily understood?:

1.9 What is the right balance between prescriptive regulation compared with the risk-based approach?

Please share your comments below.:

More direction would be useful where different businesses in the same sector are interpreting the scope of the Act in a different way, because the scoping provisions in the Act are too vague and open to differing interpretations. For example, many descriptions of activities for DNFBPs are unclear and expressed in language that is not consistent with the way concepts are expressed in New Zealand jurisprudence. This creates the following disadvantages:
(a) It leads to the potential for bad actors to pick service providers based on their compliance interpretation.
(b) It provides the opportunity for some DNFBPs to incur lower costs through applying a different interpretation.
(c) It creates inefficiency as entities try to determine the boundaries of the activities.
(d) It causes a lot of frustration and reduces buy-in for the important underlying purposes of the Act.
The Act should be consistent with FATF language, but should provide clearer signposts as to how this language applies in a New Zealand context. This could be through examples and better guidance, or Rules that describe specific sub-categories as being captured.

Does the Act currently achieve that balance, or is more (or less) prescription required?:

No. More direction is required to give certainty regarding the nature and boundaries of captured activities.

1.10 Do some obligations require the government to set minimum standards?

Not Answered

If you answered 'yes', please comment on how this could be done.:

What role should guidance play in providing further clarity?:

1.11 Could more be done to ensure that businesses’ obligations are in proportion to the risks they are exposed to?

Not Answered

If you answered 'yes', please give reasons for your answer.:

1.12 Does the Act appropriately reflect the size and capacity of the businesses within the AML/CFT regime?

Not Answered

Please give reasons for your answer.:

1.13 Could more be done to ensure that businesses' obligations are in proportion to the risks they are exposed to and the size of the business?

Not Answered

If you answered 'yes', please share your suggestions::

1.14 Are exemptions still required for the regime to operate effectively?

If not, how can we ensure AML/CFT obligations are appropriate for low-risk businesses or activities?:

The Act uses broad generic terminology to define who "reporting entities" are. We consider this approach appropriate, as it has a range of important benefits,, namely: (a) it tracks the wording in the FATF Recommendations, which is also used in the AML/CFT legislation of multiple other jurisdictions, making it easier to use international commentary; and (b) it makes the Act adaptable, as new types of providers can generally be brought within the generic descriptions (eg VASPs).
However, the broad terminology has the disadvantage that it captures businesses that are outside the Act's policy due to their presenting no, or no material, ML/FT risk. It is essential to have an effective exemption regime (enabling both class and individual exemptions) to mitigate this. To give a familiar example, it is generally appropriate that persons who are in the business of issuing the means of payment should be reporting entities; but it is inappropriate to impose obligations under the Act on (say) a coffee shop issuing loyalty cards that entitle the holder to one free coffee for every 10 coffees purchased. Given the infinite range of scenarios that can occur in practice, an exemption regime is the most efficient means to delineate exceptions where the broad wording would inappropriate capture a business that is outside the Act's policy.
Additionally, the Act's broad provisions mean that chains of intermediaries essentially need to replicate the same compliance actions, which creates costs and inefficiencies with no discernible additional benefit in terms of identifying ML/FT practices. Again, it is necessary to have an effective exemption regime to mitigate this (as with the existing PTR exemption for intermediary institutions in relation to wire transfers, or the existing CDD exemptions relating to managing intermediaries).
Equally, an exemption regime is necessary to ensure that, even in cases where an entity should have some obligations under the Act, it would have a partial exemption to the extent that compliance with all obligations would exceed what was necessary to meet the Act's policies (as with the current partial exemption for debt collectors).

Yes

1.15 Is the Minister of Justice the appropriate decision maker for exemptions under section 157?

No

If you answered 'no', should it be an operational decision maker such as the Secretary of Justice? Please comment below.:

In practice, it can take very long to obtain an individual exemption (Ministerial exemption) if there is no existing class exemption.
While the exemption application is pending, the applicant is subject to the Act, during which period compliance can be costly and onerous. The AML/CFT supervisors in practice mitigate this by taking a "no action" approach where there is a meritorious application for a Ministerial exemption. However, such an interim "no action" approach is not an adequate solution for many applicants, notably for entities who are subject to scrupulous compliance expectations.
We submit that, instead of the current regime of requiring an individual exemption to be granted by the Minister, an operational decision maker be empowered to grant this. The purposes of the Act do not necessitate individual exemptions having to be made by Ministerial grants.
As regards the issue of which operational decision maker should be able to grant exemptions, we see merit in this being the relevant sector's AML/CFT supervisor. The relevant AML/CFT supervisor is best placed to have a clear practical understanding of a particular applicant's ML/TF risk position. As there is no significant overlap between the categories of reporting entities supervised by the different AML/CFT supervisors, we do not see a meaningful risk of decisional inconsistency in analogous cases. A broad consistency of overall approach can be achieved by prescribing, in the Act, what factors must be consider in granting an exemption.
We are concerned that if some other operational decision maker than an AML/CFT supervisor were to be tasked with exemption applications, eg the Secretary of Justice, that could in practice replicate the current delays experienced with the Ministerial exemption regime. The Secretary of Justice would in any event need to refer to the relevant AML/CFT supervisor for its assessment of the particular applicant's ML/TF risk position, based on the AML/CFT supervisor's sector expertise. It is not clear to us what additional contribution the Secretary of Justice could add that would justify the additional time his or her involvement would add to the application process. In particular, we do not see any meaningful consistency of decision-making being added by such centralisation, due to applications for these kinds of exemptions being essentially individualised and sector-contextualised assessments.

1.16 Are the factors set out in section 157(3) appropriate?

Yes

If you answered 'no', please give reasons for your answer::

1.17 Should it be specified that exemptions can only be granted in instances of proven low risk?

Yes

Please give reasons for your answer.:

This would explicitly address the FATF's concern that the New Zealand legislation inappropriately enables exemptions to be obtainable in cases that have a material ML/TF risk.

Should this be the risk of the exemption, or the risk of the business?:

It should be both (separately):
(a) If an applicant's business inherently has no, or a low, ML/FT risk profile an exemption should be available. Examples would be a local council providing home insulation loans to ratepayers (as discussed in our response to Question 2.48 in relation to social loans by public authorities), or a charity providing low-interest loans (as discussed in our response to Question 2.54).
(b) But equally, if the exemption conditions would convert a business activity that has an inherently higher ML/TF risk into a low-risk activity, an exemption should be available subject to the relevant conditions. For example, the business of an entity that issues stored value payment facilities inherently has a material ML/TF risk; however, if the exemption is conditioned to apply to only non reloadable, non-redeemable gift facilities (or similar) below a certain dollar cap then the residual ML/TF risk associated with the exemption is low.

1.18 Should the Act specify what applicants for exemptions under section 157 should provide?

No

Please give reasons for your answer.:

Should there be a simplified process when applying to renew an existing exemption?:

1.19 Should there be other avenues beyond judicial review for applicants if the Minister decides not to grant an exemption?

Not Answered

If you answered 'yes', what could these avenues look like?:

1.20 Are there any other improvements that we could make to the exemptions function?

Not Answered

If you answered 'yes', please give details::

For example, should the process be more formalised with a linear documentary application process?:

1.21 Can the AML/CFT regime do more to mitigate its potential unintended consequences?

Not Answered

If you answered 'yes', please give details::

1.22 How could the regime better protect the need for people to access banking services to properly participate in society?

Please share your comments below.:

Please see:
(a) our response to Question 2.48, relating to Pacific Islands remittance services; and
(b) our response to Question 4.18, relating to the removal of the need to verify residential addresses, including for people without a settled place of residence.

1.23 Are there any other unintended consequences of the regime?

Not Answered

If you answered 'yes', what are they and how could we resolve them?:

1.24 Can the Act do more to enable private sector collaboration and coordination?

Yes

If you answered 'yes', please give details::

ALIGNMENT WITH UPCOMING DIGITAL IDENTITY SERVICES TRUST FRAMEWORK ACT
The Act should be amended to enable reporting entities to rely on private sector "accredited digital identity services" within the meaning of the future Digital Identity Services Trust Framework Act. Such reliance should be made possible on the following basis:

(a) A reporting entity relying in good faith on an accredited digital identity service should not retain responsibility for ensuring that CDD is carried out in accordance with the Act. (This would be on the assumption that only services who conduct CDD procedures to at least the standard required by the Act and Regulations will be accredited under the Digital Identity Services Trust Framework Act, so that a reporting entity will automatically have reasonable cause for reliance in an accredited digital identity service. However, if a service's CDD procedures would not need to meet that standard in order for it to be accredited then the equivalent of section 33(3A)((b) should apply to reliance by reporting entities on accredited digital identity services.)
(b) Unlike the existing reliance regime in section 33 of the Act, it should not be a requirement that the accredited digital identity service should itself be a reporting entity.
(c) Unlike the existing reliance regime in section 33 of the Act, it should not be a requirement that the reporting entity needs to obtain the relevant identity and verification information from the accredited digital identity service (except potentially in specific high-risk cases, as where a customer is a PEP). New technology would enable the accredited digital identity service to act as a sufficient verification portal. That would best protect the security of a customer's personal data and privacy, be faster and efficient, and still appropriately meet the Act's policy objectives (see in this regard also our response to Question 1.48).
APPROVED ENTITY RELIANCE REGIME
If the approved entity reliance regime in section 33(3A) is envisaged to be distinct from the accredited digital identity service regime under the future Digital Identity Services Trust Framework Act, then that approved entity reliance regime should now be activated, by the issue of the required Regulations. In this regard, we suggest reassessing the need for the conditions in section 33(2)(c) and (d) for the approved entity reliance regime. Those conditions require the reporting entity to obtain consent to the reliance, as well as the relevant identity and verification information, from the entity on whom it is relying. Those conditions would tend to reduce the practical usefulness of the approved entity regime. They would also not mitigate the risks associated with the repeated circulation of customers' personal information, contrary to the policy of the future Digital Identity Services Trust Framework Act. See also our response to Question 1.48.

1.25 What do you see as the ideal future for public and private sector cooperation?

Please share your comments below.:

Are there any barriers that prevent that future from being realised and if so, what are they?:

1.26 Should there be greater sharing of information from agencies to the private sector?

Not Answered

If you answered 'yes', would this enhance the operation of the regime?:

1.27 Should the Act require have a mechanism to enable feedback about the operation and performance of the Act on an ongoing basis?

Not Answered

If you answered 'yes', what is the mechanism and how could it work?:

1.28 Should the New Zealand Police Financial Intelligence Unit (FIU) be able to request information from businesses which are not reporting entities in certain circumstances (e.g. requesting information from travel agents or airlines relevant to analysing terrorism financing)?

Not Answered

Please give reasons for your answer.:

1.29 If the FIU had this power, under what circumstances should it be able to be used and should there be any constraints on using the power?

Please share your comments below.:

1.30 Should the FIU be able to request information from businesses on an ongoing basis?

Not Answered

Please explain your answer:

1.31 If the FIU had this power, what constraints are necessary to ensure that privacy and human rights are adequately protected?

What constraints are needed?:

1.32 Should the Act provide the FIU with a power to freeze, on a time limited basis, funds or transactions in order to prevent harm and victimisation?

Not Answered

If you answered 'yes', how could the power work and operate? In what circumstances could the power be used, and how could we ensure it is a proportionate and reasonable power? Please share your comments below.:

1.33 How can we avoid potentially tipping off suspected criminals when the power is used?

Please share your comments below.:

1.34 Should supervision of implementation of Targeted Financial Sanctions (TFS) fall within the scope of the AML/CFT regime?

Not Answered

Please give reasons for your answer.:

1.35 Which agency or agencies should be empowered to supervise, monitor, and enforce compliance with obligations to implement TFS?

Please describe below and give reasons for your answer.:

1.36 Are the secondary legislation making powers in the Act appropriate, or are there other aspects of the regime that could benefit from having regulation making powers created?

Please share your comments below.:

1.37 How could we better use secondary legislation making powers to ensure the regime is agile and responsive?

Please share your comments below.:

1.38 Are the three Ministers responsible for issuing Codes of Practice the appropriate decision makers, or should it be an operational decision maker such as the chief executives of the AML/CFT supervisors? Why or why not?

Please share your comments below and give reasons for your answer.:

1.39 Should the New Zealand Police also be able to issue Codes of Practice for some types of FIU issued guidance?

Yes

If you answered yes, what should the process be?:

1.40 Are Codes of Practice a useful tool for businesses?

Yes

If you answered 'yes', are there any additional topics that Codes of Practice should focus on? What enhancements could be made to Codes of Practice?
Please share your comments below.:

1.41 Does the requirement for businesses to demonstrate they are complying through some equally effective means impact the ability for businesses to opt out of a Code of Practice?

Not Answered

If you answered 'yes', please give reasons for your answer.:

1.42 What status should be applied to explanatory notes to Codes of Practice? Are these a reasonable and useful tool?

Please share your comments below.:

1.43 Should operational decision makers within agencies be responsible for making or amending the format of reports and forms required by the Act?

Not Answered

Please give reasons for your answer.:

1.44 If you answered 'yes' to the previous question (question 1.43), which operational decision makers would be appropriate, and what could be the process for making the decision? For example, should the decision maker be required to consult with affected parties, and could the formats be modified for specific sectoral needs?

Please share your comments below.:

1.45 Would AML/CFT Rules (or similar) that prescribed how businesses should comply with obligations be a useful tool for business?

No

Please give reasons for your answer.:

In general, a prescriptive approach would hamper adaptability. Additionally, a “one size fits all” approach is unrealistic given the broad range of businesses to which the Act applies. Instead, we support the use of Codes of Practice that: (a) include appropriate safe harbour provisions; and (b) permit

a business to substitute equally effective alternative measures.

1.46 If we allowed for AML/CFT Rules to be issued, what would they be used for, and who should be responsible for issuing them?

Please share your comments below.:

1.47 Would you support regulations being issued for a tightly constrained direct data access arrangement which enables specific government agencies to query intelligence the FIU holds?

Not Answered

Please give reasons for your answer.:

1.48 Are there any other privacy concerns that you think should be mitigated?

Yes

Please share your comments below.:

The current CDD regime creates substantial privacy and identity theft risks, by in effect requiring customers to disclose extensive identity and verification information and documents relating to themselves, their beneficial owners, and persons acting on their behalf – and to do so repeatedly, with the disclosures often being to smaller reporting entities who may realistically not have the same ability to protect that information as (say) a large bank would have. We see a real need to better protect persons against this risk, by reducing the number of times and the range of entities to whom personal information is disclosed for CDD purposes. We believe this can be achieved by aligning the Act with the future Digital Identity Services Trust Framework Act – so that identity verification may be undertaken by accredited digital identity services. Such accredited digital identity services should then merely confirm to a reporting entity whether or not a relevant person's identity has been verified; the service should not provide the identity and verification information and documents to a reporting entity (unlike the provision in section 33(2)(c) of the Act under which receipt of the identity and verification requirement is a condition for reliance). See also our response to Question 1.24.

1.49 What, if any, potential impacts do you identify for businesses if information they share is then shared with other agencies? Could there be potential negative repercussions notwithstanding the protections within section 44?

Please share your comments below.:

1.50 Would you support the development of data-matching arrangements with FIU and other agencies to combat other financial offending, including trade-based money laundering and illicit trade?

Not Answered

Please give reasons for your answer.:

1.51 What concerns, privacy or otherwise, would we need to navigate and mitigate if we developed data-matching arrangements? For example, would allowing data-matching impact the likelihood of businesses being willing to file Suspicious Activity Reports (SARs)?

Please share your comments below.:

1.52 Should there be an AML/CFT-specific registration regime which complies with international requirements?

Yes

If you answered 'yes', how could it operate, and which agency or agencies would be responsible for its operation? Please share your comments below.:

The FATF Recommendations require financial institutions (specifically including, but not limited to, VASPs, money or value transfer services and their agents, and money or currency changing services) to be licensed or registered. This requirement is currently met in New Zealand by requiring all persons who are in the business of providing a financial service (as defined) to be registered on the Financial Service Providers Register (FSPR) under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act), even if they would not otherwise be subject to the FSP Act's territorial scope (FSP Act, section 7A(1)(e)). However, the FSPR is not limited to financial service providers (FSPs) who are reporting entities; therefore, it cannot currently be determined by looking at the FSPR whether a registered FSP is or is not a reporting entity under the Act. That could readily be addressed by adding a line item in the FSPR to show the relevant FSP's status under the Act. However, that would still leave the issue that the FSPR will contain only reporting entities who are FSPs; the FSPR will not contain other reporting entities. While the FATF Recommendations do not expressly require DNFBPs (other than casinos) to be licensed or registered, they do provide that such DNFBPs should be "subject to effective systems for monitoring and ensuring compliance with AML/CFT requirements". It is difficult to see how the DNFBPs' AML/CFT supervisor can effectively monitor them without a statutory register showing who they are. For this reason, we see merit in a comprehensive AML/CFT Register of all reporting entities subject to the Act.
However, our support for an AML/CFT Register is on the basis that this would be a "phone book" type of register, i.e. would be a mere database and would not involve prudential application/maintenance requirements. Many reporting entities are already highly regulated, and we would not support adding yet another, duplicative layer of screening and monitoring via this new registration requirement. If there are any specific kinds of reporting entities that are not already prudentially regulated and monitored but that ought to be, then that should be separately addressed rather than this being shoehorned into the AML/CFT Register system.

1.53 If such a regime was established, what is the best way for it to navigate existing registration and licensing requirements?

Please share your comments below.:

If a decision is made to introduce a comprehensive AML/CFT Register for all reporting entities, section 7A(1)(e) of the FSP Act should be deleted, so that the FSP Act will cease to apply to reporting entities who are not otherwise territorially subject to it. Section 7A(1)(e) was a late addition when the FSP Act's territorial scope was amended by the Financial Services Legislation Amendment Act 2019, and was added only because the AML/CFT supervisors saw a need for a database that included all financial institutions who are reporting entities subject to the Act. That reason would fall away if a separate AML/CFT Register is created.

1.54 Are there alternative options for how we can ensure proper visibility of which businesses require supervision and that all businesses are subject to appropriate fit-and-proper checks?

Not Answered

Please give reasons for your answer.:

1.55 Should there also be an AML/CFT licensing regime in addition to a registration regime?

No

Please give reasons for your answer.:

Licensing imposes a higher compliance burden on providers, and a higher resource burden on the governmental authorities, than a mere registration regime. We do not consider that to be appropriate for all reporting entities.
Instead, we favour an approach where all reporting entities must be registered, with additional licensing being reserved for particular kinds of reporting entities who raise specific prudential or conduct concerns.
As already noted in our response to Question 1.52, and for the reasons given there, the AML/CFT Register (if adopted) should be a mere database, and should not involve prudential application/maintenance requirements.

1.56 If we established an AML/CFT licensing regime, how should it operate? How could we ensure the costs involved are not disproportionate?

Please share your comments below.:

1.57 Should a regime only apply to sectors which have been identified as being highly vulnerable to money laundering and terrorism financing, but are not already required to be licensed?

Yes

Please give reasons for your answer.:

1.58 If such a regime was established, what is the best way for it to navigate existing licensing requirements?

Please share your comments below.:

Entities who are not yet subject to licensing, but for whom this is considered appropriate (eg potentially VASPs, or money remitters) could be required to hold a market services license under the Financial Markets Conduct Act 2013.

1.59 Would requiring risky businesses to be licensed impact the willingness of other businesses to have them as customers? Can you think of any potential negative flow-on effects?

Please share your comments below.:

It may likely be the reverse, i.e. that other businesses will be more willing to accept businesses in high-risk sectors as customers in the latter category are licensed. For example, banks are broadly averse to having money remittance services as their customers; however, banks may be more comfortable having a relationship with money remitters who are subject to ongoing licensing approvals and supervision by a regulator where the regulator for, say, money remitters, affirms the activity and the processes of the money remitter.

1.60 Would you support a levy being introduced for the AML/CFT regime to pay for the operating costs of an AML/CFT registration and/or licensing regime?

Please give reasons for your answer.:

Not Answered

1.61 If we developed a levy, who do you think should pay the levy (some or all reporting entities)?

Please share your comments below.:

1.62 Should all reporting entities pay the same amount, or should the amount be calculated based on, for example, the size of the business, their risk profile, how many reports they make, or some other factor?

Please share your comments below.:

1.63 Should the levy also cover some or all of the operating costs of the AML/CFT regime more broadly, and thereby enable the regime to be more flexible and responsive?

Not Answered

Please give reasons for your answer.:

1.64 If the levy paid for some or all of the operating costs, how would you want to see the regime's operation improved?

Please share your comments below.:

2. Scope of the AML/CFT Act

2.1 How should the Act determine whether an activity is captured, particularly for Designated Non-Financial Businesses and Professions (DNFBPs)?

Please share your comments below.:

We support ongoing consistency with the FATF Recommendations. Such consistency enables lawyers, regulators, and the courts to draw on international guidance (by both the FATF, and other jurisdictions whose AML/CFT legislation is similarly modelled on the FATF Recommendations) in interpreting and applying the Act.

No

Please give reasons for your answer.:

"Ordinary course of business" is a fact-specific test. It is not capable of being defined in the Act in a way that would be easier to apply, or would produce more certainty, than the existing precedent based test.

2.2 If 'ordinary course of business' was amended to provide greater clarity, particularly for DFNBPs, how should it be articulated?

Please share your comments below.:

2.3 Should 'ordinary' be removed?

No

If so, how could we provide some regulatory relief for businesses which provide activities infrequently? Are there unintended consequences that may result? Please share your comments below.:

2.4 Should businesses be required to apply AML/CFT measures in respect of captured activities, irrespective of whether the business is a financial institution or a DNFBP?

No

Please give reasons for your answer.:

2.5 If you answered yes to the previous question (Question 2.4), should we remove 'only to the extent' from section 6(4)?

Not Answered

Would anything else need to change, e.g. to ensure the application of the Act is not inadvertently expanded? Please share your comments below.:

2.6 Should we issue regulations to clarify that captured activities attract AML/CFT obligations irrespective of the type of reporting entity which provides those activities?

Not Answered

Please give reasons for your answer.:

2.7 Should we remove the overlap between 'managing client funds' and other financial institution activities?

Yes

If you answered 'yes', how could we best do this to avoid any obligations being duplicated for the same activity? Please share your comments below.:

AVOIDANCE OF DUPLICATION
This may best be dealt with by assigning the entity to the appropriate supervisor, and then treating the reporting entity as a financial institution or DNFBP, depending on which supervisor they are assigned to.
FURTHER ISSUE: LACK OF CLARITY OVER WHEN LAW FIRMS "CONTROL" FUNDS
A further issue with the "managing client funds" definition, and the similar definitions for financial institutions, is that there is supervisor guidance to the

effect that this activity captures not only the handling of funds (eg through a trust account), but also any “control” over the movement of funds, even if the funds do not go through the reporting entity. For law firms, it is extremely unclear when they may have “control” over client funds that do not go through the firm’s trust account. For example, law firms often advise on transaction and security documents, including giving confirmation that the documents are in order from a legal perspective, and that certain registrations (such as mortgages) will be actioned. Where the transaction funds do not go through the law firm's trust account, it is unclear whether such legal sign off amounts to “control”, given that the transaction will be actioned directly by the client but would not proceed unless the law firm issues its sign off to the client. If this kind of sign off was considered to amount to controlling/managing client funds, it would broaden the captured activities to an extent that we do not believe was intended. Then, any contract or loan would create a captured activity where the lawyer is expected to give sign off before the transaction proceeds. We believe that the Act should be clarified (or an exemption should be made) to provide that an activity is not captured merely because the reporting entity gives a sign off on which the customer may rely before proceeding with the transaction.

2.8 Should we clarify what is meant by 'professional fees'?

Not Answered

If you answered 'yes', what would be an appropriate definition? Please share your comments below.:

2.9 Should the fees of a third party be included within the scope of 'professional fees'?

No

Please give reasons for your answer.:

This would create an avenue for bad actors to create “professional fees” and launder payments through trust accounts. Instead, some limited exemptions for low risk professional fee types are more appropriate.

2.10 Does the current definition appropriately capture those businesses which are involved with a particular activity, including the operation and management of legal persons and arrangements?

No

Please give reasons for your answer.:

The current definition creates a great deal of uncertainty. It is very unclear what amounts to “engaging in”. The consultation commentary for this question states that the intention is to capture businesses involved in preparing and assisting customers to undertake specified activities. This is not the natural meaning of “engaging in” in the context of the language of the activities. Many entities may consider that they are only engaging in activities (B), (D), and (E) in paragraph (a)(vi) of the definition if the transaction goes through their trust account, not simply when they are assisting in drafting documentation for a transaction that will occur through another channel. As FATF Recommendation 22 provides that DNFBPs should be captured when they prepare for or carry out transactions for their client concerning certain activities, we should adopt the FATF language, so that reporting entities do in fact understand that they must comply when assisting, not just when a transaction actually goes through their trust account.
We experience ongoing difficulty in interpreting the categories of activity within (vi), including as follows (in this list, the capital letters refer to the corresponding categories of activities in paragraph (a)(vi) of the definition):
(A) It is unclear whether the conveyancing activity is intended to apply to mortgage registration, variation, or discharge, where this activity is not connected to the sale or purchase of a freehold estate and funds do not go through the trust account.
(B) It is unclear whether law firms are captured by this activity, which for law firms overlaps with (A) and (D).
(C) It is unclear whether a “beneficial interest” in land or real property means the transfer of an economic interest only, or could also include the registration of a proprietary interest such as a mortgage.
(D) It is not clear whether partial share issues and share transfers are captured, when these involve less than 100% of the business. It is not clear whether a winding up of a legal person or arrangement is captured. It is not clear whether a change in legal ownership of a legal arrangement (i.e. change in trustee) is captured. It is not clear if peripheral involvement in a transaction, such as providing input in New Zealand aspects of an international acquisition, is captured.
(E) This category incorrectly uses “and” rather than “or”; it is only due to supervisor guidance that the capture of this clause is correctly applied (i.e. “creating, operating, and managing” instead of “creating, operating, or managing”. It is also not clear whether this category applies to regular/ongoing involvement in the operation or management of a legal person or arrangement only, such as the role of a professional director or a trustee, or also extends to one-off assistance to a company that relates to its operations (eg the preparation of resolutions for the payment of a dividend, the preparing of loan documents, or the preparation of contracts for a legal person’s trading activities). It is not clear whether company administration activities – such as filing an annual return, filing director appointment notices, or obtaining a GST number – are captured. In terms of “creation”, it is not clear whether a DNFBP that is not forming an entity, but that is involved in supporting activities such as drafting a constitution, is captured.

How could it be improved?:

We should adopt the phrases used by FATF, in particular for activities (D) and (E), to simplify the expression of these categories and to align us with FATF commentary:
- “organisation of contributions for the creation, operation or management of companies”
- “creation, operation or management of legal persons or arrangements, and buying and selling of business entities”.
This will still leave many of the interpretation difficulties mentioned above, and so we also need examples. Other legislation provides examples of how a provision is meant to apply. Regulators should also provide more detailed guidance on the scope of FATF classes of activity, to reduce the burden on each individual reporting entity in trying to research international sources for some indication of scope to apply to our New Zealand context.

2.11 Have you faced any challenges with interpreting the activity of 'engaging in or giving instructions'?

Not Answered

If you answered 'yes', what are those challenges and how could we address them?:

2.12 Should the terminology in the definition of financial institution be better aligned with the meaning of financial service provided in section 5 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008?

Yes

If you answered yes, how could we achieve this?:

The terminology in the Act should remain consistent with the terminology used in the FATF Recommendations (for the reasons noted in our response to Question 2.1). The terminology in the FSP Act should then replicate the terminology in the Act, to the extent of an intended overlap. For example, the Act currently uses "transferring money or value for, or on behalf of, a customer", whereas the FSP Act uses "operating a money or value transfer service". This difference in wording creates unnecessary uncertainty. For example, it is understood that "transferring money or value for, or on behalf of, a customer" in the Act covers not only money remitters but also eg merchant acquirers (as discussed in our response to Question 2.13); but because the wording differs, it is open to argument whether the FSP Act's "money or value transfer service" has the same extended scope.

2.13 Are there other elements of the definition of financial institution that cause uncertainty and confusion about the Act's operation?

Yes

If you answered 'yes', please give details::

TERRITORIAL SCOPE
Please see our response to Question 2.56.
FINANCIAL ACTIVITIES
Several of the key concepts are undefined, and their potential scope of application in the context of new technologies and new services is unclear. Accordingly, we frequently encounter situations where the applicability of the Act's provisions cannot be assessed with a high level of confidence when advising fintechs and other clients who provide innovative services (of which we give two examples below). Such lack of predictability and certainty is inappropriate, for two reasons: (a) the Act provides for onerous liability, so an entity is at significant risk if it misjudges the Act's application; yet (b) the compliance obligations imposed by the Act are onerous, so an entity cannot readily afford to comply with the Act as a cautionary measure when the Act may not in fact be applicable. We consider that an element of vagueness is unavoidable if the Act is to remain adaptable, and see the effective solution to balancing adaptability with certainty as being a binding rulings regime (as discussed below).
(a) Example 1 – "issuing or managing the means of payment (for example … electronic money)"
An example where the potential scope of application is unclear in the context of new technologies and new services is "issuing or managing the means of payment (for example … electronic money)".
As a practical illustration, we have had to assess whether the generation by an overseas payment services provider of a QR code on a user's smartphone in New Zealand (for scanning at the point of sale in New Zealand, to complete the purchase from the user's end) amounted to a "means of payment" being issued "in" New Zealand. Such a QR Code does not have embedded value; instead, it contains the data required to initiate a debit to the user's account with the overseas payment services provider (or the user's linked overseas bank account). A QR Code might not generally be considered a "means of payment" in the natural and ordinary sense of the word; further, as it does not itself embed value it would not seem to be "electronic money". As against this, scanning a QR Code could be seen as analogous to swiping a debit card, which also does not embed value, and which technically enables data to be communicated to the card issuer to initiate a debit to the cardholder's bank account. The dividing line between a "means of payment", on the one hand, and mere data transmission to authorise payment, on the other hand, is becoming increasingly blurred with new forms of electronic payment technology.
Further, applying the concept of "electronic money" can be problematic where closed-loop stored value is involved. There is no definition of that term in the Act, and inconsistencies between relevant definitions in overseas instruments: the definition of "electronic money" in the EU Directive requires the payment facility to be able to be used for purchases from vendors other than the issuer of the facility, whereas the applicable FATF Recommendations recognise that closed-loop payment facilities have an ML/TF risk (albeit less than that posed by open loop payment facilities).
(b) Example 2 – "transferring money or value for, or on behalf of, a customer"
As another example, the scope of "transferring money or value for, or on behalf of, a customer" is not clear. This expression at its core denotes money remittance services, but is interpreted by the DIA as including merchant acquirers (who provide an interface between the card networks, eg Visa or Mastercard, and the merchants entitled to card payments). We understand that the DIA adopts this interpretation on the basis of the Wolfsberg Guidance on Prepaid and Stored Value Cards (2011), which identifies merchant acquiring as an activity posing ML/FT risks. (The Wolfsberg Group is an association of global banks that aims to develop frameworks and guidance for the management of financial crime risks.) The difficulty is that a merchant acquirer does not "transfer" any money or value for, or on behalf of, the relevant merchant in either the technical, or the natural and ordinary, sense of the word "transfer". There is no sum that is being identifiably passed, i.e. "transferred", from the cardholder's bank to the merchant, or even more specifically from the card network to the merchant, via the merchant acquirer. The card network receives periodic netted bulk payments from a card issuer (eg bank) in respect of all the issuer's cardholders; the card network disaggregates each such receipt and reaggregates it into periodic netted bulk payments to each merchant acquirer; and the merchant acquirer then disaggregates that receipt and reaggregates it into periodic netted bulk payments to each merchant (additionally, in some scenarios the merchant acquirer may credit the merchant's bank account before the card issuer has debited the cardholder's account for the relevant purpose). There is no identifiable link between a dollar received by the merchant acquirer and a dollar paid out by it to the merchant. We do not dispute that merchant acquirers should be reporting entities under the Act, as they are a systemic conduit for fund flows (albeit it may have been preferable to achieve that by a regulation made under paragraph (b) of the definition of "financial institution"). However, interpreting "transferring money or value" in this extended sense means that its exact scope is vague, making it difficult to assess its the application to other, new kinds of service providers whose services are analogous in some – but not all – ways to those of merchant acquirers.
(c) Suggested solution – a binding rulings regime
The rapid evolution of financial technology will, on an ongoing basis, make it difficult to apply the Act's terminology to novel scenarios.
We do not consider that this can be addressed by definitions alone. On the contrary, we see a risk that an undue level of definition might make the Act

less adaptable to new technology.
In such cases of uncertainty we sometimes engage with the relevant AML/CFT supervisor for its views, to provide the client with a level of practical comfort. However that is not ideal, as any view expressed by the AML/CFT supervisor is indicative only, and non binding.
It would better balance certainty and adaptability, and would make the Act substantially more workable in terms of being able to assess its applicability to (or application in) complex or novel cases, if an AML/CFT supervisor could issue binding rulings. This could be broadly modelled on the binding rulings regime already found in the Tax Administration Act 1994 (where one is similarly faced with very broadly expressed legislation having to be applied across a very broad and evolving range of practical scenarios). We would see the binding rulings regime as sitting alongside the regime for individual exemptions:
- The two regimes would have different functions. The binding rulings regime would provide certainty where the application of the Act's general wording in a particular case is unclear; whereas the individual exemptions regime (like the class exemptions regime) would provide flexibility where the application of the Act's general wording would clearly capture a case that falls outside the policy of the Act.
- An exemptions regime by itself is not sufficient to fulfil both functions. An exemption can provide binding certainty that the Act's general wording does apply to a case (subject to the exemption). However, an exemptions regime cannot provide binding certainty that the Act's general wording does not apply to a case. In the latter case the regulators can at most refuse an application to grant an exemption as being unnecessary, which provides a level of practical comfort that the Act's wording should be inapplicable; but that is different from obtaining a binding assurance that the Act does not apply.

2.14 Should the definition of high-value dealer be amended so businesses which deal in high value articles are high-value dealers irrespective of how frequently they undertake relevant cash transactions?

Not Answered

Please give reasons for your answer.:

Can you think of any unintended consequences that might occur?:

2.15 What do you anticipate would be the compliance impact of this change?

Please share your comments below.:

2.16 Should we revoke the exclusion for pawnbrokers to ensure they can manage their money laundering and terrorism financing risks?

Not Answered

Please give reasons for your answer.:

2.17 Given there is an existing regime for pawnbrokers, what obligations should we avoid duplicating to avoid unnecessary compliance costs?

Please share your comments below.:

2.18 Should we lower the applicable threshold for high value dealers to enable better intelligence about cash transactions?

Not Answered

Please give reasons for your answer.:

2.19 If you answered 'yes' to the previous question (Question 2.18), what would be the appropriate threshold? How many additional transactions would be captured? Would you stop using or accepting cash for these transactions to avoid AML/CFT obligations?

Please share your comments below.:

2.20 Do you currently engage in any transactions involving stores of value that are not portable devices (e.g. digital stored value instruments)?

Not Answered

If you answered 'yes', what is the nature and value of those transactions?:

2.21 What risks do you see with stored value instruments that do not use portable devices?

Please share your comments below.:

2.22 Should we amend the definition of "stored value instruments" to be neutral as to the technology involved?

Yes

If you answered 'yes', how should we change the definition? Please share your comments below.:

The Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Regulations 2011, reg 15 currently create an exemption for certain stored value instruments below a specified value. This is intended to create an exemption for eg bus/train passes, gift cards, etc. However, a difficulty we often encounter is that "stored value instrument" is defined as "a PORTABLE DEVICE … that is capable of STORING monetary value in a form that is not physical currency", and including "a PORTABLE DEVICE whose value, or associated value, is transferable to a third party or able to be remitted; and any account or other arrangement associated with the value STORED ON THE DEVICE" (our emphasis). This definition requires there to be a "portable" device,

i.e. a movable, physical device, and for the value to be “stored” on, i.e. embedded in, that physical device. However, the relevant products are increasingly becoming purely digital. For example, physical gift cards are increasingly being replaced by digital code that is emailed or texted to the recipient, which the recipient can enter online at the issuer’s website; or by value credited to the recipient’s account with the issuer, which the recipient can draw down by opening a digital token or QR code on their smartphone and swiping that at the merchant’s terminal; or similar. The difficulty in such cases is that the value is not STORED on the user’s computer, mobile phone, tablet, or other portable device; instead, the value is stored in the user’s account on the issuer’s remote server and merely ACCESSED via the user’s portable device. Therefore, the definition of “stored value instrument” does not accommodate such digital products. To address this, we suggest amending the definition along the following lines:
“stored value instrument—
(a) means a [DELETE: "portable device" AND SUBSTITUTE: "thing (whether real or virtual)"], including a gift facility, that is capable of storing monetary value in a form that is not physical currency [INSERT: "or of giving access to monetary value stored in a form that is not physical currency"], regardless of whether the [DELETE: "device" and SUBSTITUTE: "thing"] is reloadable or able to be redeemed for cash; and
(b) includes—
(i) a [DELETE: "portable device" and SUBSTITUTE: "thing (whether real or virtual)"] whose value, or associated value, is transferable to a third party or able to be remitted; and
(ii) any account or other arrangement associated with the value stored on the [DELETE: "device" and SUBSTITUTE: "thing"]; but
(c) does not include a credit card or a debit card”

2.23 Should acting as a secretary of a company, partner in a partnership, or equivalent position in other legal persons and arrangements attract AML/CFT obligations?

No

Please give reasons for your answer.:

This would cast the net too wide. The Act imposes onerous compliance obligations on reporting entities, which on a cost-benefit analysis is appropriate only for entities operating in sectors with material ML/FT risks. The FATF Recommendations for good reason do not require obligations of this breadth to be imposed.

2.24 If you are a business which provides this type of activity, what do you estimate the potential compliance costs would be for your business if it attracted AML/CFT obligations?

Please share your comments below.:

How many companies or partnerships do you provide these services for?:

2.25 Should criminal defence lawyers have AML/CFT obligations?

Not Answered

If you answered 'yes', what should those obligations be and why?:

2.26 If you are a criminal defence lawyer, have you noticed any potentially suspicious activities?

Not Answered

If you answered 'yes', without breaching legal privilege, what were those activities and what did you do about them?:

2.27 Are there any unintended consequences that may arise from requiring criminal defence lawyers to have limited AML/CFT obligations, that we will need to be aware of?

Not Answered

If you answered 'yes', please give details::

2.28 Should non-life insurance companies become reporting entities under the Act?

Not Answered

Please give reasons for your answer.:

2.29 If you answered 'yes' to the previous question (Question 2.28), should non-life insurance companies have full obligations, or should they be tailored to the specific risks we have identified?

Not Answered

Please give reasons for your answer.:

2.30 If you are a non-life insurance business, what do you estimate would be the costs of having AML/CFT obligations (including limited obligations)?

Please share your comments below.:

2.31 Should we use regulations to ensure that all types of virtual asset service providers have AML/CFT obligations, including by declaring wallet providers which only provide safekeeping or administration are reporting entities?

Yes

If you answered 'yes', how should we do this?:

VASPs should largely be covered by the existing broad terminology in the Act's definition of "financial institution".
To the extent that particular kinds of VASPs may not already be covered, the necessary Regulations should be made under paragraph (b) of that definition.
It is appropriate that wallet providers should be reporting entities, given their close relationship with the relevant beneficiary and given that their custody of virtual assets or of the private keys is functionally analogous to "safe keeping or administering of cash or liquid securities on behalf of other persons". It is consistent with the FATF's Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers (28 October 2021) for VASP wallet providers offering safekeeping and administration services to have obligations under the Act.

2.32 Would issuing regulations for this purpose change the scope of capture for virtual asset service providers which are currently captured by the AML/CFT regime?

Not Answered

If you answered 'yes', please give reasons for your answer.:

2.33 Is the Act sufficiently clear that preparing or processing invoices can be captured in certain circumstances?

Not Answered

If you answered 'no', please give reasons for your answer.:

2.34 If we clarified the activity, should we also clarify what obligations businesses should have?

Not Answered

If you answered 'yes', please give reasons for your answer.:

2.35 Should preparing accounts and tax statements attract AML/CFT obligations?

Not Answered

Please give reasons for your answer.:

2.36 If you answered 'yes' to the previous question (Question 2.35), what would be the appropriate obligations for businesses which provide these services?

Please share your comments below.:

2.37 Should tax-exempt non-profits and non-resident tax charities be included within the scope of the AML/CFT Act given their vulnerabilities to being misused for terrorism financing?

Not Answered

Please give reasons for your answer.:

2.38 If these non-profit organisations were included, what should their obligations be?

Please share your comments below.:

2.39 Are there any other regulatory or class exemptions that need to be revisited, e.g. because they no longer reflect situations of proven low risk or because there are issues with their operation?

Yes

If you answered 'yes', please share your suggestions.:

(a) NON-FINANCE BUSINESSES THAT TRANSFER MONEY TO FACILITATE PURCHASE OF GOODS OR SERVICES
The exclusion in the Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Regulations 2011, reg 18A is too narrowly worded. That regulation seeks to exclude non-finance businesses that transfer money to facilitate the purchase of goods or services from being reporting entities. As currently worded, it provides: "A person is not a reporting entity, for the purposes of the Act, by reason only that, in the ordinary course of a non-finance business, the person transfers money ON BEHALF OF A CUSTOMER to facilitate the PURCHASE of goods or services BY THE CUSTOMER" (our emphasis), Under this wording, it benefits only the buyer's agent: the "customer" on whose behalf the transferor acts is the customer making the "purchase". This is too narrow: there is no substantive reason, from an ML/FT risk or policy perspective, to treat a non-finance business receiving funds on behalf of a SELLER as a reporting entity, yet exempt a non-finance business forwarding funds on behalf of a BUYER. This limitation creates practical difficulties for (in

particular) ecommerce platforms such as Amazon or AliExpress who receive payments on the merchants' behalf: the vast number of merchants offering goods or services on those platforms, coupled with the ongoing "churn" in those merchants, makes it wholly impractical to require the platform to do CDD on each merchant. We submit that the exemption should be amended to read: "A person is not a reporting entity, for the purposes of the Act, by reason only that, in the ordinary course of a non-finance business, the person transfers money on behalf of a customer to facilitate the purchase of goods or services by the customer [INSERT: "or to facilitate the sale by the customer of goods or services that are not relevant services"]."
Please also see our response at Question 2.47 relating to the difficulty in assessing when a person who, as an integral incident of its brokerage/platform service, transfers funds as agent to facilitate other parties' sales and purchases is a "non-finance business".
(b) EXEMPTION FOR LOYALTY SCHEMES
There is an ambiguity in Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Regulations 2011, reg 14. Reg 14(3)(b) relevantly requires a scheme member to be "allocated credits … as a result of the acquisition of goods or services from the non-finance business or businesses". This does not expressly state whether the credits must be allocated ONLY as a result of the acquisition of goods or services. This is problematic because it leaves open for debate whether a loyalty scheme where members can eg purchase "top-up" loyalty points for cash – as increasingly seen in practice – are within the scope of this exemption. We consider that the Act's policies require "allocated credits … as a result of the acquisition of goods or services" to be construed as "allocated credits … SOLELY as a result of the acquisition of goods or services" – otherwise the exemption could potentially cover a facility where 5% of earned loyalty points could be topped up with 95% of purchased loyalty points. However, it would be helpful to make this restriction express. (Alternatively, if purchasing top-up points are to be permitted, value caps and/or transferability restrictions would need to be added to reg 14 to mitigate the ML/TF risk that could create.)
Conversely, reg 14 is narrower in that it focuses only on loyalty credits (allocated for acquiring goods or services) and does not cover reward credits more broadly. For example, many providers (also) allocate credits for other kinds of activities they want to encourage, such as for leaving product reviews on their sites, "liking" their social media pages, friend referrals, etc. The issue of reward credits for the latter kinds of activities presents no meaningful ML/TF risk, so that an exemption for this is appropriate. However, the exemption for loyalty schemes does not cover such reward credits under its current wording. If possible, the loyalty scheme exemption should be amended to extend to such other reward schemes as well (eg by defining a loyalty scheme as a scheme where credits are allocated solely as a result of conduct as specified, including but not limited to the acquisition of goods or services); or alternatively a new exemption for the allocation of reward credits other than loyalty credits should be put in place.
(c) RELATED PARTIES EXEMPTION
The exemption in reg 16 of the Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Regulations 2011 should be extended to provide that A and B are also related where A and B are acting jointly or in concert. This would assist in (for example) a cooperative or franchise structure. For example, in a franchise structure there may be a special purpose entity of which the franchisees are minority shareholders and which administers the pooled receipts for franchise gift cards for the franchisees' benefit (eg in pooling and circulating funds from franchise stores where gift cards are sold, to franchise stores where gift cards are redeemed); in this example, the participants' relationship does not satisfy the current definition of "related", yet it is inappropriate for the Act to apply within this confined circle.

2.40 Should the exemption for internet auctions still apply, and are the settings correct in terms of a wholesale exclusion of all activities?

Yes

If you answered 'no', please give reasons for your answer.:

2.41 If it should continue to apply, should online marketplaces be within scope of the exemption?

Yes

Please give reasons for your answer.:

Internet ecommerce platforms – including the large global platforms such as Amazon or AliExpress – routinely adopt a structure whereby they: (a) receive, as agent for the merchant, the buyers' payments from the payment service intermediaries (eg from PayPal); and (b) then pay out the sale price (net of the platform fee) to the relevant merchants' bank accounts. These platforms cannot rely on the existing exemption for internet auctions, because they do not provide "a process … to conclude contracts for the sale and purchase of goods or the provision and acquisition of non-financial services", as required for that exemption to apply; instead, the platforms offer the relevant goods and services at a fixed price only (which on a contextual and purposive interpretation falls outside the scope of a relevant "process"). Further, these platforms cannot rely on the existing exemption for non finance businesses that transfer money to facilitate purchase of goods or services because, as currently worded, that exemption can only be relied on by a person receiving payment on behalf of the buyer, not also by a person receiving payment on behalf of the seller (as discussed more fully in our response to Question 2.39). For the reason we have submitted in our response to Question 2.39, we consider that that existing exemption should be reworded so that it can be relied upon by both buyers' and sellers' payment agents. Failing that, we consider that – at a minimum – a new class exemption should be provided for ecommerce platforms who receive payments for goods or non financial services on the merchants' behalf, as: (a) it is impractical for the platforms to do CDD on each merchant for whom they act (given the vast number and ongoing churn in the merchants); and (b) such a requirement is not warranted on a cost-benefit analysis, taking into account the low ML/FT risk if (as suggested) the exemption does not extend to merchants offering financial services.

2.42 What risks do you see involving internet marketplaces or internet auctions?

Please share your comments below.:

2.43 If we were to no longer exclude online marketplaces or internet auction providers from the Act, what should the scope of their obligations be? What would be the cost and impact of that change?

Please share your comments below.:

2.44 Do you currently rely on this regulatory exemption to offer special remittance card facilities?

Not Answered

If you answered 'yes', how many facilities do you offer to how many customers?:

2.45 Is the exemption workable or are changes needed to improve its operation?

Please share your comments below.:

What would be the impact on compliance costs from those changes?:

2.46 Do you consider the exemption properly mitigates any risks of money laundering or terrorism financing through its conditions?

Not Answered

If you answered 'yes', please give reasons for your answer.:

2.47 Should we amend this regulatory exemption to clarify whether and how it applies to DNFBPs?

Not Answered

If you answered 'yes', please share your suggestions.:

This exemption, like many others, applies to a “non-finance business”. The definition of “non-finance business” is circular and confusing, and should be clarified. In order to need an exemption in the first place, one would be conducting a “relevant service”. However, to be a non-finance business, one’s only or principal business must be the provision of goods and services that are not “relevant services”. A difficulty with this is that, often, the relevant service is so intertwined with the other goods and services being provided that it is extremely difficult to determine whether or not the relevant service is part of the principal business. An example is internet platforms that effectively broker contracts between retailers and buyers: the provider’s business is as a platform for the sale of goods on the website (the ecommerce marketplace it operates), but the transfer of buyer payments to retailers is typically part and parcel of that service (i.e. the platform typically receives payments from the buyers on behalf of the sellers for transmission to them, rather than acting as a reseller making and receiving payments as principal; see our response at Question 2.39). This aspect of the definition of “non-finance business” should be clarified.

2.48 Should we issue any new regulatory exemptions?

Yes

If you answered 'yes', please share your suggestions.:

(a) PACIFIC ISLANDS CORRESPONDENT BANKING AND REMITTANCE SERVICES
The AML Act has adversely impacted the Pacific Islands banking and money remittance sectors, due to New Zealand banks’ withdrawal of correspondent banking services and de-banking of remittance service providers. While the RBNZ has called on New Zealand banks “to act with courage to keep providing banking services, including money remittances, to the Pacific Islands” (opinion piece by the Governor of the RBNZ, 27 April 2021), that is frankly unrealistic: banks cannot be expected “courageously” to run the risk of onerous liability. It is appropriate to enable New Zealand banks to support the Pacific Islands banking and money remittance sectors by an appropriate exemptions, an appropriate safe harbour regime, or another similar measure.
(b) BANKING FACILITIES FOR REMITTANCE SERVICES
The existing managing intermediary exemptions do not cover (or do not cover all) scenarios where a bank is asked to open an account for a money remittance service. In such a case the bank would need to undertake CDD on not only the remittance service provider itself (as the bank’s customer), but also on each underlying money sender (as the person on whose behalf the relevant transaction is conducted) – which is generally unworkable given the number of underlying sender’s involved, and given the need for transfers to be completed with speed. Further, the Act’s current reliance provisions do not insulate the bank from liability if it relies on the remittance service provider to complete CDD on the senders on the bank’s behalf. To address this, it is appropriate to consider exempting bank from being required to do CDD on the senders where the bank believes on reasonable grounds that the remittance service provider has undertaken adequate CDD on that sender.
(c) IN-APP/IN-GAME VIRTUAL CURRENCY
It can be difficult to assess in what circumstances virtual coins or tokens that can be purchased for real money and/or “earned” in apps or on online game platforms, and that can then be used to “buy” or “unlock” various benefits in those apps or platforms, may be means of payment (whether as a form of electronic money, or otherwise) for the purposes of the Act. This difficulty arises partly because the Act does not define “means of payment” and “electronic money”, so that these terms are capable of a very broad meaning; and partly because the FATF’s Report on Virtual Currencies - Key Definitions and Potential AML/CFT Risks (June 2014) appears to treat both convertible and non-convertible virtual currencies – including those issued on gaming platforms – as means of payment. In-game virtual coins are reportedly traded on the dark web by money launderers, so that there appears to be a level of ML/TF risk. That said, requiring all app providers and game platforms to undertake CDD is impractical. The existing stored value exemption does not assist, not only because it requires the value to be stored on a physical device (which requirement is not met here), but also because the in app or in-game virtual coins or tokens do not necessarily represent a store of “monetary value”. We suggest that an exemption be issued – which could be broadly modelled on the analogous exemptions for loyalty cards and stored value facilities – so that the issuers of in-app or in game virtual coins or tokens that meet certain conditions (which adequately mitigate their potential ML/TF risk) is exempt from the Act’s provisions.
(d) REWARD SCHEMES
If the loyalty scheme exemption cannot readily be reworded to include other reward schemes (eg credits allocated to reward customer conduct such as “liking” a non-finance business’s social media pages or leaving product reviews on retailer’s online site), an exemption should be put in place to cover this. Such reward schemes do not present a meaningful ML/TF risk. Please see our response to Question 2.39.
(e) SOCIAL LOANS BY PUBLIC AUTHORITIES
We note that Question 2.54 seeks feedback about a potential exemption for low-value loans, particularly where provided for social or charitable purposes. Additionally, we consider that there should be an exemption for financial assistance by local authorities to ratepayers to insulate residential properties (whether personal residences or rental homes), improve residential properties to meet healthy home standards, or similar socially beneficial purposes. This exemption should apply to both loans and other forms of financial assistance, notably funding support recovered by targeted rates. The

value of such loans may well be above the dollar cap for the proposed exemption for low-value social loans. Nevertheless, we consider the ML/TF risk associated with such local authority loans to be low, and a cost-benefit analysis does not warrant imposing obligations under the Act on the local authority.
Our experience has related to social loans by local authorities, but thought could be given to whether this exemption should extend to social loans by public authorities more generally.
(f) SECURITY BONDS (SECURITY DEPOSITS) TAKEN BY NON-FINANCE BUSINESSES
It would be helpful to have an exemption that expressly stipulates that a non-financial business is not a reporting entity if it takes security bonds or security deposits (eg to secure compliance with leases of commercial premises, or compliance with development conditions). We have on a few occasions had to advise on such a scenario. The issue arises because of the breadth of the wording "accepting deposits or other repayable funds from the public" in the Act's definition of "financial institution". Further, there is an ambiguity in the expression "in the ordinary course of business" in this context: the acceptance of deposits or other repayable funds is not in itself the business service offered by the provider, nor a source of business revenue for the provider, but is nevertheless a routine and integral incident of the provider's business model. Based on communications we have had with DIA, we understand its view to be that the taking of security deposits by non-finance businesses is out of scope. Nevertheless, it would be helpful to have that made express (whether in the form of an exemption, or in the form of an exclusion under paragraph (c) of the definition of "financial institution").
(g) ECOMMERCE PLATFORMS
Please see our response at Questions 2.39 and 2.41.

Are there any areas where Ministerial exemptions have been granted where a regulatory exemption should be issued instead?:

Unless otherwise addressed in the legislation (see our response to Question 4.188), a regulatory exemption should be granted to facilitate a non-employee natural person being appointed as a compliance officer, in circumstances where the entity may not have an appropriate employee to fulfil that role.

2.49 Do you currently use a company to provide trustee or nominee services?

Not Answered

If you answered 'yes', why do you use them, and how many do you use? What is the ownership and control structure for those companies?:

2.50 Should we issue a new regulatory exemption to exempt legal or natural persons that act as trustee, nominee director, or nominee shareholder where there is a parent reporting entity involved that is responsible for discharging their AML/CFT obligations?

Yes

Please give reasons for your answer.:

Yes. It would be extremely inefficient for legal/natural persons in this situation to each have their own AML/CFT obligations. It also creates an unnecessary burden for supervisors who are checking compliance. It is much more effective to focus on ensuring that the parent reporting entity is discharging the obligations. The "parent reporting entity" should be defined broadly enough to include a partnership reporting entity (eg a law firm).

2.51 If so, what conditions should be attached to such an exemption to ensure it does not raise other money laundering or terrorism financing vulnerabilities?

Please share your comments below.:

2.52 Should we issue a new regulatory exemption to exempt Crown entities, entities acting as agents of the Crown, community trusts, and any other similar entities from AML/CFT obligations?

Not Answered

Please give reasons for your answer.:

2.53 If you answered 'yes' to the previous question (Question 2.52), what should be the scope of the exemption and possible conditions to ensure it does not raise other money laundering or terrorism financing vulnerabilities?

Please share your suggestions below.:

2.54 Should we issue an exemption for all reporting entities providing low value loans, particularly where those loans are provided for social or charitable purposes?

Yes

Please give reasons for your answer.:

The ML/TF risk associated with low-value loans for social or charitable purposes is minimal. It does not strike an appropriate cost-benefit balance to require the relevant lenders to have to comply with the Act. We are aware of certain charitable organisations for whom the regulatory compliance burden is an obstacle.

2.55 If so, what conditions should be attached to such an exemption to ensure it does not raise other money laundering or terrorism financing vulnerabilities?

Please share your comments below.:

The loan should fall below a specified cap; the lender should be a registered charity and the loans should be within its charitable purposes; and if the loan funds the purchase of a tradeable asset or transferable service, there should be restrictions on repeat loans to the same individual (or defined group of individuals) so as to minimise the borrower's ability to launder material amounts through onselling.

2.56 Should the AML/CFT Act define its territorial scope?

Yes

Please give reasons for your answer.:

Yes.
The Act imposes significant liability on persons who do not comply with its requirements where applicable. Therefore, justice requires that it be clear when the Act is territorially applicable.
Additionally, the Act imposes onerous compliance burdens. This makes it inappropriate to put entities in a position where they need to comply with the Act for prudence just in case it might be territorially applicable.
While the AML/CFT supervisors' guidance titled Territorial scope of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (updated November 2019) ("Territoriality Guideline") is helpful, it still leaves room for uncertainty, for the following three reasons:
(a) First, the Territoriality Guideline states as follows in relation to overseas corporations: "An overseas person carrying on business in New Zealand and engaged in one or more of the activities listed in the AML/CFT Act in New Zealand will be a "reporting entity" under the AML/CFT Act" (para 9). This indicates that an overseas corporation engaging in a relevant activity in New Zealand will be territorially subject to the Act if it is required to be registered as an overseas company under the Companies Act 1993 (such registration being required if the overseas company is carrying on business in New Zealand). However, the Territoriality Guideline also states: "An activity may also be carried on in New Zealand by an overseas entity where the entity is actively and directly advertising or soliciting business from persons in New Zealand to such an extent that the entity is carrying on business in New Zealand" (para 8); relatedly, the DIA's Virtual Asset Service Providers Guideline (March 2020) states: "VASPs registered outside of New Zealand may also be considered to be carrying on business in New Zealand, and therefore having AML/CFT obligations in New Zealand, if the entity is actively and directly advertising or soliciting business from persons in New Zealand". This raises two concerns. First, these statements are broader than the established case law on the meaning of "carrying on business in New Zealand": under the case law, "carrying on business in New Zealand" is a territorial test that requires there to be an act, activity, or other presence within New Zealand, and merely advertising or soliciting business in New Zealand from abroad (eg by telephone calls or via the internet) does not satisfy that test (i.e. the test requires carrying on business IN New Zealand, not simply carrying on business WITH New Zealand). Secondly, these statements are inconsistent with the Companies Act 1993, which specifies that "an overseas company does not carry on business in New Zealand merely because in New Zealand it …. solicits or procures an order that becomes a binding contract only if the order is accepted outside New Zealand" (section 332(b)). Accordingly, the Territoriality Guideline on its face appears to give the concept of "carrying on business in New Zealand" a different meaning than it has in the case law and Companies Act, thereby creating uncertainty as to what is intended.
(b) Secondly, the Territoriality Guideline states as follows: "An overseas person that is not carrying on business in New Zealand is unlikely to be a "reporting entity" under the AML/CFT Act" (para 9). This creates uncertainty, because it implies that there are other criteria (additional to carrying on business in New Zealand) that govern the Act's territorial scope but without outlining what these would be.
(c) Thirdly, the Territoriality Guideline offers no guidance on when an entity (whether a New Zealand entity, or an overseas corporation carrying on business in New Zealand) is to be seen as "engaged in one or more of the activities listed in the AML/CFT Act in New Zealand". The reference to being engaged in a relevant activity "in" New Zealand implies a territorial test, but this is difficult to apply in the context of new digital technologies. For example, in our response to Question 2.13 we instanced the case of an overseas payment services provider who generates QR Codes on a user's smartphone at the point of sale in New Zealand, which the user then swipes at the New Zealand merchant's terminal to complete the purchase from the user's end. Assuming for the moment that the QR Code may be a "means of payment" (on analogy with the swiping of a debit card), is the provider issuing the means of payment overseas where its server is located; or is it issuing the means of payment in New Zealand where the QR Code for the first time manifests?

2.57 If so, how should the Act define a business or activity to be within the Act's territorial scope?

Please share your comments below.:

GENERAL TEST
We consider that the policy of the Act is best achieved if it territorially applies to the following, to the extent that they engage in relevant activities: (1) in New Zealand; or (2) from overseas with New Zealand customers:
(a) New Zealand citizens;
(b) New Zealand residents;
(c) corporations that are incorporated under New Zealand law;
(d) unincorporated bodies that are formed or constituted under New Zealand law;
(e) overseas entities that are carrying on business in New Zealand within the meaning of the Companies Act 1993 (or would be carrying on business in New Zealand within the meaning of the Companies Act 1993 if they were bodies corporate); and
(f) such other entities as may be declared by Regulation (which may be issued as necessary to conform with New Zealand's obligations under the FATF Recommendations).
As regards item (e), we consider that overseas entities who engage in relevant activities in New Zealand or with New Zealand customers should not be subject to the Act unless they have an appropriate additional nexus with New Zealand. For example, it would cast the net too wide if:
- a foreign lender were to be subject to the Act simply because it has a New Zealand borrower
- a global payment services provider were to be subject to the Act simply because the merchants for whom it receives funds include New Zealand vendors
- an overseas bank were to be subject to the Act simply because a facility provided by it is used to pay for a purchase at a New Zealand shop, eg by a tourist or foreign student.
In these examples, the relevant overseas entities' ML/TF risks would be addressed by the AML/CFT laws of their home jurisdictions. On balance, we consider the appropriate nexus to be that of "carrying on business in New Zealand", so long as there is clarity that what is intended is the Companies Act test. While this is an open-textured test, in our experience it does not in practice create unacceptable uncertainty. At a minimum, clients can be given

clear advance guidance about how to structure their proposed operations to be seen, or not to be seen, as “carrying on business in New Zealand”; and in our experience, global institutions generally consider the ability to obtain that level of advance guidance as giving them sufficient certainty to: (a) know how to structure their operating models; and (b) not be deterred from entering the New Zealand market.
As regards item (f), we consider it prudent for the New Zealand authorities to retain the ability to issue Regulations extending the Act’s application to other overseas entities in specific cases warranting this (eg potentially, overseas entities who engage in relevant activities in New Zealand without meeting the “carrying on business in New Zealand” test, but who are based in specific jurisdictions without adequate AML/CFT regimes).
Providing that the Act applies to entities listed in (a)-(f) above if they engage in relevant activities:
(1) in New Zealand; or
(2) from overseas with New Zealand customers (with “New Zealand customers” to be appropriately defined, to exclude eg tourists or New Zealanders who entered into the relevant relationship abroad),
should – in its practical application – help address the difficulties associated with applying territorial concepts to new digital technologies. To the extent that uncertainties may remain, the binding rulings regime we have proposed in our response to Question 2.13 would assist.
CLARIFICATION OF SECTION 6(4)(A)
Section 6(4)(a) of the Act provides: “This Act applies to a reporting entity only to the extent that, (a) in the case of a reporting entity that is a financial institution, the financial activities undertaken by that entity fall within the activities described in the definition of financial institution in section 5(1)”. This raises an interpretation issue where an overseas entity that is carrying on business in New Zealand undertakes both exempt and non-exempt financial activities. If all the financial activities it carries on in New Zealand are exempt, then in our view the Act should not apply to that overseas entity notwithstanding that it undertakes non-exempt financial activities in other jurisdictions. It would be helpful if that could be made express.

3. Supervision, regulation, and enforcement

3.1 Is the AML/CFT supervisory model fit for purpose or should we consider changing it?

Not Answered

3.1 Please indicate why? :

3.2 If it were to change, what supervisory model do you think would be more effective in a New Zealand context?

Not Answered

3.2 Please provide context for your choice:

3.3 Do you think the Act appropriately ensures consistency in the application of the law between the three supervisors? If not, how could inconsistencies in the application of obligations be minimised?

Not Answered

3.3 Please provide options for how inconsistencies in the application of obligations could be minimised:

3.4 Does the Act achieve the appropriate balance between ensuring consistency and allowing supervisors to be responsive to sectoral needs? If not, what mechanisms could be included in legislation to achieve a more appropriate balance?

Not Answered

If not, what mechanisms could be included to achieve balance:

3.5 Are the statutory functions and powers of the supervisors appropriate or do they need amending? If so, why?

Not Answered

3.5 If so, why are the statutory functions and powers of the supervisors not appropriate:

3.5 What amendments are required:

3.6 Should AML/CFT Supervisors have the power to conduct onsite inspections of REs operating from a dwelling house? If so, what controls should be implemented to protect the rights of the occupants?

Not Answered

Please explain your answer:

What controls are required to protect the rights of occupants?:

3.7 What are some advantages or disadvantages of remote onsite inspections?

Please share your thoughts:

3.8 Would virtual inspection options make supervision more efficient? What mechanisms would be required to make virtual inspections work?

Not Answered

Please explain your answer:

What mechanisms would be required to make virtual inspections work?:

3.9 Is the process for forming a designated business group (DBG) appropriate? Are there any changes that could make the process more efficient?

Yes

Please expalin your answer:

Changes are needed to make the process more efficient.

Are there changes that could make the process more efficient?:

The review by the supervisor adds a layer of time that is unnecessary. The DBG process should also provide for a shared compliance officer rather than relying on a Ministerial exemption.

3.10 Should supervisors have an explicit role in approving or rejecting formation of a DBG? Why or why not?

No

Why or why not?:

The supervisor does not review a number of other critical documents and processes at the inception of an AML/CFT Programme, but instead reviews those at the review stage. That approach would make sense in this instance as well. Removing the requirement for supervisor approval will improve timeliness.

3.11 Should explicit standards for audits and auditors be introduced? If so, what should those standards be and how could they be used to ensure audits are of higher quality?

Yes

If yes, what should the standards be?:

We have observed that audits vary greatly in quality and consider that audit standards would be beneficial. An audit is a key safeguard to the AML/CFT system. Further, if a reporting entity receives an inadequate audit, it may come as an unfair shock when it later receives negative feedback and possibly enforcement action from its supervisor.

How could standards be used to ensure audits are of higher quality?:

3.12 Who would be responsible for enforcing the standards of auditors?

Not Answered

If other, which agency/organisation would enforce the standards?:

Please explain your answer:

3.13 What impact would that have on cost for audits? What benefits would there be for businesses if we ensured higher quality audits?

Please share your thoughts:

Costs would no doubt be higher, but is more costly in the long term to have an inadequate audit where relevant issues are not identified.

What benefits would there be for businesses if we ensured higher quality audits?:

3.14 Should there be any protections for businesses which rely on audits, or liability for auditors who do not provide a satisfactory audit?

Yes

Please explain your answer:

Good faith reliance should be a defence in appropriate circumstances, in the same way that reliance is a defence for significant failings in financial markets legislation, eg where: (a) the contravention was due to the act or default of another person; or (b) reasonable steps and due diligence taken to avoid the contravention.

If yes, what protections would you want? What should be the nature of the liability for auditors?:

3.15 Is it appropriate to specify the role of a consultant in legislation, including what obligations they should have? If so, what are appropriate obligations for consultants?

Not Answered

Please explain your answer:

If a consultant's rule should be specified in legislation, what are the appropriate obligations?:

3.16 Do we need to specify what standards consultants should be held to? If so, what would it look like? Would it include specific standards that must be met before providing advice?

Not Answered

Please explain your answer:

If yes, what should the standards look like?:

3.17 Who would be responsible for enforcing the standard of consultants?

Not Answered

If other, please indicate which agency/organisation you see having responsibility:

Please explain your answer:

3.18 Do you currently use agents to assist with your AML/CFT compliance obligations? If so, what do you use agents for?

Not Answered

What do you use agents for?:

3.19 Do you currently take any steps to ensure that only appropriate persons are able to act as your agent? What are those steps and why do you take them?

Not Answered

If yes, what are the steps you take to ensure only appropriate persons act as your agent?:

3.20 Should there be any additional measures in place to regulate the use of agents and third parties? For example, should we set out who can be an agent and in what circumstances they can be relied upon?

Not Answered

Please explain your answer:

3.20 If yes, what other additional measures would you like to regulate the use of agents and third parties? :

3.21 Does the existing penalty framework in the AML/CFT Act allow for effective, proportionate, and dissuasive sanctions to be applied in all circumstances, including for larger entities? Why or why not?

Not Answered

Please explain your answer:

3.22 Would additional enforcement interventions, such as fines for non-compliance or enabling the restriction, suspension, or removal of a license or registration enable more proportionate, effective, and responsive enforcement?

Not Answered

Please explain your answer:

3.23 Are there any other changes we could make to enhance the penalty framework in the Act?

Not Answered

Please provide further detail:

3.24 Should the Act allow for higher penalties at the top end of seriousness to ensure sufficiently dissuasive penalties can be imposed for large businesses? If so, what should the penalties be?

Not Answered

Please provide further information, including what the penalties could be:

3.25 Would broadening the scope of civil sanctions to include directors and senior management support compliance outcomes? Should this include other employees?

Unsure

Please provide further detail:

Making directors and senior management at risk of being held responsible for some aspects of compliance may focus them further on appointing a sufficiently experienced compliance officer, and on ensuring that this person and the compliance function have adequate powers and resources within the organisation and adequate access to and support from the governance function. It would be appropriate to target any such measure at core obligations such as timely filing of suspicious activity reports, fit for purpose risk assessment and programme and record-keeping, and substantially compliant customer due diligence.

3.26 If penalties could apply to senior managers and directors, what is the appropriate penalty amount?

Please share your thoughts:

3.27 Should compliance officers also be subject to sanctions or provided protection from sanctions when acting in good faith?

Please share your thoughts:

No. Making a designated compliance officer have personal responsibility would make it extremely difficult for many organisations without scale and a compliance department to hire a person willing to take on this liability.

3.28 Should the Department of Internal Affairs (DIA) have the power to apply to liquidate a business to recover penalties and costs obtained in proceedings undertaken under the Act?

Not Answered

Please provide your comments in the box below:

3.29 Should we change the time limit by which prosecutions must be brought by? If so, what should we change the time limit to?

Not Answered

Please provide your thoughts:

If you answered yes, what should we change the time limit to?:

4. Preventive measures

4.1 What challenges do you have with complying with your customer due diligence (CDD) obligations? How could these challenges be resolved?

What challenges do you have with complying with your CDD obligations?:

The challenges we have in complying with CDD obligations include:
(a) Challenges relating to applying the definition of "customer", as described in the response to Question 4.2 below.
(b) If the client is a liquidator or similar, there can be uncooperative beneficial owners of the entity in liquidation, who may not be willing to engage in CDD.
(c) Where a trustee company is the legal owner of an entity, the individual who holds a beneficial ownership above the threshold is often not an economic owner.
(d) In contested estate and trust administration, similar issues can arise, i.e. there may be persons who have a vested interest of more than 25% but who are not willing to engage in CDD (usually for reasons to do with familial dysfunction, rather than for suspicious reasons).
(e) For some overseas jurisdictions, it is unclear who should be accepted as being able to take the equivalent of statutory declarations, for documentary certification purposes.
(f) Address verification is difficult for persons who do not own their own property and who have their correspondence sent to a P O Box. It is also very easy to change the address for communications, so the main sources of address verification (i.e. letters from utilities, banks, Government departments) does not seem to be particularly reliable.
(g) Address verification is also impractical for legal arrangements that do not have an address in their own right, such as family trusts.
(h) The requirement in the Identity Verification Code of Practice (IVCOP) to only accept documentary CDD certified no more than three months previously means that there are many times when it is not possible to rely on documents obtained for CDD by another reporting, because too much time has passed. It is not clear why a certification loses its reliability after three months.
(i) The practice of supervisors to expect that a reporting entity must wait to receive originals of certified documents before considering CDD to be complete is extremely impractical, especially as many postal services are slow.

How could these challenges be resolved?:

(a) Provide a special definition of "customer" for law firms that takes due account of how lawyers interact with clients, rather than being based on a financial institution transactional premise.
(b) Permit CDD exceptions in appropriate circumstances, such as where the CDD subject in fact has no effective control of the transaction or activity even

though they may be above the ownership threshold (eg companies in liquidation, contested estates).
(c) Provide a definition of "customer" that addresses structures that have more than one part (eg limited partnership plus general partner; or scheme manager plus trust that is managed and its trustee), with clarity that enhanced CDD should include the part of the structure with the wealth.
(d) Provide more guidance on who can certify documents in overseas jurisdictions.
(e) Remove the requirement for address verification (but still require the reporting entity to provide any address information it has available when submitting a SAR, to assist Police with their enquiries). Alternatively, if address verification is still considered important, allow an alternative where the CDD subject cannot provide verification for genuine reasons (such as a person with no fixed address, or where there is no trust address).
(f) Change the IVCOP to allow a longer period of validity for the certification on identity documents, and to expressly allow acceptance of electronic copies of certified documents provided that risk-based measures have been taken to ensure the electronic copy has not been interfered with.

4.2 Have you experienced any situations where trying to identify the customer can be challenging or not straightforward? What were those situations and why was it challenging?

Yes

If yes, what were those situations and why was it challenging?:

(a) The definition of "customer" is inadequate for law firms:
- Law firms often act for and open client facilities in the name of intermediaries, such as another law firm (eg an overseas instructing law firm) or a liquidator.
- In these situations, the definitions of "customer" and of "beneficial owner" could lead to carrying out full CDD on the intermediary as client, but limited CDD on the underlying entity. If a transaction is conducted, there would be CDD on individuals with effective control/a threshold ownership interest in the person on whose behalf a transaction is conducted. If there is an activity for the underlying person, there should be further CDD, but it might still be quite limited without focusing adequately on the nature and purpose of business relationship (no business relationship). Many firms, including ours, do in fact carry out full CDD on the underlying client; but it should be clarified that this is the legal obligation.
- Where a file is opened in the name of another law firm or liquidator, it is challenging to conduct CDD, and there is resistance by instructing firms who do not understand how their information is relevant. It is in fact not relevant to the transaction involving the underlying client, to conduct CDD on the instructing firm and obtain their governing documents and ownership and control information. There should be an exemption from CDD for customers who are instructing on behalf of a client, where CDD is conducted on the underlying client.
- We agree with the commentary that it is unclear what obligations DNFBPs have in respect of a third party when holding funds in their trust account for the ultimate benefit of their client.
(b) Where an entity will be formed in a formation activity, it would be appropriate to regulate for CDD on the proposed entity to cover the intended beneficial owners and, if enhanced CDD would be required on the formed entity, the source of wealth/funds.
(c) For some entities, the customer definition may result in CDD only being completed on part of the relevant structure:
- For limited partnerships or other private equity investment structures, the client of record might the general partner/manager rather than the limited partnership itself;
- Similarly, for managed investment schemes, the client of record might be the manager rather than the trust that holds the assets.
- A trust is a concept and not a customer, and it is only because of supervisor guidance that reporting entities treat the trust itself as the client (rather than treating the trustees as the client).

4.3 Would a more prescriptive approach to the definition of a customer be helpful? For example, should we issue regulations to define who the customer is in various circumstances and when various services are provided?

Yes

Please share your thoughts:

Yes, there should be more clarity about who the customer is for law firms, so as to capture underlying entities who are not the client of record.
There should also be clarification of who the "customer" includes in insolvency situations (eg the insolvent entity, insolvency practitioner, or insolvency practitioner's firm), trusts, limited partnerships, managed investments schemes, and other structures that separate effective control of the entity/person and economic ownership of the entity.

4.4 If so, what are the situations where more prescription is required to define the customer?

What do you think?:

Please see our response to Question 4.3.

4.5 Do you anticipate that there would be any benefits or additional challenges from a more prescriptive approach being taken?

Please share your thoughts:

The suggested prescription would be beneficial in addressing current gaps in the legislation and in ensuring reporting entities are consistent in how they apply CDD.

4.6 Should we amend the existing regulations to require real estate agents to conduct CDD on both the purchaser and vendor?

Not Answered

Please provide comments below :

4.7 What challenges do you anticipate would occur if this was required? How might these be addressed? What do you estimate would be the costs of the change?

What challenges do you anticipate would occur if CDD was required on both parties?:

How might the challenges be addressed?:

What do you estimate the costs of the change would be?:

4.8 When is the appropriate time for CDD on the vendor and purchaser to be conducted in real estate transactions?

Not Answered

If you have indicated other above or have more comments to make please provide them in the box below:

4.9 Are the prescribed points where CDD must be conducted clear and appropriate? If not, how could we improve them?

No

Please provide further detail below:

For law firms who conduct both captured and non-captured activities, the time at which CDD must conducted is very unclear when an instruction starts as advice (non-captured) but evolves to start to put steps in place for a transaction. For example, a firm might be asked to carry out due diligence on a target in a potential transaction. For the due diligence period, the activity is advice. Then at some stage, the law firm may be asked to advise on transaction documents; but this might still be during a time when there is no certainty that there would be a transaction. Eventually, if the client decides to make the acquisition and is selected by the vendor, the transaction documents will be negotiated. The transaction itself may not be going through the law firm's trust account. There is a great deal of ambiguity in this example as to when CDD is required to be conducted, and if work should stop at some point while CDD is conducted.
The legislation should be clarified so that law firms know whether all work that may be preparatory to a transaction or captured activity is itself captured, even if it is just advice; or if CDD is in fact only required to be conducted before there is a transaction that will go through the firm's trust account.

4.10 For enhanced CDD, is the trigger for unusual or complex transactions sufficiently clear?

No

Please provide further detail below:

No:
(a) The phrasing of this trigger needs improvement, so that it is clearer that it covers complex or unusually large transactions, rather than a transaction which is both complex and unusually large.
(b) Further, the trigger should be clarified to indicate whether the assessment is a reference to inherent complexity (because of number of steps), or can take into account what may be normal for the transaction/entity type.
(c) It would also be good to clarify whether what is complex or large is to be determined in the reporting entity's reasonable opinion, having regard to its knowledge of the client and the sector the client operates in, or instead by reference to some other standard.
(d) It would be good to clarify if "large" is by reference to the client's expected activity, or instead by reference to the range of transaction sizes experienced by the reporting entity.

4.11 Should CDD be required in all instances where suspicions arise?

No

Please provide your comments in the box below:

CDD should not be required where: (a) it is not reasonably possible to complete this without tipping off the customer that you have suspicions; or (b) the suspicion relates to an inquiry that does not convert into an actual client (eg a potential client may enquire about captured services in a way that is suspicious, and when it is indicated that CDD will be conducted, the potential client may not proceed).

4.12 If so, what level of CDD should be required, and what should be the requirements regarding verification? Is there any information that businesses should not need to obtain or verify?

Standard customer due diligence

What should be the requirements regarding verification?:

Where CDD can be conducted, this should be:
(a) at least standard CDD that is verified (if possible without tipping off); and
(b) enhanced CDD if source of wealth/funds information is relevant to the suspicion.

Is there any information that businesses should not need to obtain or verify?:

4.13 How can we ensure that this obligation does not put businesses in a position where they are likely to tip off the person?

Please provide your comments in the box below:

4.14 What money laundering risks are you seeing in relation to law firm trust accounts?

Please provide your comments in the box below:

(a) Retainer repayment
(b) third party payments
(c) transacting in the name of a client of record for an underlying client
(d) real estate transactions involving non-bank finance
(e) international payments from or to a tax haven or secrecy jurisdiction
(f) conducting client business through a trust account (as opposed to the trust account being used for one-off transactions for settlements).

4.15 Are there any specific AML/CFT requirements or controls that could be put in place to mitigate the risks? If so, what types of circumstances or transactions should they apply to and what should the AML/CFT requirements be?

Unsure

Please share your thoughts:

We are unsure what additional controls or requirements could be imposed. Education about what to look out for is likely to be the key.

If you answered yes, what types of circumstances or transactions should they apply to and what should the AML/CFT requirements be?:

4.16 Should this only apply to law firm trust accounts or to any DNFBP that holds funds in its trust account?

Not Answered

Please provide your comments in the box below:

4.17 What do you estimate would be the costs of any additional controls you have identified?

Please provide your comments in the box below:

4.18 Is the information that the Act requires to be obtained and verified still appropriate? If not, what should be changed?

No

Please share your thoughts:

ADDRESS VERIFICATION
The requirement to verify addresses should be removed (or made more flexible). Many overseas jurisdictions do not require address verification. We recommend dispensing with this as well, as: (a) proof of address serves no useful function in verifying a person's identity where this has already been established in the prescribed manner; (b) it is an impractical requirements in various cases (eg where the property in which a person resides is owned by their spouse so that there are no rates assessments or fixed utility bills in their name, and their mail is all sent to their business address); and (c) it excludes persons with no settled place of residence from financial participation.
We recognise that a person of interest's last known address is useful information for Police in following up on SARs, and so reporting entities could still be required to include any address information that they have available when submitting a SAR.
If address verification is retained, reporting entities should be permitted to have an exceptions policy that allows them to accept customers without verification of address where reasonable to do so, for example where the customer has no fixed address or where the customer is a trust that has no place of business.
It could also be assessed whether the requirement for address verification should remain in certain enhanced CDD cases.
VERIFICATION OF TRUST NAMES
If a customer is a trust, it should not be obligatory to verify its name. This is because a trust is not legally required to have a name, and may well not have one. For example, family trusts are typically given names in the trust deeds constituting them; but by contrast, trusts established as incidental aspects of parties' commercial arrangements would generally not have names. As a practical illustration, a commercial contract with a ticketing service may stipulate that the ticketing service will hold the ticket sale proceeds on trust for the show organiser, and that these funds must be held in a separate bank account (with notice to the bank that these are trust funds, so that the bank cannot exercise its right of combination in relation to the account). When the ticketing service applies to open the required bank account, the bank needs to do CDD in the way prescribed for a trust as customer – including verification of the trust's non-existent name. This creates inefficiencies, such as the banks requiring unnecessary trust deeds (stipulating a trust name) to be executed.

4.19 Are the obligations to obtain and verify information clear?

No

Please provide your comments in the box below:

It is unclear whether a reporting entity must verify customer information about whether there is a person with a more than 25% ultimate beneficial ownership interest. It would be complex and onerous if this was always required, while there are no standard international sources of beneficial ownership.
It is also difficult to verify whether directors are nominee directors, without any external source such as a beneficial ownership register.

4.20 Is the information that businesses should obtain and verify about their customers still appropriate?

No

Please provide your comments in the box below:

The general requirement to verify addresses should be removed (or at least modified), for the reasons given in the response to Question 4.18.
The requirement to verify trusts' names should be removed (or at least modified), for the reasons given in the response to Question 4.18.

4.21 Is there any other information that the Act should require businesses to obtain or verify as part of CDD to better identify and manage a customer's risks?

Please provide your comments in the box below:

4.22 Should we issue regulations to require businesses to obtain and verify information about a legal person or legal arrangement's form and proof of existence, ownership and control structure, and powers that bind and regulate? Why?

Yes

Please provide your thoughts :

Yes, these should be required for entities whose form, existence, ownership, and control documents are not a matter of public record (other than those qualifying for simplified CDD). This requirement would be consistent with a proper understanding of the effective control of the customer. Making it a legal obligation would assist reporting entities in justifying to prospective customers why they want this information from them.
It would be useful to have a Code of Practice covering what kinds of evidence is appropriate for verifying the ownership and control structure in the case of investment funds, trusts, and limited partnerships.

4.23 Do you already obtain some or all of this information, even though it is not explicitly required? If so, what information do you already obtain and why?

Yes

If so, what information do you already obtain and why?:

Yes, we verify entity existence and persons with control. We review control documents based on risk, or where effective control is not clear from other information.

4.24 What do you estimate would be the impact on your compliance costs for your business if regulations explicitly required this information to be obtained and verified?

Please estimate the impact on your compliance costs in the box below:

No additional impact, as this is already consistent with our existing practices.

4.25 Should we issue regulations to prescribe when information about a customer's source of wealth should be obtained and verified versus source of funds? If so, what should the requirements be for businesses?

Yes

Please provide further details below:

Yes, this would be of assistance in providing certainty and a level playing field for how source of wealth and funds is approached by reporting entities.

If so, what should the requirements be for businesses?:

(a) Source of wealth information should always be required when enhanced CDD is carried out during customer acceptance and ongoing CDD, and if being conducted in circumstances of suspicion.
(b) Source of funds information should be required in relation to transactions only.

4.26 Are there any instances where businesses should not be required to obtain this information? Are there any circumstances when source of funds and source of wealth should be obtained and verified?

Yes

Please provide your thoughts:

New Zealand discretionary family trusts should be subject to enhanced CDD on a risk basis only, rather than as the default. These structures are extremely common for legitimate purposes. Many present a very low money laundering risk while have difficulty in providing evidence (eg where the wealth is from employment earnings over a long period but the settlors are now retired or deceased, where there are not required to be financial statements for the trust).

4.27 Would there be any additional costs resulting from prescribing further requirements for source of wealth and source of funds?

Not Answered

Please provide your estimate of additional costs in the box below:

4.28 Should we issue regulations to require businesses to obtain information about the beneficiary/ies of a life insurance or investment-related insurance policy and prescribe the beneficiary/ies as a relevant risk factor when determining the appropriate level of CDD to conduct? Why or why not?

Not Answered

4.28 Please provide your comments on why or why not in the box below:

4.29 If we required this approach to be taken regarding beneficiaries of life and other investment-related insurance policies, should the obligations only apply for moderate or high-risk insurance policies? Are there any other steps we could take to ensure compliance costs are proportionate to risks?

Not Answered

Please provide your comments in the box below:

Are there any other steps we could take to ensure compliance costs are proportionate to risks?:

4.30 Have you encountered issues with the definition of a beneficial owner? If so, what about the definition was unclear or problematic?

Yes

If so, what about the definition was unclear or problematic?:

(a) The definition is badly worded in relation to “person on whose behalf a transaction is conducted”. The AML/CFT supervisors in their Beneficial Ownership Guideline (December 2012) set out their view of what this means. The difficulty is that while their view may reflect the true intention of the definition, it conflicts with the express wording of the definition. The definition needs to be clarified.
(b) When considering effective control, it is not clear how persons who exercise control jointly, rather than individually, should be treated. For example, the concept of “effective control” needs clarification in relation to whether a person must be able to exercise effective control in their own right, or whether they are captured if they exercise effective control with others (eg directors exercise effective control jointly as a board; trustees exercise effective control jointly, as most are required to act unanimously).
(c) Consideration should also be given to CDD on entities that exercise effective control, such as a trustee company, general partner, or manager. These entities could be made subject to CDD, or it could be clarified that CDD is only required on the individuals within these entities who exercise effective control over the client.

4.31 How can we improve the definition in the Act as well as in guidance to address those challenges?

Please provide your thoughts:

(a) The definition should be amended to read:
“Beneficial owner means:
(a) For customers that are legal persons or legal arrangements, the individual or individuals (whether acting alone or together):
i. who ultimately have a prescribed interest in the customer; or
ii. if no such individual can be identified, who exercise control over the customer through means other than ownership; and
(b) for all customers, the individual or individuals on whose behalf a transaction is conducted, if the transaction is not conducted for the benefit of the customer.”
(b) The Act should provide for frameworks and methodologies that can be issued by regulators and that are binding on reporting entities, or for Codes of Practice. These instruments can describe how “ultimately” and “control” are determined, and how to determine whether a transaction is conducted for the benefit of a third person. These instruments should be written in a manner that is consistent with the FAFT Recommendations and FATF guidance.
(c) The Act should also require reporting entities to take steps to understand the ownership and control structure of customers that are legal persons and legal arrangements.

4.32 Should we issue a regulation which states that businesses should be focusing on identifying the "ultimate" beneficial owner? If so, how could “ultimate” beneficial owner be defined?

Unsure

Please provide your thoughts:

The concept does require definition or description. However, consideration should be given as to whether the concept is best explained in regulations, or in frameworks and methodologies, or in a Code of Practice.

If so, how could "ultimate" beneficial owner be defined:

This should be done in a manner that is consistent with FATF guidelines.

4.33 To what extent are you focusing beneficial ownership checks on the "ultimate" beneficial owner, even though it is not strictly required?

Always

Please provide any comments you have on "ultimate" beneficial owner checks in the box below:

We seek to identify ultimate beneficial owners holding a more than 25% indirect interest in the client.

4.34 Would there be any additional costs resulting from prescribing that businesses should focus on the “ultimate” beneficial owner?

Not Answered

Please provide your thoughts:

If yes, can you please indicate the level of costs you think apply:

4.35 Should we issue a regulation which states that for the purposes of the definition of beneficial owner, a person on whose behalf a transaction is conducted is restricted to a person with indirect ownership or control of the customer (to align with the Financial Action Task Force (FATF) standards)? Why or why not?

No

Please provide your thoughts below:

The FATF Recommendations do not limit the definition in the way described in the Question. On the contrary, they provide: “Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.”
An FATF footnote to that definition adds that “[r]eference to ‘ultimately owns or controls’ and ‘ultimate effective control’ refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control”. However, that footnote relates to those references only; it does not affect the rest of the definition. In particular, it does not affect the definition's reference to "and/or the natural person on whose behalf a transaction is being conducted".

4.36 Would this change make the “specified managing intermediaries” exemption or Regulation 24 of the AML/CFT (Exemption) Regulations 2011 unnecessary? If so, should the exemptions be revoked?

Not Answered

Please provide your thoughts:

4.37 Would there be any additional compliance costs or other consequences for your business from this change? If so, what steps could be taken to minimise theses costs or other consequences?

Not Answered

Please provide your thoughts:

4.38 What process do you currently follow to identify who ultimately owns or controls a legal person, and to what extent is it consistent with the process set out in the FATF standards?

NZ AML/CFT Supervisor guidance on Beneficial Ownership

To what extent is the process you follow consistent with the process set out in the FATF standards?:

It would be much more straightforward to follow the FATF Standards rather than our AML/CFT supervisors’ Beneficial Ownership Guideline (FMA, RBNZ, and DIA, December 2012). The FATF Standards requires a staged enquiry that progresses to a next stage only if information is not identified at the relevant stage. By contrast, our AML/CFT supervisors’ Beneficial Ownership Guideline requires all stages to be assessed, even if a beneficial owner has been identified under stage 1; and therefore imposes unnecessary burdens on reporting entities.
We note that as well as applying the “steps” described on page 56 of the consultation document (derived from FATF guidance), the obligation to identify the natural person on whose behalf a transaction is being conducted should also be covered if applicable to the circumstances, i.e. individuals that are central to a transaction being conducted even where the transaction has been deliberately structured to avoid control or ownership of the customer but to retain the benefit of the transaction.

4.39 Should we issue regulations or a Code of Practice which is consistent with the FATF standards for identifying the beneficial owner of a legal person?

Other

Please provide any further comments you have in the box below:

A combined approach would be preferable. Regulations are appropriate for where there is a definite approach to be adopted. A Code of Practice may be preferable where some judgment is required. The Code could describe common scenarios, such as the treatment of boards, trustee companies, general

partners, and managers.

4.40 Are there any aspects of the process the FATF has identified that are not appropriate for New Zealand businesses?

Not Answered

If yes, please indicate what aspects they are and why they are not appropriate for New Zealand businesses:

4.41 Would there be an impact on your compliance costs by mandating this process? If so, what would be the impact?

Not Answered

If so, what would be the impact?:

4.42 Should we issue regulations or a Code of Practice that allows businesses to satisfy their beneficial ownership obligations by identifying the settlor, the trustee(s), the protector and any other person exercising ultimate effective control over the trust or legal arrangement?

Other

Please provide any comments you have in the box below:

Yes, this clarity would be welcome. It can be provided through whichever means turns out to be more effective when the detail is developed. Nominal settlors (eg a professional named as having established the trust with an initial settlement of $10, and who is not otherwise connected with the trust) and deceased settlors should be excluded from CDD requirements.

4.43 Would there be an impact on your compliance costs by mandating that this process be applied? If so, what is the impact?

Not Answered

Please provide further details below:

4.44 Are the standards of verification and the basis by which verification of identity must be done clear and still appropriate? If not, how could they be improved?

No

Please provide your thoughts:

The Act's identity verification provisions should be aligned with the future Digital Identity Services Trust Framework Act to better protect individuals from the risks of disclosure of identity information, as discussed in the response to Question 1.48.
The general requirement for address verification should be removed, for the reasons given in the response to Question 4.18.

4.45 Do you encounter any challenges with using Identity Verification Code of Practice (IVCOP)? If so, what are they, and how could they be resolved?

Yes

4.48 If so, what are they, and how could they be resolved?:

The three month validity period for certification of identity documents is too short, and limits the availability of reliance on CDD conducted by other reporting entities.
More options should be provided for certification overseas, eg specifically permitting persons with an office equivalent to some on the New Zealand list, such as lawyers and chartered accountants. Certification by a client's in-house counsel should be accepted for low or medium risk clients and where there is no reason to believe that counsel would act inconsistently with their ethical obligations, and their client is in a country with adequate AML/CFT systems.
The IVCOP should be expanded to provide a selection of additional measures for high risk clients.

4.46 Is the approach in IVCOP clear and appropriate? If not, why?

Not Answered

Please provide your comments in the box below:

4.47 Should we amend or expand the IVCOP to include other AML/CFT verification requirements, e.g. verifying name and date of birth of high-risk customers verifying legal persons or arrangements, ongoing CDD, or sharing CDD information between businesses?

Yes

What other verification requirements could be included?:

Yes, these would all be very useful expansions that would promote consistency, reduce complexity, and reduce compliance costs in having to work out those situations on a case-by-case basis.

4.48 Are there any identity documents or other forms of identity verification that businesses should be able to use to verify a customer's identity?

Please provide your comments in the box below:

4.49 Do you have any challenges in complying with Part 3 of IVCOP in relation to electronic verification? What are those challenges and how could we address them?

Yes

What challenges have you faced? :

It would be very useful to have standards for biometric verification providers, so as to have some certainty as to what is acceptable. It is difficult for reporting entities to assess whether a provider's technology is sufficient.
It is not clear why biometric service providers other than RealMe cannot be used to confirm identity when they match a person's live image to a single source via the relevant Government database, i.e. passports and driver licences. This could be resolved by providing standards that a provider must meet in order to be able to be accepted as a verifier against a single source.

How could those challenges be addressed?:

4.50 What challenges have you faced with verification of address information? What have been the impacts of those challenges?

What challenges have you faced with verification of address information?:

Please see the response to Question 4.18.

4.53 What have been the impacts of those challenges?:

4.51 In your view, when should address information be verified, and how should that verification occur?

When should address information be verified?:

Please see the response to Question 4.18.

How should verification occur?:

4.52 How could we address challenges with address verification while also ensuring law enforcement outcomes are not undermined? Are there any fixes we could make in the short term?

How could we address challenges with address verification while also ensuring law enforcement outcomes are not undermined? :

Please see the response to Question 4.18.

Are there any fixes we could make in the short term?:

4.53 Do you currently take any of the steps identified by the FATF standards to manage high-risk customers, transactions or activities? If so, what steps do you take and why?

Yes

If you answered yes, what steps do you take and why?:

We examine high risk customers more frequently and also obtain information on the reasons for transactions.

4.54 Should we issue regulations or a Code of Practice which outlines the additional measures that businesses can take as part of enhanced CDD?

Unsure

Please provide any further comments you have in the box below:

It would be useful for there to be an easily accessible New Zealand document that describes additional measures that can be taken for high risk clients, because many reporting entities would not find the FATF guidance easily accessible. This could be by way of regulations or a Code of Practice, with a requirement for written findings about why the measures chosen in the particular circumstances were appropriate.

4.55 Should any of the additional measures be mandatory? If so, how should they be mandated, and in what circumstances?

No

If you answered yes, what measures should be mandatory?:

How shouild we make the measures mandatory?:

When should the measures be mandatory?:

The selection of particular additional measures should not be mandatory. Rather, reporting entities should be given a range of additional measures that they can consider and apply as appropriate to the circumstances, as long as they do something.

4.56 Are there ways we can enhance or streamline the operation of the simplified CDD obligations, in particular where the customer is a large organisation?

Yes

Please provide further detail below :

(a) Clarify how to treat directors on a large board, and when they are considered to have effective control. Individually, directors in this situation are unlikely to have effective control, but collectively they control the appointment and removal of senior management. A practical approach is to require CDD on the board chairperson, and on board members who hold executive positions. Alternatively, in certain situations it may be appropriate to obtain CDD on a number of directors equal to the board quorum. A Code of Practice could outline this further.
(b) CDD should also only be required on the specific persons who in fact instruct a reporting entity on behalf of an organisation, not on every person who may have power to act on behalf of the organisation.

4.57 Should we issue regulations to allow employees to be delegated by a senior manager without triggering CDD in each circumstance? Why?

Yes

Why? Please provide your response in the box below:

In large organisations — including those that qualify for simplified CDD — there are a lot of people who may give instructions to reporting entities; but unless they are reasonably senior, they themselves are under the control and supervision of their management. More junior personnel also frequently change, and it would be a burden to expect CDD to be required each time junior instructing personnel change.

4.58 Should we remove the requirement for enhanced CDD to be conducted for all trusts or vehicles for holding personal assets? Why or why not?

Yes

Why or why not? Please elaborate:

New Zealand discretionary trusts and companies for holding personal assets are extremely common, and most often used for legitimate purposes. It is therefore an unnecessary burden to assume that enhanced CDD is required for all of them, and it should become a risk-based decision. It is also very unclear what makes something other than a trust a “vehicle for holding personal assets”.
Certain commercial trusts are also low risk, for example registered managed investment schemes or employee share purchase schemes.

4.59 If we removed this requirement, what further guidance would need to be provided to enable businesses to appropriately identify high risks trusts and conduct enhanced CDD?

Please provide further detail below:

Provide guidance on high risk trusts and give examples of vehicles for holding personal assets, and the types of assets that are of concern.

4.60 Should high-risk categories of trusts which require enhanced CDD be identified in regulation or legislation? If so, what sorts of trusts would fall into this category?

Unsure

Please provide further detail below:

It may be more practical to identify high risk characteristics than to name particular categories of trusts.

If so, what sorts of trusts would fall into this category?:

4.61 Are the ongoing CDD and account monitoring obligations in section 31 clear and appropriate, or are there changes we should consider making?

Not Answered

Please provide further detail below:

What changes should we consider making to clarify CDD and account monitoring obligations in section 31?:

4.62 As part of ongoing CDD and account monitoring, do you consider whether and when CDD was last conducted and the adequacy of the information previously obtained?

Yes

Please provide any further comments in the box below:

4.63 Should we issue regulations to require businesses to consider these factors when conducting ongoing CDD and account monitoring? Why?

Not Answered

Why? Please provide your comments in the box below:

4.64 What would be the impact on your compliance costs if we issued regulations to make this change? Would ongoing CDD be triggered more often?

What would be the impact on your compliance costs if we issued regulations to make this change?:

Not Answered

4.65 Should we mandate any other requirements for ongoing CDD, e.g. how frequently it needs to be conducted?

Not Answered

Why? Please provide further detail below:

Please provide any other examples of mandated requirements for ongoing CDD in the box below:

4.66 If you are a DNFBP, how do you currently approach your ongoing CDD and account monitoring obligations where there are few or no financial transactions?

Please provide your response in the box below:

We set a frequency for ongoing CDD based on client risk, and we review all client information and update CDD when ongoing CDD falls due.
In terms of ongoing monitoring for activities, we require lawyers opening new matters for clients to consider whether the new matter is consistent with the client nature and purpose information previously collected. Otherwise, we rely on our firm's lawyers to be on the lookout for red flags and material changes during the course of conducting the matter.

4.67 Should we issue regulations to require businesses to review activities provided to the customer as well as account activity and transaction behaviour? What reviews would you consider to be appropriate?

Unsure

Please provide further information below:

We would welcome guidance on methods for monitoring activity based captured activities, as we have not identified any automation options and have found it necessary to rely on staff awareness and internal audits.

What reviews would you consider to be appropriate?:

4.68 What would be the impact on your compliance costs if we issued regulations to make this change?

What would be the impact on your compliance costs if we issued regulations to make this change?:

4.69 Do you currently review other information beyond what is required in the Act as part of account monitoring? If so, what information do you review and why?

No

If so, what information do you review and why?:

4.70 Should we issue regulations requiring businesses to review other information where appropriate as part of account monitoring? If so, what information should regulations require businesses to regularly review?

Not Answered

Please provide further information below:

If you answered yes, what information should regulations require businesses to regularly review?:

4.71 How could we ensure that existing (pre-Act) customers are subject to the appropriate level of CDD? Are any of the options appropriate and are there any other options we have not identified? What would be the cost implications of the options?

Why? Please provide further details below:

Are there any other options for ensuring existing (pre-Act) customers are subject to the appropriate levels of CDD?:

What would be the cost implications of the options?:

4.72 Should the Act set out what can constitute tipping off and set out a test for businesses to apply to determine whether conducting CDD or enhanced CDD may tip off a customer?

Not Answered

Why? Please provide more information below:

4.73 Once suspicion has been formed, should reporting entities have the discretion not to conduct enhanced CDD to avoid tipping off?

Yes

Please provide any further information below:

4.74 If you answered yes to question 4.73, in what circumstances should this apply? For example, should it apply only to business relationships (rather than occasional transactions or activities)? Or should it only apply to certain types of business relationships where the customer holds a facility for the customer (such as a bank account)?

Not Answered

If other, please provide details in the box below:

Why? Please provide further detail below:

4.75 Are there any other challenges with the existing requirements to conduct enhanced CDD as soon as practicable after becoming aware that a SAR must be reported? How could we address those challenges?

Yes

What are those challenges?:

Sometimes it is not possible to completed enhanced CDD, for example where the suspicion is in relation to an enquiry and the potential client decides not to engage the provider with the result that CDD is either not initiated or cannot be completed.

If yes, how could we address those challenges?:

4.76 Do you have any challenges with complying with your record keeping obligations? How could we address those challenges?

Not Answered

Please provide more detail below:

If yes, how could we address those challenges?:

4.77 Are there any other records we should require businesses to keep, depending on the nature of their business?

Not Answered

If yes, what are the other records and why should they be kept?:

4.78 Does the exemption from keeping records of the parties to a transaction where the transaction is outside a business relationship or below the occasional transaction threshold hinder reconstruction of transactions? If so, should the exemption be modified or removed?

Not Answered

If so, should the exemption be modified or removed?:

Why? Please provide any additional information:

4.79 Do you have any challenges with complying with the obligations regarding politically exposed persons? How could we address those challenges?

Not Answered

Please provide any additional information below:

If you answered yes, how could we address those challenges?:

4.80 Do you take any additional steps to mitigate the risks of politically exposed persons (PEPs) that are not required by the Act? What are those steps and why do you take them?

Not Answered

If yes, what are those steps and why do you take them?:

4.81 How do you currently treat customers who are domestic PEPs or PEPs from international organisations?

How do you currently treat customers who are domestic PEPs or PEPs from international organisations?:

4.82 Should the definition of "politically exposed persons" be expanded to include domestic PEPs and/or PEPs from international organisations? If so, what should the definitions be?

Yes

Please provide any additional information below:

(a) PEPs from international organisations should be included, with clear information about the types of roles that would be captured and how to identify persons holding those roles.
(b) However, domestic PEPs should not be included. Corruption has not been identified as a significant risk with New Zealand domestic PEPs and so the additional compliance is not justified for the risk.

If you answered yes, how do you think these terms should be defined?:

4.83 If we included domestic PEPs, should we also include political candidates and persons who receive party donations to improve the integrity of our electoral financing regime?

Not Answered

Please provide any further comments in the box below:

4.84 What would be the cost implications of such a measure for your business or sector?

4.84 What would be the cost implications of such a measure for your business or sector?:

4.85 How do you currently treat customers who were once PEPs?

4.85 How do you currently treat customers who were once PEPs?:

4.86 Should we require a risk-based approach to determine whether a customer who no longer occupies a public function should still nonetheless be treated as a PEP?

Yes

4.86 If you want to elaborate on your choice please provide your comments in the box below:

Yes, we agree that a 12-month limit is arbitrary and not in line with the risk that PEPs present. Reporting entities should be required to record additional risk-based measures they will take if a client or beneficial owner has been a PEP in the past.

4.87 Would a risk-based approach to former PEPs impact compliance costs compared to the current prescriptive approach?

Yes

4.87 Please provide any further comments you would like to make in the box below:

It would impact costs, but foreign PEPs are not common clients and the impact is manageable.

4.88 What steps do you take, proactive or otherwise, to determine whether a customer is a foreign PEP?

4.88 What steps do you take, proactive or otherwise, to determine whether a customer is a foreign PEP?:

We use Cloudcheck screening on all CDD subjects to identify whether they are PEPs.

4.89 Do you consider the Act's use of "take reasonable steps" aligns with the FATF's expectations that businesses have risk management systems in place to enable proactive steps to be taken to identify whether a customer or beneficial owner is a foreign PEP? If not, how can we make it clearer?

Not Answered

4.89 If not, how can we make it clearer?:

4.90 Should the Act clearly allow businesses to consider their level of exposure to foreign PEPs when determining the extent to which they need to take proactive steps?

Not Answered

4.90 Please provide any further comments you would like to make in the box below:

4.91 Should the Act mandate that businesses undertake the necessary checks to determine whether the customer or beneficial owner is a foreign PEP before the relationship is established or occasional activity or transaction is conducted?

Not Answered

4.91 Please provide any further comments in the box below:

4.92 How do you currently deal with domestic PEPs or international organisation PEPs? For example, do you take risk-based measures to determine whether a customer is a domestic PEP, even though our law does not require this to be done?

Not Answered

4.92 If there are other ways you currently deal with domestic PEPs or international organisation PEPs please indicate what you do in the box below:

4.93 If we include domestic PEPs and PEPs from international organisations within scope of the Act, should the Act allow for businesses to take reasonable steps, according to the level of risk involved, to determine whether a customer or beneficial owner is a domestic or international organisation PEP?

Not Answered

4.93 Please provide any further comments in the box below:

4.94 What would the cost implications of including domestic PEPs and PEPs from international organisations be for your business or sector?

4.94 What would the cost implications of including domestic PEPs and PEPs from international organisations be for your business or sector?:

4.95 Should businesses be required to take reasonable steps to determine whether the beneficiary (or beneficial owner of a beneficiary) of a life insurance policy is a PEP before any money is paid out?

Not Answered

4.95 Please provide any comments you have in the box below:

4.96 What would be the cost implications of requiring life insurers to determine whether a beneficiary is a PEP?

4.96 What would be the cost implications of requiring life insurers to determine whether a beneficiary is a PEP?:

4.97 What steps do you currently take to mitigate the risks of customers who are PEPs?

4.97 What steps do you currently take to mitigate the risks of customers who are PEPs?:

4.98 Should the Act mandate businesses take the necessary mitigation steps the FATF expects for all foreign PEPs, and, if domestic or international organisation PEPs are included within scope, where they present higher risks?

Not Answered

4.98 Please provide your comments in the box below:

4.99 What would be the cost implications of requiring businesses to take further steps to mitigate the risks of customers who are PEPs?

4.99 What would be the cost implications of requiring businesses to take further steps to mitigate the risks of customers who are PEPs?:

4.100 Should businesses be required to assess their exposure to designated individuals or entities?

Not Answered

Please provide your comments in the box below:

4.101 What support would businesses need to conduct this assessment?

Please provide your comments in the box below:

4.102 If we require businesses to assess their proliferation financing risks, what should the requirement look like? Should this assessment be restricted to the risk of sanctions evasion (in line with FATF standards) or more generally consider proliferation financing risks?

Please provide your comments in the box below:

4.103 Should legislation require businesses to include, as part of their AML/CFT programme, policies, procedures, and controls to implement TFS obligations without delay? How prescriptive should the requirement be?

Please provide your comments in the box below:

4.104 What support would businesses need to develop such policies, procedures, and controls?

Please provide your comments in the box below:

4.105 How should businesses receive timely updates to sanctions lists?

Please provide your comments in the box below:

4.106 Do we need to amend the Act to ensure all businesses are receiving timely updates to sanctions lists? If so, what would such an obligation look like?

Please provide your comments in the box below:

4.107 How can we support and enable businesses to identify associates and persons acting on behalf of designated persons or entities?

Please provide your comments in the box below:

4.108 Do you currently screen for customers and transactions involving designated persons and entities? If so, what is the process that you follow?

Please provide your comments in the box below:

4.109 How could the Act support businesses to screen customers and transactions to ensure they do not involve designated persons and entities? Are any obligations or safe harbours required?

Please provide your comments in the box below:

4.110 If we created obligations in the Act, how could we ensure that the obligations can be implemented efficiently and that we minimise compliance costs?

Please provide your comments in the box below:

4.111 How can we streamline current reporting obligations and ensure there is an appropriate notification process for property frozen in compliance with regulations issued under the United Nations Act?

Please provide your comments in the box below:

4.112 If we included a new reporting obligation in the Act which complies with UN and FATF requirements, how could that obligation look? How could we ensure there is no duplication of reporting requirements?

Please provide your comments in the box below:

4.113 Should the government provide assurance to businesses that have frozen assets that the actions taken are appropriate?

Not Answered

Please provide your comments in the box below:

4.114 If so, what could that assurance look like and how would it work?

Please provide your comments in the box below:

4.115 Are the requirements for managing the risks of correspondent banking relationships set out in section 29 still fit-for-purpose or do they need updating?

Not Answered

Please provide your comments in the box below:

4.116 Are you aware of any correspondent relationships in non-banking sectors? If so, do you consider those relationships to be risky and should the requirements in section 29 also apply to those correspondent relationships?

Not Answered

Please provide your comments in the box below:

4.117 If you are a money or value transfer service (MVTS) provider which uses agents, how do you currently maintain visibility of how many agents you have?

Please provide your comments in the box below:

We are not in this position. However, we comment generally that the term "transferring money or value for, or on behalf of, a customer" in the Act's definition of "financial institution" is being given a very broad interpretation, to include not only money remittance services but also eg merchant acquirers (see our response to Question 2.13). If any additional regulation of money remitters is introduced, care should be taken that it does not, as an unintended consequence, inappropriately affect such other entities.

4.118 Should a MVTS provider be required to maintain a current list of its agents as part of its AML/CFT programme?

Not Answered

Please provide your comments in the box below:

4.119 Should a MVTS provider be explicitly required to monitor and manage its agents for compliance with its AML/CFT programme (including vetting and training obligations)?

Not Answered

Please provide your comments in the box below:

4.120 Should the Act explicitly state that a MVTS provider is responsible and liable for AML/CFT compliance of any activities undertaken by its agent? Why or why not?

Not Answered

Why or why not?:

4.121 If you are an MVTS provider which uses agents, do you currently include your agents in your programme, and monitor them for compliance (including conducting vetting and training)? Why or why not?

Not Answered

Why or why not?:

4.122 Should we issue regulations to explicitly require MVTS providers to monitor and manage its agents for compliance with its AML/CFT programme (including vetting and training obligations)? Why or why not?

Not Answered

Why or why not?:

4.123 What would be the cost implications of requiring MVTS providers to include agents in their programmes?

Please provide your comments in the box below:

4.124 Who should be responsible for the AML/CFT compliance for sub-agents for MVTS providers which use a multi-layer approach? Should it be the MVTS provider, the master agent, or both?

Please provide your comments in the box below:

4.125 Should we issue regulations to declare that master agents are reporting entities under the Act in their own right? Why or why not?

Not Answered

Why or why not?:

4.126 What would be the cost implications of requiring MVTS providers to include agents in their programmes?

Please provide your comments in the box below:

4.127 What risks with new products or technologies have you identified in your business or sector? What do you currently do with those risks?

Please provide your comments in the box below:

4.128 Should we issue regulations to explicitly require businesses to assess risks in relation to the development of new products, new business practices (including new delivery mechanisms), and using new or developing technologies for both new and pre-existing products? Why or why not?

Not Answered

Why or why not?:

4.129 If so, should the risks be assessed prior to the launch or use of any new products or technologies?

Please provide your comments in the box below:

4.130 What would be the cost implications of explicitly requiring businesses to assess the risks of new products or technologies?

Please provide your comments in the box below:

4.131 Should we issue regulations to explicitly require businesses to mitigate risks identified with new products or technologies? Why or why not?

Not Answered

Why or why not?:

4.132 Would there be any cost implications of explicitly requiring business to mitigate the risks of new products or technologies?

Not Answered

If yes, what are your views?:

4.133 Are there any obligations we need to tailor for virtual asset service providers? Is there any further support that we should provide to assist them with complying with their obligations?

Not Answered

Please provide your comments in the box below:

4.134 Should we set specific thresholds for occasional transactions for virtual asset service providers? Why or why not?

Not Answered

Why or why not?:

4.135 If so, should the threshold be set at NZD 1,500 (in line with the FATF standards) or NZD 1,000 (in line with the Act's existing threshold for currency exchange and wire transfers)? Why?

Not Answered

Why?:

4.136 Are there any challenges that we would need to navigate in setting occasional transaction thresholds for virtual assets?

Not Answered

Please provide your comments in the box below:

4.137 Should we issue regulations to declare that transfers of virtual assets to be cross-border wire transfers? Why or why not?

Not Answered

Why or why not?:

4.138 Would there be any challenges with taking this approach? How could we address those challenges?

Not Answered

Please provide your comments in the box below:

4.139 What challenges have you encountered with the definitions involved in a wire transfer, including international wire transfers?

Please provide your comments in the box below:

4.140 Do the definitions need to be modernised and amended to be better reflect business practices? If so, how?

Not Answered

If so, how?:

4.141 Are there any other issues with the definitions that we have not identified?

Not Answered

If yes, what are your views?:

4.142 What information, if any, do you currently provide when conducting wire transfers below NZD 1000?

Please provide your comments in the box below:

4.143 Should we issue regulations requiring wire transfers below NZD 1000 to be accompanied with some information about the originator and beneficiary? Why or why not?

Not Answered

Why or why not?:

4.144 What would be the cost implications from requiring specific information be collected for and accompany wire transfers of less than NZD 1000?

Please provide your comments in the box below:

4.145 How do you currently treat wire transfers which lack the required information about the originator or beneficiary, including below the NZD 1000 threshold?

Please provide your comments in the box below:

4.146 Should ordering institutions be explicitly prohibited from executing wire transfers in all circumstances where information about the parties is missing, including information about the beneficiary? Why or why not?

Not Answered

Why or why not?:

4.147 Would there be any impact on compliance costs if an explicit prohibition existed for ordering institutions?

Not Answered

If yes, what are your views?:

4.148 When acting as an intermediary institution, what do you currently do with information about the originator and beneficiary?

Please provide your comments in the box below:

4.149 Should we amend the Act to mandate intermediary institutions to retain the information with the wire transfer? Why or why not?

Not Answered

Why or why not?:

4.150 If you act as an intermediary institution, do you do some or all of the following:• keep records where relevant information cannot be passed along in the domestic leg of a wire transfer where technical limitations prevent the information from being accompanied?• take reasonable measures to identify international wire transfers lacking the required information?• have risk-based policies in place for determining what to do with wire transfers lacking the required information?

Not Answered

Please provide your comments in the box below:

4.151 Should we issue regulations requiring intermediary institutions to take these steps, in line with the FATF standards? Why or why not?

Not Answered

Why or why not?:

4.152 What would be the cost implications from requiring intermediary institutions to take these steps?

Please provide your comments in the box below:

4.153 Do you currently take any reasonable measures to identify international wire transfers that lack required information? If so, what are those measures and why do you take them?

Not Answered

If so, what are those measures and why do you take them? :

4.154 Should we issue regulations requiring beneficiary institutions to take reasonable measures, which may include post-event or real time monitoring, to identify international wire transfers that lack the required originator or beneficiary information?

Not Answered

If yes, what are your views?:

4.155 What would be the cost implications from requiring beneficiary institutions to take these steps?

Please provide your comments in the box below:

4.156 Are the prescribed transaction reporting requirements clear, fit for purpose, and relevant? If not, what improvements or changes do we need to make?

Unsure

If not, what improvements or changes do we need to make?:

The Act and Regulations do not contain any express provisions requiring amounts to be aggregated for PTR purposes (eg multiple successive ATM cash deposits that in isolation fall below the threshold, but in combination exceed it).
It is our analysis that such aggregation is not currently required, for among others the following reasons: (a) given the obvious potential for linked transactions in this context, one would expect an express requirement for aggregation had this been intended; (b) if aggregation were required, one would expect the Act and Regulations to contain provisions to accommodate this, especially provisions about the timeframe within which successive transactions must occur in order to require aggregation (as found in the legislation of certain overseas jurisdictions where aggregation is prescribed), and yet there are no such provisions; (c) not requiring aggregation for PTR purposes would not materially affect the overall purposes of the Act, as the PTR regime is complemented by account monitoring requirements, SAR requirements, and the anti-avoidance provisions so that an attempt to launder money through disaggregation should still be subject to scrutiny and therefore detection. We also note that the DIA's Guideline: High Value Dealers (March 2021) states: "You are not required to submit an LCT-PTR for any single transaction below the threshold value (including cash transactions that appear related)."
That said, it is open to argument that the Act's policy may require aggregation (as indeed expressly required by the AML/CFT legislation of several overseas jurisdictions). This could potentially be activated by interpreting a "transaction" as capable of being executed in multiple operations (as indeed recognised in the definition of "occasional transaction") – albeit the details to be reported in PTRs under the Regulations do not fit well with such aggregation.
Accordingly, there is a risk (which we would assess as moderate risk) that eg multiple ATM cash deposits totalling $10,000 or more may need to be reported under the PTR regime if: (a) they amount to a single "transaction" that is made through multiple operations; or (b) a court were to hold that the policy of the PTR regime required aggregation of multiple transactions that appear linked.
It would be helpful if the legislation expressly clarified that aggregation is not required. Alternatively, if aggregation were to be required, it would be helpful if the legislation expressly provided for this, stated the applicable criteria, and provided for the PTR forms to accommodate aggregated reporting.

4.157 Have you encountered any challenges in complying with your prescribed transaction reporting (PTR) obligations? What are those challenges and how could we resolve them?

Not Answered

If yes, what are those challenges and how could we resolve them?:

4.158 Should we issue regulations or a Code of Practice to provide more clarity about the sorts of transactions that require a PTR?

Not Answered

Please provide your comments in the box below:

4.159 If so, what transactions have you identified where the PTR obligation is unclear? What makes the reporting obligation unclear, and how could we clarify the obligation?

Please provide your comments in the box below:

4.160 Should non-bank financial institutions (other than MVTS providers) and DNFBPs be required to report PTRs for international fund transfers?

Not Answered

Please provide your comments in the box below:

4.161 If so, should the PTR obligations on non-bank financial institutions and DNFBPs be separate to those imposed on banks and MVTS providers?

Please provide your comments in the box below:

4.162 Are there any other options to ensure that New Zealand has a robust PTR obligation that maximises financial intelligence available to the FIU, while minimising the accompanying compliance burden across all reporting entities?

Not Answered

Please provide your comments in the box below:

4.163 Should we amend the existing regulatory exemption for intermediary institutions so that it does not apply to MVTS providers?

Not Answered

Please provide your comments in the box below:

4.164 Are there any alternative options that we should consider which ensure that financial intelligence on international wire transfers is collected when multiple MVTS providers are involved in the transaction?

Not Answered

If yes, what are your views?:

4.165 Are there any other intermediary institutions that should be included in the exemption?

Not Answered

If yes, what are your views?:

4.166 Are there situations you have encountered where submitting a PTR within the required 10 working days has been challenging? What was the cause of that situation and what would have been an appropriate timeframe?

Not Answered

Please provide your comments in the box below:

4.167 Do you consider that a lower threshold for PTRs to be more in line with New Zealand's risk and context? If so, what would be the appropriate threshold for reporting?

Not Answered

If so, what would be the appropriate threshold for reporting?:

4.168 Are there any practical issues not identified in this document that we should address before changing any PTR threshold?

Not Answered

Please provide your comments in the box below:

4.169 How much would a change in reporting threshold impact your business?

Please provide your comments in the box below:

4.170 How much time would you need to implement the change?

Please provide your comments in the box below:

4.171 Do you use any of the reliance provisions in the AML/CFT Act? If so, which provisions do you use?

Not Answered

If so, what provisions do you use?:

4.172 Are there any barriers to you using reliance to the extent you would like to?

Yes

Please provide your comments in the box below:

See generally our response to Question 1.24.

4.173 Are there any changes that could be made to the reliance provisions that would mean you used them more? If so, what?

Yes

If so, what?:

See generally our response to Question 1.24.

4.174 Given the 'approved entities' approach is inconsistent with FATF standards and no entities have been approved, should we continue to have an 'approved entities' approach?

Unsure

Please provide your comments in the box below:

This could potentially be subsumed by the accredited accredited digital identity services regime to be established under the future Digital Identity Services Trust Framework Act. See generally our response to Question 1.24.

4.175 If so, how should the government approve an entity for third party reliance? What standards should an entity be required to meet to become approved?

Please provide your comments in the box below:

See generally our response to Question 1.24.

4.176 If your business is a reporting entity, would you want to be an approved entity? Why or why not?

Not Answered

Why or why not?:

4.177 Are there any alternative approaches we should consider to enable liability to be shared during reliance?

Not Answered

Please provide your comments in the box below:

4.178 Should we issue regulations to enable other types of businesses to form DBGs, if so, what are those types of businesses and why should they be eligible to form a DBG?

Not Answered

If so, what are those types of businesses and why should they be eligible to form a DBG?:

4.179 Should we issue regulations to prescribe that overseas DBG members must conduct CDD to the level required by our Act?

Not Answered

Please provide your comments in the box below:

4.180 Do we need to change existing eligibility criteria for forming DBGs? Why?

Not Answered

Why?:

4.181 Are there any other obligations that DBG members should be able to share?

Not Answered

Please provide your comments in the box below:

4.182 Should we issue regulations to explicitly require business to do the following before relying on a third party for CDD:• consider the level of country risk when determining whether a third party in another country can be relied upon;• take steps to satisfy themselves that copies of identification data and other relevant documentation will be made available upon request without delay; and• be satisfied that the third party has record keeping arrangements in place.

No

Please provide your comments in the box below:

COUNTRY RISK
Requiring consideration of the level of country risk when determining whether a third party in another country can be relied upon is a prudent step.
AVAILABILITY OF IDENTIFICATION DATA AND OTHER DOCUMENTATION

However, requiring copies of identification data and other relevant documentation to be made available (upon request or otherwise) creates privacy concerns, and should not be required for reliance on an accredited accredited digital identity service under the future Digital Identity Services Trust Framework Act nor for reliance on an approved entity. See our responses to Questions 1.24 and 1.48.

4.183 Would doing so have an impact on compliance costs for your business? If so, what is the nature of that impact?

Not Answered

If so, what is the nature of that impact?:

4.184 Are there any other issues or improvements that we can make to third party reliance provisions?

Not Answered

Please provide your comments in the box below:

4.185 Are there other forms of reliance that we should enable? If so, how would those reliance relationships work?

Not Answered

If so, how would those reliance relationships work?:

4.186 What conditions should be imposed to ensure we do not inadvertently increase money laundering and terrorism financing vulnerabilities by allowing for other forms of reliance?

Please provide your comments in the box below:

4.187 Are the minimum requirements set out still appropriate? Are there other requirements that should be prescribed, or requirements that should be clarified?

Yes

Please provide your comments in the box below:

The minimum requirements are clear and well supported by the Guidelines.

4.188 Should the Act mandate that compliance officers need to be at the senior management level of the business, in line with the FATF standards?

No

Please provide your comments in the box below:

The Act should provide for the appointment of a non-employee natural person as a compliance officer, in circumstances where the entity may not have an appropriate employee role. Small entities might only have employees who are in functions that are not consistent with also acting as compliance officer, and they may not have the resources to hire and support a dedicated compliance officer. It would be appropriate to allow such entities to hire an external person with appropriate experience, who reports to senior management, or to the board if the role is specified as being a senior manager role. Entities who do not have employees (eg subsidiaries who have a board of directors but no employees, on the basis that all operating activities are outsourced within the corporate group) are already able to outsource this role, and so this outsourcing model should also be made available to entities with employees where appropriate.

4.189 Should the Act clarify that compliance officers must be natural persons, to avoid legal persons being appointed as compliance officers?

Not Answered

Please provide your comments in the box below:

4.190 If you are a member of a financial or non-financial group, do you already implement a group-wide programme even though it is not required?

Please provide your comments in the box below:

4.191 Should we mandate that groups of financial and non-financial businesses implement group-wide programmes to address the risks groups are exposed to?

Not Answered

Please provide your comments in the box below:

4.192 Do we need to clarify expectations regarding reviewing and keeping AML/CFT programmes up to date? If so, how should we clarify what is required?

Not Answered

If so, how should we clarify what is required?:

4.193 Should legislation state that the purpose of independent audits is to test the effectiveness of a business's AML/CFT system?

Not Answered

Please provide your comments in the box below:

4.194 What other improvements or changes could we make to the independent audit or review requirements to ensure the obligation is useful for businesses without imposing unnecessary compliance costs?

Please provide your comments in the box below:

4.195 How can we better enable businesses to understand and mitigate the risk of the countries they deal with, and determine whether countries have sufficient or insufficient AML/CFT systems and measures in place? For example, would a code of practice (rather than guidance) setting out the steps that businesses should take when considering country risk be useful?

Please provide your comments in the box below:

4.196 Should we issue regulations to impose proportionate and appropriate countermeasures to mitigate the risk of countries on FATF's blacklist?

Not Answered

Please provide your comments in the box below:

4.197 If so, what do you think would be appropriate measures to counter the risks these countries pose?

Please provide your comments in the box below:

4.198 Is the FATF blacklist an appropriate threshold? If not, what threshold would you prefer?

Not Answered

If not, what threshold would you prefer?:

4.199 Should we use section 155 to impose countermeasures against specific individuals and entities where it is necessary to protect New Zealand from specific money laundering threats?

Not Answered

Please provide your comments in the box below:

4.200 If so, how can we ensure the power is only used when it is appropriate? What evidence would be required for the Governor-General to decide to impose a countermeasure?

Please provide your comments in the box below:

4.201 How can we protect the rights of bona fide third parties?

Please provide your comments in the box below:

4.202 Should there be a process for affected parties to apply to revoke a countermeasure once made? If so, what could that process look like?

Not Answered

If so, what could that process look like?:

4.203 How can we improve the quality of reports received by the FIU and avoid low-quality, defensive reporting?

Please provide your comments in the box below:

4.204 What barriers might you have to providing high quality reporting to the FIU?

Please provide your comments in the box below:

Given that a SAR involves the disclosure of confidential information that would usually have to be kept as secret except that for disclosure required by law, the SAR filing threshold should be made clearer. For example, it should be aligned with FIU guidance if the FIU's interpretation is considered to be correct (i.e. "inherently likely" standard).

The SAR form should be made more user-friendly. The current form is unwieldy and the requirements are not always self-evident, which is a barrier for those who do not use the form often.
Indicators should be reviewed to include ones that are more relevant to DNFBPs as well as financial institutions.
Law firms have to consider legal professional privilege, and it may be extremely challenging to define what can and cannot be included. Further, the threshold for filing a SAR is “reasonable grounds to suspect” (a reasonably low threshold), yet one threshold for loss of privilege under section 42(2) is a “prima facie case” of dishonest purpose or enabling the commission of an offence (a high threshold). This can lead to the suspicion threshold being met, but all information nevertheless being subject to privilege, with insufficient information to establish a prima face case of dishonesty etc. In other words a SAR must be filed, but all relevant information must be withheld due to privilege. It may be appropriate to exempt law firms from filing a full SAR if all substantive details are required to be withheld due to the application of legal professional privilege.

4.205 Should the threshold for reporting be amended to not capture low level offending?

Not Answered

Please provide your comments in the box below:

4.206 Should we expand the circumstances in which SARs or SAR information can be shared? If so, in what circumstances should this information be able to be shared?

Not Answered

If so, in what circumstances should this information be able to be shared?:

4.207 Should there be specific conditions that need to be fulfilled before this information can be shared? If so, what conditions should be imposed (e.g. application to the FIU)?

Not Answered

If so, what conditions should be imposed (e.g. application to the FIU)?:

4.208 Should we issue regulations to state that a MVTS provider that controls both the ordering and beneficiary ends of a wire transfer is required to consider both sides of the transfer to determine whether a SAR is required? Why or why not?

Not Answered

Why or why not?:

4.209 If a SAR is required, should it be explicitly stated that it must be submitted in any jurisdiction where it is relevant?

Not Answered

Please provide your comments in the box below:

4.210 Should we extend additional AML/CFT obligations to high value dealers? Why or why not? If so, what should their obligations be?

Not Answered

Why or why not? If so, what should their obligations be?:

4.211 Should all high value dealers have increased obligations, or only certain types, e.g., dealers in precious metals and stones, motor vehicle dealers?

Not Answered

Please provide your comments in the box below:

4.212 Are there any new risks in the high value dealer sector that you are seeing?

Not Answered

Please provide your comments in the box below:

5. Other issues or topics

5.1 Should the AML/CFT Act define the point at which a movement of cash or other instruments becomes an import or export?

Not Answered

If you answered 'yes', please give reasons for your answer.:

5.2 Should the timing of the requirement to complete a BCR be set to the time any Customs trade and/or mail declaration is made, before the item leaves New Zealand, for exports, and the time at which the item arrives in New Zealand, for imports?

Not Answered

If you answered 'yes', please give reasons for your answer.:

5.3 Should there be instances where certain groups or categories of vessel are not required to complete a BCR (for example, cruise ships or other vessels with items on board, where those items are not coming off the vessel)?

Not Answered

If you answered 'yes', please give reasons for your answer.:

5.4 How can we ensure the penalties for non-declared or falsely declared transportation of cash are effective, proportionate, and dissuasive?

Please share your suggestions below.:

5.5 Should the Act allow for Customs officers to detain cash even where it is declared appropriately through creating a power, similar to an unexplained wealth order that could be applied where people are attempting to move suspiciously large volumes of cash?

Not Answered

If you answered 'yes', please give reasons for your answer.:

5.6 If you answered 'yes' to the previous question (Question 5.5), how could we constrain this power to ensure it does not constitute an unreasonable search and seizure power?

Please share your suggestions below.:

5.7 Should BCRs be required for more than just physical currency and bearer-negotiable instruments and also include other forms of value movements such as stored value instruments, casino chips, and precious metals and stones?

Not Answered

If you answered 'yes', please give reasons for your answer.:

5.8 Does the AML/CFT Act properly balance its purposes with the need to protect people's information and other privacy concerns?

No

If you answered 'no', how could we better protect people's privacy?:

The Act's identity verification provisions should be aligned with the future Digital Identity Services Trust Framework Act, to better protect individuals from the risks of disclosure of identity information, as discussed in the response to Question 1.48.

5.9 Should we specify in the Act how long agencies can retain information, including financial intelligence held by the FIU?

Not Answered

Please give reasons for your answer.:

5.10 If you answered 'yes' to the previous question (Question 5.9), what types of information should have retention periods, and what should those periods be?

Please share your suggestions below.:

5.11 Does the Act appropriately protect the disclosure of legally privileged information?

Not Answered

If you answered 'no', please give reasons for your answer.:

Are there other circumstances where people should be allowed not to disclose information if it is privileged?:

5.12 Is the process for testing assertions that a document or piece of information is privileged set out in section 159A appropriate?

Not Answered

If you answered 'no', please give reasons for your answer.:

5.13 What challenges or barriers have you identified that prevent you from harnessing technology to improve efficiencies and effectiveness?

Please share your comments below.:

How can we overcome those challenges? Please share your suggestions below.:

5.14 What additional challenges or barriers may exist which would prevent the adoption of digital identity once the Digital Identity Trust Framework is established and operational?

Please share your comments below.:

How can we overcome those challenges?:

5.15 Should we achieve greater harmonisation with Australia's regulation?

Not Answered

If you answered yes, tell us why and any suggestions you have for how we could achieve this.:

5.16 How can we ensure the AML/CFT system is resilient to long- and short-term challenges?

Please share your suggestions below.:

To ensure adaptability while still achieving an appropriate cost-benefit balance in particular cases, and while still providing reporting entities with the level of certainty of application that the Act's onerous liability provisions in justice require, we support:
(a) retaining the Act's risk-based, principles-based approach (i.e. not moving to a prescriptive approach);
(b) for added flexibility, allowing in the Act for call-in Regulations;
(c) coupling this with an effective exemption regime (for both class and individual exemption), to avoid the Act's broad terminology capturing entities and activities that are outside the Act's policy or that have a low ML/FT risk and on balance do not warrant compliance with the Act;
(d) additionally coupling this with a binding rulings regime (on the model of the regime already found in the Tax Administration Act 1994), to provide clarity about the interpretation of the Act's broad terminology and application in novel or complex cases. For the reasons stated in our response at Question 2.13, we think there is a need for a binding rulings regime that sits alongside the exemptions regime; and
(e) introducing safe-harbour regimes as appropriate.

6. Minor changes

6.1 What are your views regarding the minor changes we have identified?

Please share your comments below.:

Are there any changes you don't support? Please tell us what they are and why you don't support them.:

6.2 Are there any other minor changes that we should make to the Act or regulations?

Yes

If you answered 'yes', please share your suggestions.:

It would greatly assist users if the Regulations made under the Act could be consolidated into a single set of Regulations. The legislation is sufficiently complex without the added complexity created by having to work through multiple intermeshing statutory instruments.
At a minimum, the Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Regulations 2011, the exclusions in regs 18-24 of the Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Regulations 2011, and the Anti-Money Laundering and Countering Financing of Terrorism (Class Exemptions) Notice 2014 should be consolidated. A user should be able to find all generic/class exemptions and exclusions (which are functionally equivalent to exemptions) in one place. The current spread of these across three instruments is difficult to work with. It may also cause users to miss relevant provisions: a user who locates the Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Regulations 2011 would have no reason to think that that is not a comprehensive instrument.
The DIA indicated in its revised FAQs of December 2020 (see at https://www.dia.govt.nz/AML-CFT-Planned-changes-to-anti-money-laundering-regulations-FAQ-Dec-2020) that the consolidation of the existing six sets of Regulations was being planned, but with the notation "timing to be confirmed" which suggests that this was not on the immediate horizon. For the reasons given above, we think this consolidation (or at a minimum the consolidation of the regulations containing exemptions and definitional exclusions) merits attention in the near future, if not already in active progress.