

Ministry of Justice Consultation Paper – Phase Two of the AML/CFT Act

First NZ Capital Submission

Part 3 Sector-Specific Issues and Questions

Lawyers

1. We submit that the legal services listed on page 13 of the Consultation Paper should be subject to AML/CFT requirements when provided in the ordinary course of business. Further, it is our view that the following additional services also should be included:

- Trustee company services
- Escrow services and arrangements
- Preparing for or carrying out transactions for customers related to the acquisition of an ownership interest in a company or business (this should not be limited to NZ domicile)
- Trust account facility – holding funds in the firm Trust Account

We submit that the point of engagement should be the stage at which the AML/CFT checks and assessments are carried out. We understand that the Rules of Conduct and Care specify requirements for Lawyers with respect to client care obligations, including certain information to be provided to clients at the outset of an engagement, standard terms and conditions and letter of engagement. We consider that this is the point of engagement with the client and accordingly is the stage at which client due diligence checks and assessments in accordance with the AML/CFT legislation should be completed. With respect to the Trust Account facility service above, it would be our expectation that a letter of engagement would be required and CDD completed as above. If not, CDD would need to be completed prior to any funds being received in the Trust Account. For the purposes of suspicious transaction reports, these should be submitted at the time a suspicion is raised, which could be prior to an engagement that never came to fruition due to firm or the potential client not pursuing the engagement. For the purposes of reporting, this should be placed on the firm's appointed Compliance Officer, accordingly this will need to be a partner or director of the firm, or someone else in a high level position of responsibility such as a chief executive officer.

We submit that AML/CFT needs to be considered with respect to the practicing rules. Further, there is a potential issue for the legal profession with respect to the ability of the lawyer to refuse instructions. The parameters for this refusal are prescribed in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 clause 4. The parameters for refusing to accept instructions are very limited, in brief: outside normal field of practice, breach of professional obligation and unwillingness or inability to pay normal fee. We submit that these parameters may need to be reviewed. The legal profession should be able to refuse to act for a client in the event that a client fails to meet the AML/CFT requirements of the applicable firm.

2. We submit that the current mechanism for protecting legal professional privilege is not appropriate within the realms of AML/CFT. The very premise of the AML/CFT is to 'detect and deter'. In the event a lawyer is exposed to, or comes in to contact with, ML/FT or potentially becomes aware of an activity or transaction that would be suspicious, that lawyer needs to be in a position to be required to report the same. In the event of a privilege protection that has the ability to defeat this requirement, the purpose of the Act will be undermined, in particular with respect to detection. We are of the view that industry guidance on the relationship between the requirements of the AML/CFT Act and legal professional privilege will need to be prepared and published. We have reviewed the UK Law Society Chapter 6 Legal Professional Privilege referred to in the Consultation Paper. We submit that this document would be a useful and practical guide for the preparation of a NZ equivalent.

Accountants

3. We submit that the AML/CFT requirements for lawyers and accountants should be the same. Accordingly, the services listed on page 17 of the Consultation Paper should be subject to AML/CFT

requirements when provided in the ordinary course of business, as above the following additional services also should be included:

- Trustee company services
- Escrow services and arrangements
- Preparing for or carrying out transactions for customers related to the acquisition of an ownership interest in a company or business (this should not be limited to NZ domicile)

We submit that, as with Lawyers, the point of engagement between the accountant/accountancy firm and the client should be the stage at which the AML/CFT checks and assessments should be carried out. Our comments with respect to lawyers above are applicable to accountants also.

4. We submit that the AML/CFT obligations should also be applicable to advisory and assurance services such as tax advice, bookkeeping and auditing. We submit that these services would be critical to the detection of ML/FT. We note that the UK and Canada capture these services, and further note that including these services would future proof the regime.

Real Estate and Conveyancing

5. We submit that the services listed on page 20 of the Consultation Paper should be subject to AML/CFT requirements. However, these should be extended to include 'offering' to provide as well to capture the circumstances where the transaction is not completed but a deposit made, see bullet point 2 on page 19. We submit that the checks and assessments will need to be carried out at the point of engagement, however, in the real estate industry this differs depending on whether the client is the buyer or the seller. The real estate agent always acts for the seller, and accordingly the seller will enter into an agency agreement with the agent for the purposes of engagement, AML/CFT customer due diligence should be carried out at that point. However, a buyer will not enter into an equivalent arrangement. Accordingly, we submit that the point of engagement for a buyer, and the time at which the AML/CFT customer due diligence should be carried out is when an offer is to be made to a seller. For completeness, the agent for the seller will be required to carry out customer due diligence for both the buyer and seller.

For the purposes of suspicious transaction reports, these should be submitted at the time a suspicion is raised, which could be prior to a transaction that never came to fruition for whatever reason. For the purposes of reporting, this should be placed personally on the agent, and also where the agent works within a firm, that firm also.

6. We submit that the property development sector should also maintain obligations under the AML/CFT Act. This will need to extend to and capture the investors within the property development. The trigger point for customer due diligence will need to be the transaction. The 'transaction' will need to be broadly defined to ensure that all aspects and persons/investors involved in the transaction will be subject to AML/CFT. What also constitutes a 'property development' will also need careful consideration. For example, the intention should not be to capture a one-off small subdivision by mum and dad.
7. For the purposes of when to carry out customer due diligence, please see paragraph 5 above.

High Value Goods

8. We submit that the AML/CFT requirements should apply to all high-value goods. It is our view that it is better to take a broad approach as opposed to focussing on certain industries such as vehicles and jewellery. This view is expressed on the basis that those involved with ML/FT are ever changing and adept at diversifying, accordingly, in the event one sector is subject to AML/CFT, those involved with ML/FT will turn to another. This approach looks to future proof the industry. Whilst it may be perceived as draconian, it is only applicable to actual cash transactions.
9. We submit that the appropriate threshold for cash transactions is \$10,000.00. We are of the view that this aligns with other prescribed transaction thresholds.

Gambling Sector

10. We have limited experience in this area and accordingly, do not wish to make a submission.

Part 4 Supervision

11. We submit that the current supervisory regime is not suitable for the supervision of the businesses captured in Phase Two. Further, it is our view that the current supervisory regime is unfortunately not regulating the sectors that came within the AML/CFT regime through Phase One in a suitable manner. We submit that the Financial Markets Authority, Department of Internal Affairs and the Reserve Bank all appear to interpret and apply the AML/CFT Act differently and with varying degrees. Further, all agencies appear to be under-staffed and do not maintain the depth of knowledge that this growing industry needs and will need in the future, particularly with respect to the introduction of Phase Two.
12. We submit that there needs to be a further third alternative that provides for multiple self-regulating sector specific bodies that focus on their respective industry, such as the law society and real estate agents association, which then report in to a single supervisor. This is a combination of the two alternative methods presented in the Consultation Paper. It is our view that this model will enable those with expertise in the sector to deal with their sector and the nuances of that sector, but also enable the one over-arching supervisor to provide consistent leadership and regulation.
13. Further, we are of the view that this approach should be applied to Phase 1. Accordingly, a full review of the supervisory regime for AML/CFT should be undertaken. It is our submission that the full supervisory regime encapsulating all sectors regulated by the AML/CFT Act should be comprised of multiple self-regulating sector specific bodies that focus on their respective industry, with the one single over-arching supervisor. We are of the view that the FMA would be best placed to fulfil the role of over-arching supervisor.

Part 5 Implementation period and costs

14. No submission.

Part 6 Enhancing the AML/CFT Act

Expanded Reporting to the Police Financial Intelligence Unit

15. We submit that the current requirement to report suspicious transactions should be expanded to reporting suspicious activities.
16. We further submit that it would be beneficial for the FIU to release guidelines on what the FIU considers to be “suspicious activity” and “suspicious transactions”.

Information Sharing

17. Industry regulators should share AML/CFT related information with government agencies on request.
18. We submit that the sharing of AML/CFT related personal information by AML/CFT supervisors with government agencies will, in the first instance, depend on the supervisory model that is adopted. Further, it will also depend on the inter-relationship of agents and supervisors. The concept in very general terms sounds feasible, however, we appreciate that there will be significant privacy issues with respect to this proposition.
19. We submit that reporting entities should be able to approach the FIU and ask questions about proposed customers, for instance has this person been rejected by another reporting entity. A customer will continue to try to get access to a reporting entity until they find one that accepts them. There should be a central depot holding information that can be shared across reporting entities and government departments. We submit it would be helpful for the FIU to issue monthly lists of persons convicted of AML/CFT related predicate offences then a reporting entity can check for accounts that involve that name. We understand that other jurisdictions do this. We are of the view that the bulk of this information would be publicly available following judicial proceedings.

20. The restrictions would need to be clear and stringently regulated. The information would need to be limited to the appointed Compliance professional and the directors of the company where relevant.

Reliance on third parties

21. We submit that a third party, the intermediary, has been inadvertently missed from this list. We submit that the existing provisions to allow reporting entities to rely on third parties to meet their AML/CFT obligations are sufficient and appropriate.

Trust and Company service providers

22. We submit that all activities carried out in the ordinary course of business by persons providing trust and company services should be caught by the AML/CFT Act.

Simplified Customer due diligence

23. We submit that the simplified customer due diligence provisions should be extended to the low risk institutions proposed in the Consultation Paper.