

16th September 2016

Attention:
Anti-Money Laundering/Countering Financing of Terrorism Consultation Team
Ministry of Justice
SX 10088
Wellington 6140

By email: aml@justice.govt.nz

Submission on consultation paper (August 2016) on Phase Two of the AML/CFT Act

Kiwibank welcomes the opportunity to submit on the consultation paper on the above.

Executive Summary

1. Kiwibank is supportive of the scope of the Phase Two reforms of the Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) Act 2009. Kiwibank submits that the businesses and professions proposed to be included within the Phase Two reforms present an inherently high risk of money laundering and it is Kiwibank's view that it is appropriate for these types of businesses and professions to be subject to the AML/CFT legislation. Kiwibank submits that the Phase Two reforms are necessary to ensure New Zealand's AML/CFT framework aligns with international standards and avoids New Zealand being a soft target for money laundering or terrorist financing.
2. Kiwibank submits that the cornerstone to an effective AML/CFT framework is an effective supervisory model. Kiwibank is a member of a Designated Business Group that is uniquely supervised by all three existing AML/CFT supervisors. It is Kiwibank's view that there are inefficiencies and the risk of inconsistency with the existing multiple supervisor model and changes are required with the establishment of a new single supervisor. Kiwibank does not support a multiple supervisor model that contains multiple agencies. In addition the inclusion of self-regulatory bodies would further contribute to the risk of inconsistent standards and inefficient use of resource. Kiwibank submits that the establishment of a new, well-resourced, single AML/CFT supervisor will require investment and an extended period to successfully implement. However, it is Kiwibank's view that this is the best option to ensure an effective and sustainable AML/CFT framework and supervision thereof.
3. Kiwibank submits that businesses and professions under Phase Two should be permitted an implementation timeframe of two years. It is Kiwibank's view that the implementation timeframe should commence once all relevant regulations have been gazetted. Kiwibank submits that this approach is consistent with Phase One and will provide those businesses and professions under Phase Two with a reasonable timeframe to comply with the new requirements.
4. Kiwibank submits that greater collaboration between AML/CFT supervisors, Police Financial Intelligence Unit (FIU), government agencies and reporting entities is needed. This collaboration is required to create a more effective AML/CFT framework that facilitates greater prevention and detection of criminal activity. It is Kiwibank's view that where there are reasonable grounds to suspect a person may be involved in money laundering or terrorism related activities then information sharing should be permitted.

5. Kiwibank submits that the existing third party reliance provisions within the AML/CFT Act 2009 are sufficient and appropriate under both the current regime and also Phase Two. Kiwibank submits that the current third party reliance provisions provide sufficient flexibility for reporting entities to meet various AML/CFT obligations. Kiwibank submits that a reporting entity remains ultimately responsible for its compliance with AML/CFT obligations. This includes when another reporting entity is a customer or the originator of a transaction or funds. It is Kiwibank's view that a compliant AML/CFT programme does not necessarily mean a reporting entity presents a low risk of money laundering or terrorist financing.

Supervision

Question: Do you think any of our existing sector supervisors (the Reserve Bank, the Financial Markets Authority and the Department of Internal Affairs) are appropriate agencies for the supervision of Phase Two businesses? If not, what other agencies do you think should be considered? Please tell us why. Are there other advantages or disadvantages to the options in addition to those outlined in the consultation document?

Single supervisor

6. Kiwibank's strong preference is the establishment of a single AML/CFT supervisor who would be responsible for supervising reporting entities under both Phase 1 and Phase 2.
7. Kiwibank understands that the establishment of a new, well-resourced, single AML/CFT supervisor will require investment and an extended period to successfully implement. However, it is Kiwibank's view that this is the best option to ensure an effective and sustainable AML/CFT framework and supervision thereof within New Zealand.
8. Kiwibank submits that the single AML/CFT supervisor should have close liaison with existing supervisors to obtain a good understanding of existing business practices and avoid any duplication of effort.
9. Kiwibank is a member of a Designated Business Group which uniquely includes reporting entities who are subject to supervision by all three existing AML/CFT supervisors. Based on our experience there are already inconsistencies with the approaches adopted by the existing AML/CFT supervisors. It is Kiwibank's view that additional supervisors for supervising the Phase Two businesses and professions would further contribute to the risk of inconsistent standards and inefficient use of resource.
10. Kiwibank is generally supportive of the Australian AML/CFT supervisory model where there is a single supervisor (AUSTRAC) who is responsible for regulatory monitoring and enforcement of AML/CFT obligations. However, AUSTRAC is also responsible for operating a secondary arm as Australia's Financial Intelligence Unit. Kiwibank submits that New Zealand's Financial Intelligence Unit should remain within the New Zealand Police and independent of a single supervisor. It is Kiwibank's view that the same agency should not operate as both a supervisory function and an intelligence gathering function. It is Kiwibank's view that this model can potentially result in segregation of duties issues.

Multiple agencies with self-regulatory bodies

11. Kiwibank does not support a multiple supervisor model that contains multiple agencies with self-regulatory bodies. Kiwibank submits that this type of model is generally ineffective based on international experience. In addition the inclusion of self-regulatory bodies would further contribute to the risk of inconsistent standards and inefficient use of resource.
12. The existing supervisory model in the United Kingdom (U.K.) includes multiple AML/CFT supervisors across multiple sectors. At the time this model was implemented it was considered to be the most cost effective. However, in November 2015 Transparency International U.K. (a non-governmental anti-corruption organisation) published a report¹ on the U.K.'s weaknesses in the supervision of its AML/CFT obligations.

¹ <http://www.transparency.org.uk/publications/dont-look-wont-find-weaknesses-in-the-supervision-of-the-uks-anti-money-laundering-rules/>

13. This report identified that, in some sectors, having multiple supervisors led to widespread inconsistencies and variations across the sector. The report has recommended a number of changes including the consolidation of multiple supervisors into a well-resourced single supervisor. Kiwibank acknowledges that utilising multiple, existing sector agencies to perform AML/CFT supervisory functions may appear to be the most cost and time effective option for New Zealand in the short-term. However, based on the U.K. experience, it is Kiwibank's view that a multiple supervisor model may not be the most cost effective in the long term nor the most effective for preventing or detecting money laundering.

Alternative approach

14. If a single AML/CFT supervisor model is not adopted, Kiwibank submits an alternative option could be for all reporting entities covered by the Phase Two changes to be subject to supervision, including on-site inspections, by the Department of Internal Affairs.

15. It is Kiwibank's view that reporting entities currently subject to supervision by either the Reserve Bank or Financial Markets Authority should continue with their supervision of their current reporting entities. Kiwibank submits that this alternative option is a hybrid approach of a single supervisor model and a multiple supervisor model. It is Kiwibank's view that this hybrid approach could help to minimise the likelihood of any further inconsistencies within New Zealand's AML/CFT supervisory framework.

Enhancing the AML/CFT Act

Expanded reporting to the Police Financial Intelligence Unit

Question: Should the current requirement to report suspicious transactions be expanded to reporting suspicious activities? Please tell us why or why not.

16. Kiwibank supports the expansion of reporting to also include suspicious activities. Kiwibank submits that there are some scenarios that could relate to money laundering or terrorism related activity, but due to there being an absence of an actual or proposed transaction they would not currently be reported. This includes the following:

- a. Actual or proposed establishment of a company through a company formation agent for the purpose of facilitating money laundering or terrorist related activities.
- b. Actual or proposed establishment of a complex trust through a professional intermediary to conceal the underlying beneficial owners.

17. Under the current AML/CFT legislation there is no reporting obligation unless there is an actual or proposed transaction.

18. Kiwibank submits that reporting suspicious activities is particularly relevant in the establishment of legal entities such as companies and trusts for the purpose of facilitating money laundering and terrorism related activities in the future.

19. Kiwibank submits that extending the reporting obligation to suspicious activities will address the current deficiency and ensure New Zealand's AML/CFT reporting regime better aligns to international good practice. This will provide the FIU with a greater pool of intelligence that could be relevant to preventing and detecting money laundering and terrorism.

20. Kiwibank submits that further guidance should be published to provide examples of different scenarios where the reporting of suspicious activity would be required. Kiwibank submits that this additional guidance should also include examples of what does and what doesn't constitute 'tipping off' if a reporting entity is contemplating reporting suspicious activity.

Information Sharing

Question: Should industry regulators be able to share AML/CFT-related information with government agencies?

Question: Should AML/CFT supervisors be able to share customers' AML/CFT-related personal information with government agencies?

21. Kiwibank submits that greater collaboration between AML/CFT supervisors and government agencies is required to create a more effective AML/CFT framework that facilitates greater prevention and detection of criminal activity. It is Kiwibank's view that where an AML/CFT supervisor has reasonable grounds to suspect a person may be involved in money laundering or terrorism related activities (including predicate offences) then an AML/CFT supervisor should be permitted to share that person's personal information with other government agencies.
22. Kiwibank submits that there would be limited circumstances where an AML/CFT supervisor would have access to a person's personal information and also have reasonable grounds to suspect money laundering or terrorist financing *e.g. information obtained as part of an on-site inspection*. In this particular circumstance it is Kiwibank's view that an AML/CFT supervisor should inform the reporting entity of their specific concerns, prior to any disclosure of any personal information to a government agency *e.g. submission of a suspicion transaction report*.
23. Kiwibank submits that the primary focus of an AML/CFT supervisor should be the supervision of reporting entities' compliance with AML/CFT obligations rather than operational tasks. Where a supervisor believes a reporting entity has not complied with suspicious transaction reporting obligations, it is Kiwibank's view that it is a reporting entity's obligation to report, rather than an AML/CFT supervisor. However, Kiwibank submits that in exceptional circumstances an AML/CFT supervisor should have the power to submit a suspicious transaction report (STR) if a reporting entity refuses after concerns have been raised by that AML/CFT supervisor.
24. However, Kiwibank submits that appropriate safeguards must be in place to ensure the misuse of sharing a person's personal information is not abused. It is Kiwibank's view that there must be appropriate checks and balances implemented to ensure the 'reasonable grounds to suspect' test is met. Kiwibank submits that there should be specific legislation outlining the appropriate safeguards.

Question: What are the appropriate circumstances under which the FIU can share financial intelligence with government agencies (such as the sector supervisors, industry regulators, intelligence agencies, IRD and Customs) and reporting entities? What protections should apply?

25. Kiwibank submits that the sharing of financial intelligence with government agencies and reporting entities is necessary to strengthen New Zealand's AML/CFT regime and further disrupt criminal activity. For example, a STR may have been submitted on a customer of one reporting entity. That same customer may also have a business relationship with a number of other reporting entities. Kiwibank submits that the FIU should be able to share this STR information with other government agencies and reporting entities where the FIU has reasonable grounds to suspect money laundering or terrorism.
26. Kiwibank submits that the FIU should have the ability to disclose financial intelligence to both government agencies and reporting entities where there are reasonable grounds to suspect a person may be involved in money laundering or terrorism related activities (including predicate offences). Circumstances should also include the prevention, detection and investigation of money laundering and terrorism related activities.

27. In terms of protections, Kiwibank submits that there must be appropriate checks and balances implemented to ensure the 'reasonable grounds to suspect' test is met.

Question: What restrictions should be placed on information sharing?

28. Kiwibank submits that there is a general duty of confidentiality to a customer and their personal information should be protected and not disclosed to third parties. However, it is Kiwibank's view that this duty is not absolute *e.g. reporting of suspicious transactions*.

29. Kiwibank submits that the disclosure of personal information is permissible in certain circumstances under the Principle 11(e) of the Privacy Act 1993. This includes disclosure to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences. However it is Kiwibank's view that Principle 11(e) creates some ambiguity for reporting entities around when and what personal information can be disclosed. Kiwibank submits that specific information sharing provisions should be inserted into AML/CFT Act to provide greater clarity around when personal information can be disclosed.

30. Kiwibank submits that information sharing enhancements across both the private and public sector would make a significant impact on identifying and disrupting criminal activity.

31. As submitted above, the sharing of information between the Police FIU, government agencies, and reporting entities should be restricted to information that relates to the prevention, detection and investigation of money laundering and terrorism related activities.

Reliance on Third Parties

Question: Are the existing provisions that allow reporting entities to rely on third parties to meet their AML/CFT obligations sufficient and appropriate? If not, what changes should be made?

32. Kiwibank submits that the existing third party reliance provisions within the AML/CFT Act are sufficient and appropriate under both the current regime and also Phase Two. Kiwibank submits that the current third party reliance provisions provide sufficient flexibility for reporting entities to meet various AML/CFT obligations. Kiwibank would be concerned if the current third party reliance provisions were extended to simply allow one reporting entity to rely upon another reporting entity in the absence of any written agreement or consent.

33. It is Kiwibank's view that consent must always be obtained where one reporting entity seeks to place reliance on a reporting entity to comply with specific AML/CFT obligations *e.g. customer due diligence*. Kiwibank submits that a reporting entity should also reserve the right to not provide that consent. Kiwibank is concerned that if the current consent requirement is removed then this will weaken New Zealand's AML/CFT framework.

34. Under the Financial Transactions Reporting Act 1996 (FTRA) a financial institution could satisfy verification requirements for a facility holder by just confirming the facility holder held a facility at another financial institution. Consent was not required to be obtained and copies of verification documentation were not required to be provided either. It is Kiwibank's understanding that the Financial Action Task Force (FATF) was critical of this section of the FTRA when they initially assessed New Zealand's level of compliance with the FATF Recommendations.

35. Kiwibank submits that long standing financial institutions will have a proportion of customers who were on-boarded prior to the AML/CFT Act coming into force at 30 June 2013. A percentage of these 'legacy customers' will not necessarily have been subject to the customer due diligence standards required under the AML/CFT Act. Therefore, if a reporting entity seeks to place reliance on a third party/reporting entity without consent, the former reporting entity may be placing reliance on information that is not to the standard as required under the AML/CFT Act.
36. Kiwibank submits that a reporting entity remains ultimately responsible for its compliance with AML/CFT obligations. It is Kiwibank's view that allowing one reporting entity to place reliance on another reporting, without consent, assumes a person has been subject to the appropriate customer due diligence when in fact they may not have.
37. Kiwibank submits that financial transactions can often be complex and flow through multiple reporting entities. This can be further complicated when a reporting entity is also a customer of another reporting entity. Kiwibank's view is that where financial transactions involve multiple reporting entities, each reporting entity remains ultimately responsible for its compliance with AML/CFT obligations.
38. Kiwibank submits that where multiple reporting entities are involved in a chain of transactions there will be varying degrees of transparency over underlying customer and transactional information. It is Kiwibank's view that it is more robust for each reporting entity to monitor their respective portion of the transaction, rather than placing reliance on another reporting entity. Kiwibank submits that this is particularly important where there is a cross border component within the chain of transactions as there is a heightened risk of money laundering or terrorist financing.
39. Kiwibank submits that just because a reporting entity may have a compliant AML/CFT programme this does not necessarily mean they present a low risk of money laundering or terrorist financing. It is Kiwibank's view that money laundering and terrorist financing is broader than just strict regulatory compliance. Kiwibank submits that there are also reputational factors to consider as well. Being associated with money laundering or terrorist financing can cause significant reputational damage even if a reporting entity has a compliant AML/CFT programme.
40. Kiwibank submits that a reporting entity should not be able to place reliance on another reporting entity in terms of transaction monitoring of suspicious transaction reporting, simply because the transaction or funds have originated from another reporting entity.

Trust and Company Service Providers

Question: Should the scope of the provision requiring persons providing trust and company services to comply with the AML/CFT Act be extended to activities carried out in the ordinary course of business, rather than just when they're the only or principal part of a business?

41. Kiwibank supports the scope extension due to the high money laundering risk with these types of services the extension is justified and will align with other professions under Phase Two that also present a high money laundering risk.

Simplified Customer Due Diligence

Question: Should the simplified customer due diligence provisions be extended to the types of low-risk institutions we've proposed above? If not, why?

42. Kiwibank supports the proposed additional types of low risk institutions where simplified due diligence can be applied. In particular, Kiwibank is supportive of the proposed changes in relation to majority owned subsidiaries of publicly listed companies (both in New Zealand and overseas).

Question: Should we consider extending the provisions to any other institutions?

43. Kiwibank submits that other than the proposed institutions outlined in the consultation document the simplified due diligence provisions should not be extended to any other institutions.

If you have any questions please contact me on liz.knight@kiwibank.co.nz or 04 816 1554 or Damian Henry on damian.henry@kiwibank.co.nz or 04 439 6978.

Yours sincerely,



Liz Knight
General Manager Operational Risk and Compliance (AML/CFT Compliance Officer)
Kiwibank Limited