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From: [redacted]@cygnuslaw.nz>
Sent: Monday, 6 December 2021 5:39 pm
To: aml
Subject: Cygnus Law's submissions on the AML/CFT Act review
Attachments: Cygnus Law Submissions on the AMLCFT Act review.pdf

Please find attached Cygnus Law's submissions on the AML/CFT Act review. My apologies for providing these after the deadline. I would be grateful if you can confirm that these submissions have been received and will be considered. Thank you.

Regards

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3 December 2021

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SUBMISSIONS ON THE REVIEW OF THE AML/CFT ACT

Thank you for the opportunity to make submissions on the review of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (**AML/CFT Act**). These submissions are made by Cygnus Law Ltd (**Cygnus Law**) on its own behalf.

Simon Papa is the director of Cygnus Law. He has 18 years' experience as a corporate and commercial lawyer. His previous experience includes working as a lawyer at the Financial Markets Authority for 2½ years. Cygnus Law is a commercial law firm that assists a wide range of businesses to carry out commercial transactions and to comply with law. Cygnus Law is an AML/CFT reporting entity. In addition Cygnus Law advises reporting entities on AML/CFT compliance matters.

Cygnus Law sets out its key submissions in Part 1 (pages 1 to 4). Cygnus Law's full submissions on selected questions in the consultation document are in Part 2 (pages 5 to 22).

1. KEY SUBMISSIONS

The significant compliance burden already faced by small businesses should be taken into account

1.1 We fully support the intent of AML/CFT law. However, there are significant issues with the design of the law and its implementation, which we highlight in our submissions. As a small business that is a reporting entity we consider that the costs of implementation are more significant than originally assumed. AML/CFT requirements are the most costly and time-consuming compliance obligations we face as a business. Those costs are already disproportionate for small businesses that do not have the economies of scale to implement AML/CFT programmes efficiently. We note that on, an annual basis, AML/CFT compliance involves, in the case of every law firm, carrying out at least 15 separate activities including:

- Vetting staff.
- Ongoing training.
- Updating the risk assessment.
- Updating the compliance programme.
- Reviewing dozens of AML/CFT updates, and new and updated documents, produced by DIA, FIU, the Law Society and others and considering their impact and incorporating them into documents and systems.
- Appointing a compliance officer and maintaining that appointment.

- Assessing each client to determine whether the firm is carrying out captured activities for that client (where not all activities are captured).
- Assessing each client to identify persons acting on behalf, beneficial owners and persons on whose behalf a transaction is conducted.
- Carrying out CDD on clients, beneficial owners and persons acting on behalf including identity checks and verification, PEP checks and checks on SoW/SoF (where relevant).
- Collecting information required in relation to wire transfers.
- Carrying out prescribed transaction reporting (where relevant).
- Carrying out account monitoring.
- Carrying out continuing CDD.
- Monitoring for suspicious activities, assessing potentially suspicious activities and submitting suspicious activity reports.
- Keeping records.
- Completing an annual return.
- Arranging an AML/CFT audit (every three years).

These activities mostly do not occur at a specific point in time but are continuous obligations that take up significant time. We consider that the review should take that into account, and focus on not increasing, and in fact reducing, the compliance burden for small businesses.

Cost/Benefit analysis should be a core part of the review

1.2 Neither the terms of reference nor the consultation paper for the AML/CFT review refer to the 2017 Treasury document *Government Expectations for Good Regulatory Practice* or Cabinet's 2020 *Impact Analysis Requirements*. The *Government Expectations for Good Regulatory Practice* document states that:

> *"The government expects any regulatory system to be an asset for New Zealanders, not a liability.*
>
> *By that we mean a regulatory system should deliver, over time, a stream of benefits or positive outcomes in excess of its costs or negative outcomes. We should not introduce a new regulatory system or system component unless we are satisfied it will deliver net benefits for New Zealanders. Similarly, we should seek to remove or redesign an existing regulatory system or system component if it is no longer delivering obvious net benefits."*

1.3 Under the *Impact Analysis Requirements* an impact analysis is a requirement for regulatory proposals. That document states that the requirements:

> *"are both a process and an analytical framework that encourages a systematic and evidence-informed approach to policy development. The requirements incorporate the Government Expectations for Good Regulatory Practice."*

1.4 The terms of reference refer to costs that are imposed on businesses but makes no reference to the expectation that the benefits of regulatory measures should outweigh the costs. Rather the focus appears to be almost entirely on further embedding and extending AML/CFT obligations on businesses and New Zealand as a whole, without full consideration of the costs imposed. The starting point in the terms of reference is the goal of creating "A "gold standard" AML/CFT regime" with costs not referred to. "Ease of doing business" is referred to but that is very different from considering the costs of creating a "gold standard" regime and

whether they are justified in relation to incremental benefits to be achieved. The benefits themselves are only stated at a high level of abstraction with no data (except occasional anecdotal information) that supports or confirms the actual value of the benefits. In some cases benefits are not referred to, only a stated intention to comply with FATF recommendations.

1.5 However, the consultation paper itself states, in the introduction:

> *"The Minister of Justice, Hon Kris Faafoi, commenced a review of the AML/CFT Act on 1 July 2021. This review is an opportunity to look back on the past eight years and ask ourselves: have we got this right? Does the regime effectively achieve its purposes in the most cost-efficient way? What can we do better? What can we do without?"*

As noted, the terms of reference and the principles do not provide a process for assessment of costs or the consideration of whether, after taking into account benefits, there is a net benefit to New Zealand. We acknowledge that the paper does ask for submissions on costs at various points. However, we submit that the review itself should be founded on consideration of cost and benefit, as the only objective way to determine if particular regulatory measures (and the measures collectively) have a net benefit for society and to comply with Government and Cabinet requirements for the assessment of new and amended statutes and regulations.

1.6 The terms of reference and the consultation paper both state that one of the goals of the AML/CFT regime is to:

> *"Adopt international best practices where appropriate in the New Zealand context and ensure that New Zealand fulfils its international obligations and addresses matters of international concern so that New Zealanders' economic wellbeing and national security is protected"*

We fully acknowledge the importance of international obligations. However, we submit that:

a The relevant standards, as set out in FATF recommendations, are not binding on New Zealand, do not have the status of international treaty obligations or relevant UN measures, and are not enforceable in the traditional sense. So it would not be appropriate to adopt FATF recommendations as though they are binding on New Zealand. New Zealand remains sovereign and it is important to assess those obligations in light of New Zealand conditions. It is entirely appropriate to take into account New Zealand's commitment to FATF but this is not absolute. This is confirmed in the "Government Expectations for Good Regulatory Practice", which states that regulatory systems should be (emphasis added) "consistent with relevant international standards and practices to maximise the benefits from trade and from cross border flows of people, capital and ideas (*except when this would compromise important domestic objectives and values*)".

b FATF recommendations should not be treated as fully effective and appropriate for New Zealand. FATF recommendations are adopted at an international level and reflect a level of compromise and are designed for adaptation by jurisdictions with a wide variation in their ML/TF risks, economic and social conditions, legal systems and governance systems. We consider that they should be carefully considered for their relevance to New Zealand's circumstances. As we've noted, cost/benefit should be an overarching consideration. As we note throughout these submissions, there can be no basis for implementing FATF recommendations if they do not achieve net benefits for New Zealand. As noted, consideration of benefits can take into account benefits at an international level, including New Zealand's standing internationally, but that should not and cannot be the sole or overriding consideration. Nor, in our view, should

negative comment internationally be treated as determinative. New Zealand from time-to-time adopts independent stances and policies on a range of matters, often on a principled basis. We submit that that be taken into account in the process of reviewing and updating the AML/CFT regime.

A central administration function should be created to address significant inconsistencies and shortcomings in implementation of the AML/CFT regime

1.7 There are numerous issues in relation to how regulations, guidance materials and other documents in relation to the AML/CFT regime are implemented, controlled and published. These creates significant costs and issues for reporting entities that we consider should be addressed through the review process, particularly as, by law, reporting entities are required to take into account guidance materials produced by supervisors in relation to their risk assessments and compliance programmes. The issues with such materials include:

- Guidance materials are in varying formats and locations. Some are not well written or formatted, with no consistency between different documents that would aid reporting entities to navigate them easily.
- Until recently many guidance documents didn't have a version number or explain in any way what changes were being implemented via an updated document. In some cases documents are still undated.
- On numerous occasions new documents, or new versions of documents, have been released with no notification.
- Some documents contain errors, some subsequently corrected.
- There is no document management system for guidance materials produced by AML/CFT agencies. There is no master list of documents a reporting entity can refer to. There is no way to knowing for certain if a document is current or whether it has been updated or withdrawn.
- There is no notification service for those materials. It is necessary to check agency websites (and to login in the case of FIU) to check on the status of documents. Agencies from time-to-time send emails (if subscribed) that include information on updates but that is not used consistently. Until 2018 FMA operated an RSS feed, which made it relatively easy to identify changes. That was discontinued and, to our knowledge, no other relevant agencies operate RSS feeds. We're not suggesting that RSS feeds are fit-for-purpose but they are better than nothing.
- As we note in these submissions, each supervisor operates a completely different system for providing access to those documents and organising those documents.
- For CDD alone there are dozens of individual documents that could be much better organised.

In our view changes are required to address such matters. As a key measure to address those issues, we propose that a central function be established with its own mandate, management and budget to oversee and manage the administration of the AML/CFT regime including with power to develop and approve guidance materials and codes of practice, to publish relevant information in a coherent, user-friendly and co-ordinated way. This function can develop as a centre of excellence by bring together core capability and know-how in one area rather than it being thinly spread and poorly co-ordinated across multiple agencies. This function should apply to all activities that are common across reporting entities but aren't sector specific (or only in minor ways) including preparing and updating guides in relation to establishing and implementing risk assessments and compliance programmes.

2. CYGNUS LAW'S FULL SUBMISSIONS

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
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. We can only see that as being appropriate if justified on a robust cost/benefit basis. Businesses operate in complex legal and commercial environment with many relevant counter-parties and stakeholders. To require businesses to actively prevent ML/TF would likely have very significant and complex impacts in that environment and could result in significant risk and liabilities for those businesses. We consider that those impacts need to be taken into account. The definition of ML/TF in law can be difficult to apply to specific circumstances and the assessment is often very fact specific. It is unlikely that businesses will have sufficient information in many cases to make an effective assessment. And it is difficult to see how 10,000 different businesses, many of them small, could realistically identify ML/TF and take action in relation to it. As noted, that would place large risks on those businesses including if their assessment turns out to be wrong. While the law could protect against claims it couldn't protect against potential commercial implications including loss of business. Insurers may not be prepared to cover this risk leaving businesses exposed. In contrast the State does not necessarily face any financial liability if it takes actions against ML/TF and is later proven to be wrong. In the absence of further detailed analysis, including a cost/benefit analysis, in relation to such a significant change, we do not support that proposal and consider that it should not be implemented.
1.4	**Should a purpose of the Act be that it also seeks to counter the financing of proliferation of weapons of mass destruction? Why or why not?** The Act already imposes extensive and expensive obligations on businesses. Any new obligation should only be implemented if justified on a robust cost/benefit basis.
1.8	**Are the requirements in section 58 still appropriate? How could the government provide risk information to businesses so that it is more relevant and easily understood?** National and sector risks assessment methodology and presentation varies across supervisors, with significant degrees of overlap and also gaps. Businesses with even moderately diverse activities often face having to take into account sector risk information prepared by more than one supervisor. We submit that there should be a standardised approach to sector risk assessments with supervisors required to take a consistent approach. Supervisor sector risk assessment are all presented in different ways with different methodologies for determining risks, with the underlying methodologies not always being clear or not being consistent with risk assessment methodology recommended in the supervisors' *Risk Assessment Guideline*. In many cases it is not clear how risk ratings for different types of businesses in the sector risk assessments were determined, which makes it difficult to assess an individual reporting entity's risk relative to the sector. We submit that sector risk assessments for all supervisors:

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	• Should be developed using the same methodology, presentation and format. • A gap and overlap analysis is carried out taking into account all sectors in the AML/CFT regime, with the goal of developing sector risk assessments that are consistent and complementary.
1.12	**Does the Act appropriately reflect the size and capacity of the businesses within the AML/CFT regime? Why or why not?** Cygnus Law's experience is that the AML/CFT Act itself is largely appropriate for businesses of different sizes. As a small business a key issue Cygnus Law faces implementing AML/CFT requirements is the way MoJ, Police and DIA and other agencies implement the regime. A small business needs to take into account multiple regulations and a wide assortment of: • guidelines • fact sheets • FAQs • statements • clarifications • a code of practice • an "explanatory note" (separate from, but to be read with, the *Identity Verification Code Of Practice*) • various other documents and sources of information. There are numerous issues with how the regime is implemented by agencies, some of which we note below. This is more than an academic issue. Not only does it make it harder for businesses to operate within the AML/CFT regime, it creates a real risk that they may miss relevant changes and materials. More fundamentally: • The AML/CFT states that in section 57(2) "In developing an AML/CFT programme, a reporting entity must have regard to any applicable guidance material produced by AML/CFT supervisors or the Commissioner relating to AML/CFT programmes" • Section 57(2)(g) states that "In assessing the risk, the reporting entity must have regard to … any applicable guidance material produced by AML/CFT supervisors or the Commissioner relating to risk assessments". So many of the documents and information noted above are required, by law, to be taken into account by reporting entities. It is not acceptable in our view that the agencies do not operate an effective and coherent system for implementing, managing and controlling those documents and that information, to assist reporting entities to locate them, understand what documents/information are applicable and in-force, and to know when there are changes. There are numerous issues that we consider should be addressed through the review process including the following: • Guidance materials are in varying formats and locations (we consider that further below). Some are not well written or formatted, with no consistency between different documents that would aid a reporting entity to navigate them easily.

Question No	Cygnus Law's Submissions (consultation paper questions in bold)

	• Until recently guidance documents didn't have a version number or explain in any way what changes were being implemented via an updated document. Some are still undated.
	• On numerous occasions new documents, or new versions of documents, have been released with no notification.
	• Some documents contain errors, some subsequently corrected.
	• There is no document management system for guidelines and other documents produced by agencies. There is no master list of documents a reporting entity can refer to. There is no way of knowing for certain if a document is current or whether it has been updated or withdrawn.
	• There is no effective notification service for those documents. It is necessary to check agency websites (and to login in the case of FIU) to check on the status of documents. Agencies from time-to-time send emails (if subscribed) that include information on updates but that process is not used consistently. Until 2018 FMA operated an RSS feed, which made it relatively easy to identify changes. That was discontinued and, to our knowledge, no other relevant agencies operate RSS feeds. We're not suggesting that RSS feeds are fit-for-purpose but they were better than nothing.
	• As we note below each supervisor operates its completely different system for providing access to those documents and organising those documents.
	• DIA alone published 24 updates in 2021 in relation to AML/CFT matters. Amendment regulations implemented in 2021 made changes to dozens of individual regulations under the AML/CFT Act. There appears to be no effective consideration of how the flow of AML/CFT information and documents should be managed effectively especially for businesses that cannot support dedicated compliance functions. While there is some private sector support to help alleviate that burden we don't consider that is sufficient or effective, particularly given the very large regulated population. Nor do we think this aspect should be addressed only by the private sector, given that the costs for agencies of more effective measures should not be particularly high.
	• For CDD alone there are dozens of individual documents that could be much better organised and published, including the following documents:
	  ○ Customer due diligence factsheets for companies (April 2013), trusts (July 2019), sole traders & partnerships (July 2019), clubs & societies (July 2019), co-operatives (July 2019), and 'acting on behalf of customer' (August 2013)
	  ○ Clarification of the position the AML/CFT supervisors are taking with respect of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 ("the Act") interpretation of a trust as a customer (July 2019)
	  ○ Lawyers and simplified customer due diligence (CDD) and registered banks (DIA, 29 June 2018)
	  ○ Beneficial Ownership Guideline (December 2012)
	  ○ Enhanced Customer Due Diligence Guideline (August 2020)

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
	○ Amended Identity Verification Code of Practice (undated) ○ Explanatory Note: Electronic Identity Verification Guideline (updated July 2021) ○ Statement on the Kiwi Access Card (undated) ○ Guidance on Expired Passports as Identification for Customer Due Diligence (undated) ○ Class Exemption for managing intermediaries information sheet (October 2018) ○ Internal Affairs interim advice on due diligence obligations for lawyers receiving mortgage instructions from registered banks (NZ Law Society, 29 June 2018) ○ Guidance: Complying with AML/CFT verification requirements during COVID-19 Alert Levels (March 2020) DIA attempts to present these documents in a somewhat coherent way for different types of businesses. However, FMA (for example) provides access from its "Guidance library" webpage which simply disgorges 164 documents across various parts of FMA's remit, including AML, into one database. They can be viewed in chronological or alphabetical order and it is possible to refine the search by "AML" which results in 34 documents being provided with no particular organisation or guidance as to what they relate to. The Guidance Library isn't even expressly referred to on FMA's AML/CFT compliance webpage (https://www.fma.govt.nz/compliance/amlcft/); there's simply a list of the most recent AML documents in the right-hand column with a "see more" link at the bottom that links to the full Guidance library. Overall, it is difficult in our view for a reporting entity or compliance officer, without existing extensive experience in the regime, to locate many relevant documents let along to use them or to have confidence that they know which documents are current and when new documents are published. To use them it is necessary to download dozens of separate PDFs or to visit specific webpages. These examples are not all of the issues we consider exist. We consider that the issues highlighted are a very costly externality that agencies do not have visibility of and that significantly increase risks and costs for businesses. In our view the current issues don't reflect any problems with resources or technology. So it shouldn't be difficult to develop more effective systems in relation to AML/CFT guidance and other materials that will support businesses to implement AML/CFT requirements more effectively and efficiently. The issues noted appear to arise, at least in part, from the fact that different agencies are involved and not all appear to have the resources or interest to support businesses more effectively. This probably reflects that AML/CFT is not a core part of any of their remits. To address that we propose later in these submissions that a single function is given responsibility and oversight to ensure more effective and consistent implementation of the AML/CFT regime including to address the issues noted above. The cost of addressing those concerns should be small but the benefits are likely to be significant.

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
1.17	**Should it be specified that exemptions can only be granted in instances of proven low risk? Should this be the risk of the exemption, or the risk of the business?** No, low risk should not be the only basis for an exemption. The exemption regime should take into account risk/benefit considerations. Using "low risk" as the sole criterion fails to take into account instances where the costs of implementing particular AML/CFT measures are inconsistent with the relevant benefit in the relevant area. This is a consistent problem with the regime. If risk minimisation is the only goal the costs of society of the harms it is seeking to reduce or prevent may be outweighed by the costs imposed more broadly.
1.27	**Should the Act require have a mechanism to enable feedback about the operation and performance of the Act on an ongoing basis? If so, what is the mechanism and how could it work?** Yes. A simple tool to help with that would be to require AML/CFT agencies to publicly consult on all statutory instruments and guidelines, fact sheets, explanatory notes etc they produce. Those instruments and documents are often implemented with little or no notice. In some cases they contain errors or set out what some in the private sector consider to be unreasonable positions. Consultation would improve the quality of relevant instruments and documents. This necessarily needs to extend to guidance materials as, under the AML/CFT Act, businesses are required to have regard to them. Good practice would dictate that they should be consulted on. Often little consideration appears to be given to the practical implications. A recent example is the implementation of a new requirement from 9 July 2021 to identify some nominated persons, implemented in the Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Amendment Regulations 2021. Four days after the new requirements came into force the supervisors notified that, in recognition that some reporting entities would need to amend their processes, procedures and systems to give effect to that requirement, they would implement a de facto "transitional compliance period will apply until 29 April 2022". This could have been avoided if there had been effective consultation on the new requirement. More broadly, new documents and obligations would be improved by allowing businesses impacted by them to provide feedback before implementation. While the AML/CFT National Coordination Committee has responsibility for these types of arrangements, and other "targeted consultations", any consultations in our experience consistently focus on larger businesses and specialists. Smaller businesses and sector participants are often not considered and often bring a different perspective. We recommend that any such initiatives are mandated to seek out views from a wide range of participants and have, as a default requirement, that all such initiatives are publicly notified so a range of participants can provide feedback.
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?**

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
	As a starting point, the consultation paper states that "in practice, the process for issuing Codes of Practice is burdensome and only one Code has been issued related to identity verification". No explanation is given as to why it is "burdensome", which makes it difficult to propose alternatives. It appears to us that the relevant agencies have failed to seek to co-operate, rather than the mandate itself being deficient. One answer is simply to require and resource the process of producing codes. Given that the codes have legal effect we don't consider that powers to produce them should be devolved to individual supervisors. Given the inconsistent and inadequate approach to implementation and publication of guidance materials we've noted in these submissions, it is difficult to have confidence that individual supervisors would carry out this process equally well or consistently. As we've proposed in this consultation, such powers, together with powers to prepare (or at least approve) codes and guidance materials, should sit in a central function, operationally separate from the supervisors. As noted in these submissions, public consultation on draft codes of practice (and other guidance materials) should be a default requirement.
1.39	**Should the New Zealand Police also be able to issue Codes of Practice for some types of FIU issued guidance? If so, what should the process be?** The codes of practice are a reasonable and useful tool and are consistent with other complex regimes that govern market conduct and practice. Those other regimes recognise that it is necessary for regulators to have the power to set standards at a more detailed level to respond to particular issues. We don't consider that extends to the FIU. The Police do not have experience with operating these types of regulatory regimes. As noted in answer to question 1.38 we submit that a single function has this power, in relation to all relevant agencies. This will ensure that there is a centre of excellence with the personnel to ensure these processes are implemented effectively.
1.43	**Should operational decision makers within agencies be responsible for making or amending the format of reports and forms required by the Act? Why or why not?** Given experience to date we don't consider operational decision makers within agencies should have that power. Again, we recommend that a central function has the power to do so or at least to approve such amendments, to ensure that the right level of consistency and expertise is applied.
1.44	**If so, 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?** As noted, decision making should be centralised and in all cases public consultation should be a default requirement.
1.45.	**Would AML/CFT Rules (or similar) that prescribed how businesses should comply with obligations be a useful tool for business? Why or why not?** Yes. The regime is complex and detailed rules make the process of compliance somewhat easier overall provided the rules are clear and not used to impose

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	significant and onerous new obligations. The AML/CFT Act already includes a rules making function via the codes of practice process. So we don't see a basis or need to create a new process. We submit that it is best to adapt the existing code process for the purpose of creating rules.
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?** As noted elsewhere, we submit that the power to issue such rules be centralised in a single function, not amongst different agencies, for the reasons we've noted elsewhere.
1.52.	**Should there be an AML/CFT-specific registration regime which complies with international requirements? If so, how could it operate, and which agency or agencies would be responsible for its operation?** We don't consider there should be a separate registration regime. The Financial Service Providers Register (**FSPR**) was established as a result a key FATF member commitment (as recorded in the FATF Recommendations) to "ensure that financial institutions are subject to adequate regulation and supervision and are effectively implementing the FATF Recommendations." That includes: • Taking "necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest or holding a management function in a financial institution". • Ensuring that "financial institutions [are] licensed or registered and adequately regulated, and subject to supervision or oversight for anti-money laundering purposes.... [Including] businesses providing a service of money or value transfer, or of money or currency changing...". We submit that a slightly repurposed FSPR should be used for the purpose of registering reporting entities, given that the FSPR already operates as a register, reporting entities that provide relevant financial services are required to register on the FSPR, and that the FSPR was adopted primarily to comply with FATF requirements. Those changes can be implemented via the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSP Act**). We don't consider there is a basis to implement significant new fit-and-proper checks as part of the registration process. These could have been imposed as part of financial service licensing requirements and a policy decision was made to not require that. While such businesses are at risk from ML/TF any new obligations should take into account actual issues arising including whether the current negative assurance checks undertaken as part of the FSPR registration process are adequate. It would be useful to review the rationale for the current negative assurance checks to see if the risks noted were considered at the time and taken into account, and whether any subsequent changes and information mean that the policy basis is no longer valid.
1.53.	**If such a regime was established, what is the best way for it to navigate existing registration and licensing requirements?** As noted any changes could be implemented via the FSPR. If significant new fit and proper requirements are to be imposed we submit that they are best

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	implemented via financial markets legislation and a licensing process to be operated by FMA. There are good arguments in favour of licensing businesses such as money remitters and FX dealers. Currently those businesses face additional hurdles accessing the banking system because of the absence of a licensing regime that assists to prove that they meet required standards. This would help to address issues with de-risking. We submit that the FMA and other relevant agencies should be consulted on this, to ensure that a consistent policy is adapted across agencies and not in response to isolated issues.
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?** See above.
1.55.	**Should there also be an AML/CFT licensing regime in addition to a registration regime? Why or why not?** Possibly but only if the cost/benefits indicate a real net benefit. Since a licensing regime was not established previously it needs to be justified and not simply imposed.
1.56.	**If we established an AML/CFT licensing regime, how should it operate? How could we ensure the costs involved are not disproportionate?** The AML/CFT Act regime is not the appropriate mechanism to implement a licensing regime. For financial service providers this is best addressed in financial markets legislation with the FMA as the lead agency.
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 except that being vulnerable to ML shouldn't be the sole criterion. This should only be implemented if a cost/benefit analysis supports that approach.
1.58.	**If such a regime was established, what is the best way for it to navigate existing licensing requirements?** As noted, we submit that the licensing process should be executed by existing agencies through existing legal frameworks, not through a bespoke AML/CFT framework.
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?** As noted the effects are likely to be positive, provided that the licensing process focuses on the businesses as a sector not as an AML/CFT risk.
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? Why or why not?** No. Fee regimes are predicated on the role of government being to support sectors to provide greater confidence and certainty to customers and third parties. The AML/CFT regime is largely focused on benefits to wider society in

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	reducing ML/TF. It would be unfair to impose further costs on reporting entities that already incur significant costs in implementing a regime that does not provide significant benefits to the reporting entities themselves. Rather, the regime seeks to achieve wider societal benefits including crime reduction.
2.1.	**How should the Act determine whether an activity is captured, particularly for DNFBPs? Does the Act need to prescribe how businesses should determine when something is in the "ordinary course of business"?** We consider that the existing approach is appropriate. It is unlikely that any particular formulation can remove all uncertainty and, as we note below, we don't consider it would be appropriate to regulate every occasional activity.
2.3.	**Should "ordinary" be removed, and if so, how could we provide some regulatory relief for businesses which provide activities infrequently? Are there unintended consequences that may result?** No. This would impose disproportionate obligations.
2.7.	**Should we remove the overlap between "managing client funds" and other financial institution activities? If so, how could we best do this to avoid any obligations being duplicated for the same activity?** Yes. We note that those terms were developed by FATF and don't always accord with terminology and concepts in New Zealand law and New Zealand commercial practice. We suggest that replacement concepts are based on New Zealand terminology and concepts, while checking that they achieve the overall intent of the relevant FATF recommendations.
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? If so, how could we achieve this?** Yes, definitely. In our experience the gaps create significant issues and result in strange outcomes including businesses being registered on the FSPR but not subject to the AML/CFT Act for equivalent services. As noted above, this can be achieved by referring to New Zealand law and market terminology to develop new definitions. In our view an effective outcome can only be achieved by undertaking a "first principles" review including considering the particular issues the FATF recommendations are trying to address and to then develop appropriate definitions.
2.13.	**Are there other elements of the definition of financial institution that cause uncertainty and confusion about the Act's operation?** There are multiple areas including: • "accepting deposits or other repayable funds from the public". "From the public" is unclear and New Zealand law moved away from regulation of securities based on "offers to the public" in 2014. An option is to base this category on the definition of "debt security" in the FMC Act but we consider it is advisable to consider what FATF was focusing on with this concept. It appears to focused on larger financial institutions such as banks but we query whether it should also apply to "private" offers (with the "ordinary course of

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
	business" criterion reducing the impact for existing businesses that make a one-off offer or very infrequent offers). • "trading for, or on behalf of, a customer in any of the following using the person's account or the customer's account:...". This captures an array of financial products (securities) and other transactions (e.g. foreign exchange). The terminology and categorisations are not consistent with New Zealand law in all respects and there are significant gaps between this definition and equivalent categories of financial service used in the FSP Act, for example "changing foreign currency" and "trading financial products or foreign exchange on behalf of other persons". • "financial leasing (excluding financial leasing arrangements in relation to consumer products)": Financial leasing is a term used in commercial practice but is not defined in law and has not fixed meaning. We submit that this term should be defined. • "participating in securities issues and the provision of financial services related to those issues": "Securities" has a specific meaning in NZ law and is no longer the default term, that term being "financial product" (in the FMC Act). "Financial services" is not defined but FMA recommends following the FSP Act definition of "financial services". We think that should be confirmed and clarified including by reference to the intent of this term. • "safe keeping or administering of cash or liquid securities on behalf of other persons" and "investing, administering, or managing funds or money on behalf of other person". There are overlaps between these two categories. In addition they don't align with the equivalent financial service category in the FSP Act of "keeping, investing, administering, or managing money, securities, or investment portfolios on behalf of other persons". We submit that there should be one category only and that it should be the same in both the AML/CFT Act and the FSP Act. • "money or currency changing": although, the supervisors accepted that the existing definition is sufficiently broad to cover a wide range of virtual asset activities, it will be helpful to define "money" and "currency" including confirming whether those terms extend to cryptocurrencies. This will also help to clarify other financial activity definitions, for example, "investing, administering, or managing funds or money on behalf of other person" and "transferring money or value for, or on behalf of, a customer". See our comments below on virtual currencies.
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?** We don't see that as necessary. This category of person needs to be assessed in light of New Zealand circumstances. Such positions are, in our experience, very uncommon and, as noted, there is no legal recognition of them. Any person with significant influence may be a beneficial owner as a person with effective control or may be a person acting on behalf. So it seems unnecessary to further expand the ambit as proposed.
2.28.	**Should non-life insurance companies become reporting entities under the Act?**

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
	This should only be added if there is actual evidence of substantial risk. Simply adding another category of reporting entity to address theoretical risks in New Zealand would not be consistent with good policy development. Again, any new imposition of obligations should be subject to a cost/benefit analysis to establish whether there would be net benefits, given the substantial costs that would likely be imposed on such businesses.
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? If so, how should we?** Yes. See our comments above on the category of "money or currency changing" in answer to question 2.13. It is unclear why the very specific category of "participation in and provision of financial services related to an issuer's offer and/or sale of a virtual asset." is included. We submit that categories should, as much as possible, be principles based and not focused on particular narrow business segments that are currently of concern.
2.35.	**Should preparing accounts and tax statements attract AML/CFT obligations? Why or why not?** Only if justified on a cost/benefit basis including assessment of the nature and extent of the ML that arises currently in this way. It seems unlikely that most accountants would have sufficient information to make a proper assessment. Given the very significant costs that are imposed on businesses currently for AML/CFT activities we cannot see a clear basis for this extension especially given the problems that exist currently with implementation and supervision of the AML/CFT regime.
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?** We agree that this should take into account "measures are risk-based and in proportion to the organisation's vulnerability to being misused for terrorism financing". But again the costs need to be taken into account. Not just the direct costs but the risks that such measures may hinder, or prevent, non-profits from operating. We expect that many will simply not be able to effectively comply, even if the obligations were implemented. It would potentially lead to significant non-compliance as well as the loss of relevant non-profits that provide real societal benefits. In addition, existing measures, including the capabilities of existing agencies to identify and address such risks, need to be taken into account. The AML/CFT regime should not be used as the sole or primary response to such risks. In our view the risks would have to be real and substantial to justify imposing this measure. That would have to include some wider evidence from the Police and other agencies that have established that this has actually happened or been attempted on multiple occasions. Otherwise this is simply a theory of risk that will quite likely impose costs out of proportion with the risks.
2.56.	**Should the AML/CFT Act define its territorial scope?** Yes. This is required. The supervisor guidance is limited and cannot properly address the absence of a territorial scope provision. This leads to uncertainty and

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
	difficulty in some cases in determining whether a person is subject to the AML/CFT Act. The paper notes changes to the FSP Act but does not address the key issue. Section 7A of the FSP Act sets out who the FSP Act applies to (it is, in effect, a territorial scope provision). A significant change implemented on 15 March 2021 was to extend the scope to a FSP that "is a reporting entity to which the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 applies." (where the relevant FSP is not already captured by another scope criterion in section 7A). The absence of a territorial scope provision in the AML/CFT Act means that the FSP Act itself is subject to the same uncertainties. The consequences are significant for an FSP that is within the territorial scope of the AML/CFT Act, and is in the business of providing financial services, but fails to register. The FSP (and potentially its directors) commit a criminal offence which carries a penalty of up to imprisonment for a term of up to 12 months on conviction for breach. We don't consider the level of uncertainty that the absence of a territorial scope causes is acceptable, given the real risk faced by FSPs that get their assessment of the territorial scope of the AML/CFT Act wrong (which is possible given the high level of uncertainty currently).
2.57.	**If so, how should the Act define a business or activity to be within the Act's territorial scope?** We suggest that the "carrying on business" test (or similar) under the Companies Act 1993 is used to establish territorial scope (this approach has been adopted in Australia). However, this test has its limitations including that it is vague and there is little case law that assists with its interpretation, despite being in force for decades. We recommend that careful consideration is given to the definition. Inadequacies in the territorial scope of the FSP Act lead to significant issues. The territorial scope of the FSP Act has been completely re-written three times since the FSP Act was enacted in 2008, to try to address issues. This highlights that this is not an easy area and, in our view, significant time and effort should be taken to develop the territorial scope.
3.1.	**Is the AML/CFT supervisory model fit-for-purpose or should we consider changing it?** In our review the supervisory regime is, overall, not fit-for-purpose and should be changed. We don't consider that the supervisors or other agencies have adapted effective co-operation arrangements with the resultant inconsistencies and differences of approach we have noted in these submissions. That's despite the AML/CFT mandating the creation of a co-ordination committee. It does not appear that this has been effective and indicates that a weak co-ordination obligation is not sufficient to overcome the tendency of agencies to adopt silo-ed approaches. A recent example of this was the "Assessing Country Risk: Guideline for reporting entities supervised by DIA" published by the DIA in June 2021. This document is 19 pages long, addressees requirements that apply to all reporting entities, does not address any sector specific matters and could (and does in practice) apply to every reporting entity. In our view there is no valid reason for this to have been published by DIA in isolation since it is equally applicable to all reporting entities. This publication has not been listed by the Reserve Bank or FMA on their websites so their supervised reporting entities may not know of its existence. Yet the guideline it is "applicable guidance material produced by AML/CFT supervisors or the Commissioner relating to risk assessments." that a

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
	reporting entity is required to have regard to (section 58(2)(g)). Moreover, the DIA's guideline overlaps to a significant degree with the Supervisors' "Countries Assessment Guidelines". A much approach may be to update the current guideline to reflect, rather than to issue an overlapping guideline, which is unnecessary and confusing for reporting entities. This example indicates that co-ordination is becoming less effective, not better, and that changes are required.
3.2.	**If it were to change, what supervisory model do you think would be more effective in a New Zealand context?** We can see virtue in continuing to have the three supervisors each having responsibility for monitoring for compliance and taking action to address non-compliance. We propose that a central function be established with its own mandate, management and budget to oversee and manage the administration of the AML/CFT regime including with power to develop and approve guidance materials and codes of practice, and to publish relevant information in a coherent, user-friendly and co-ordinated way. This function can develop as a centre of excellence by bringing together core capability and know-how in one area rather than it being thinly spread and poorly co-ordinated across multiple agencies. This function should apply to all activities that are common across reporting entities but aren't sector specific (or only in minor ways) including preparing and updating guides in relation to establishing and implementing risk assessments and compliance programmes. For example, this function would have been responsible for developing an equivalent to the "Assessing Country Risk: Guideline for reporting entities supervised by DIA" but applicable to all reporting entities (see our comments on that in response to question 3.1). Individual supervisors could be given discretion to prepare their own guides on matters specific to their sectors but those guides should be subject to approval by that function, to ensure that they are consistent with other materials and are presented in a consistent way.
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?** No, the AML/CFT Act does not ensure consistency despite attempting to mandate that via the co-ordination provisions. We consider that the inconsistencies are greater than the paper indicates. Please see our responses to questions 3.1 and 3.2, which are also applicable to this question.
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?** No. We consider that the inconsistencies are greater than the paper indicates. Please see our responses to questions 3.1 and 3.2, which are also applicable to this question. We consider that something more than a legislative mechanism for co-ordination is required. We have proposed that a separate function be established to carry out core functions. We have not proposed that any particular agency incorporate that function and we don't consider it is necessary that a stand-alone agency be established for that purpose. It seems quite feasible to establish it within an existing agency but with a separate budget and management function to ensure it can maintain its role and visibility.

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
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?** We don't consider AML/CFT legislation is an appropriate place to address this. Consultants provide a wide range of services to businesses in many areas and we do not see any reason why any issues presented by consultants in relation to AML/CFT are of greater concern than in other areas. Businesses are familiar with using a wide range of consultants for different purposes and are used to making judgments about associated risks. This is an area where we consider the market is best placed to address risks. It is very likely that over time the quality of the services provided by consultants has risen with a general increase in AML/CFT skills and know how across a broad range of businesses.
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?** No. AML/CFT legislation is not an appropriate place to set out an occupational conduct regime. This is unrelated to the purpose and focus of the regime and we cannot see how there is significant value in focusing the available resource on these matters.
3.17.	**Who would be responsible for enforcing the standard of consultants?** It is difficult to know since, as noted above, regulating occupations is unrelated to the purpose of the AML/CFT Act.
3.25.	**Would broadening the scope of civil sanctions to include directors and senior management support compliance outcomes? Should this include other employees?** This may support compliance outcomes but it has significant disadvantages that we consider likely outweigh the benefits. It is likely to create a significant disincentive for individuals to take up such roles particularly as professional indemnity insurance for directors and senior managers is becoming increasingly expensive and limited.
3.26.	**If penalties could apply to senior managers and directors, what is the appropriate penalty amount?** Any penalties should be kept to a reasonable level to reflect the very serious personal implications for the relevant directors and senior managers especially in relation to civil breaches.
3.27.	**Should compliance officers also be subject to sanctions or provided protection from sanctions when acting in good faith?** See our answer to question 3.25.
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 we can see clear value in that. We suggest that SoF be limited to matters involving fund transfers and should not apply to other transactions or services.

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
4.30.	**Have you encountered issues with the definition of a beneficial owner? If so, what about the definition was unclear or problematic?** It is clear that the definition of a beneficial owner in the AML/CFT is deficient, with the supervisors effectively re-interpreting that definition to obtain a more logical outcome. We consider that the re-interpretation is largely adequate but we think more specific guidance is required in some areas, either via regulations or codes of conduct. In particular, we see real value in "safe harbours" that identify when certain persons are not beneficial owners because of "effective control".
4.31.	**How can we improve the definition in the Act as well as in guidance to address those challenges?** As noted above we consider that more definitions/guidance are required to clarify when "effective control" arises. The current guideline is vague, for example where multiple persons have power to appoint/remove directors of a company. The tendency appears to be to take cautious approach that increases costs and difficulties onboarding customers without any apparent substantive benefit.
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?** Yes. We have no suggestions for the definition.
4.33.	**To extent are you focusing beneficial ownership checks on the 'ultimate' beneficial owner, even though it is not strictly required?** Yes.
4.34.	**Would there be any additional costs resulting from prescribing that businesses should focus on the 'ultimate' beneficial owner?** Not in practice since this is often the focus.
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?** Yes.
4.51.	**In your view, when should address information be verified, and should that verification occur?** As noted in the discussion document, only for higher risk customers.
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?** We query what substantive mischief address verification is addressing. We suggest that address verification only be required in areas where the use of false addresses is likely a real and substantive contributor/enabler of ML/TF. In practice it's likely quite easy for an individual to create a false address or to create a temporary address and it will always be difficult to prove an address is legitimate (especially for a person who does not own real estate).

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
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?** This would impose very significant burdens on the many small businesses that are subject to AML/CFT obligations. It is not entirely clear how obtaining significant additional information addresses the ML/TF risk. In practice risks can be identified and addressed (including through suspicious activity reports) on an ongoing basis.
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, definitely. The discussion document states that "not all trusts are inherently high risk". In fact, in New Zealand, a large majority of trusts will not be inherently high risk. Rather, high risk is the exception. Setting up trusts is very common in New Zealand and in most cases they are set up for legitimate purposes and this should be acknowledged. In our view the costs of applying ECDD to all trusts is significantly out of proportion to the risks posed.
4.61.	**Are the ongoing CDD and account monitoring obligations in section 31 clear and appropriate, or are there changes we should consider making?** No they are not clear or appropriate. For a start, they mix ongoing CDD and account monitoring, which have a different focus, yet the relevant requirements are treated (or assumed by the law) to be equally applicable. So we consider that ongoing CDD and account monitoring requirements should be split into separate provisions. "Account monitoring" is a concept that isn't always relevant to the types of activities carried out by DNFBPs and this should be addressed in our view.
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?** No, the definition should not be extended to include domestic PEPs. The costs of implementing that would likely be significant but would likely provide very limited benefit. This takes into account the low level of corruption in New Zealand including at government level. We query also the benefit of adding PEPs from international organisations. A key question is whether there is any reliable way for a business to obtain such information. We note that PEP checks already absorb significant reporting entity resource with many false positives and dealing with issues of many people having the same names. So we don't consider there is any significant benefit to be obtained, relative to the significant costs involved.
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?** We consider that "reasonable steps" is aligned with FATF expectations, given that FATF's regime is risk-based. The discussion document notes the "FATF does not consider simply relying on commercial databases to be sufficient." However, it is difficult for many businesses, particularly small businesses, to take many further substantive steps to identify PEPs that are reasonable and proportionate. It is practically impossible to establish that someone isn't a PEP and any new obligations in that regard would require extensive and entirely impractical steps.

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
	Overall we consider that the current requirement, and the approach of reporting entities, are reasonable to address the associated risk.
4.90.	**Should the Act clearly allow business to consider their level of exposure to foreign PEPs when determining the extent to which they need to take proactive steps?** Yes.
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?** The activities and risks presented by agents need to be addressed by reporting entities in their risk assessments and, where relevant, their compliance programmes. So we don't consider it is the case that MVTS lack responsibility; they have responsibilities under the AML/CFT Act. Making MVTS liable would likely have significant unintended consequences potentially including further reducing access to money remittance services.
4.139	**What challenges have you encountered with the definitions involved in a wire transfer, including international wire transfers?** The term "carried out on behalf of a person (the originator) through a reporting entity by electronic means…" is inherently unclear where trust accounts at a bank are involved. The concept of PTR was developed for money remittance businesses but is difficult to apply to other arrangements. A key issue is the law was not designed to deal with non-standard arrangements and is difficult to apply with certainty in those cases. In particular, on one interpretation, the bank account holder (rather than the financial institution) is the person carrying out the transaction. In practice banks tend to impose the PTR obligation on the account holder in that case even if the bank itself also completes PTR in relation to the same transactions. The related guidance and commentary on this is varied and generally does not help with clarifying how the law applies, for example as set out in: • Treasury's "Review of the Money Remittance Market in New Zealand" • The supervisor "Wire Transfer Factsheet" • FMA's online guidance (https://www.fma.govt.nz/compliance/amlcft/) FMA's online guidance states: *"In the case of an international wire transfer, the first reporting entity to transfer funds, and the last reporting entity to receive funds, must do a PTR. We expect that a reporting entity that receives and/or passes on instructions from a client to do an international wire transfer, but does not actually transfer the funds, is not required to do a PTR. This means that international wire transfers carried out by a bank on behalf of another reporting entity will be reportable by the bank."* FMA's guidance is of limited help as it appears to assume a pure agency relationship and doesn't address more complex arrangements that arise including the examples we have noted. We consider that there is a need to clarify exactly who should have the prescribed transaction reporting obligation, to avoid overlaps and ongoing uncertainty, and

Question No	Cygnus Law's Submissions (consultation paper questions in bold)
	to recognise that the definition was not developed with more complex relationships in mind.
4.140	**Do the definitions need to be modernised and amended to be better reflect business practices? If so, how?** Yes. For one example, please see the answer to question 4.139.
4.160	**Should non-bank financial institutions (other than MVTS providers) and DNFBPs be required to report PTRs for international fund transfers?** No.
4.193	**Should legislation state that the purpose of independent audits is to test the effectiveness of a business's AML/CFT system?** No. This would require a comprehensive review of the entire system, in effect requiring the auditor to re-validate the whole risk assessment, compliance programme and their implementation. This would be particularly difficult for more complex businesses. While this would improve compliance, the costs would be significant and would likely be greater than any benefits obtained, assuming there are sufficient auditors capable of carrying out the review to that extent. An option would be to only require that level of audit as a potential remedial action by a supervisor in the event significant non-compliance was identified.

Yours sincerely
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