FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

3 February 2017

Ms Carolyn Marsden
Senior Legal Officer
Financial Crime Section, Transnational Crime Branch
Criminal Justice Policy and Programmes Division
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Email: antimoneylaundering@ag.gov.au.

Dear Ms Marsden

Re. Phase 1 amendments to the AML/CTF Act 2006

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback on the Attorney-General's Department's industry consultation paper on the phase 1 amendments to the AML/CTF Act.

The financial planning profession operates under the Australian Financial Services Licensing (AFSL) regime of the Corporations Act, with financial planners providing direct services to clients under the auspices of a license holder. While financial planners make 'arrangements' for clients, they do not make transactions. This makes financial planning services unique in relation to the AML/CTF regime. As such, financial planners are categorised as Item 54 reporting entities, some of whom may also provide occasional Item 33 designated services.

We have provided feedback regarding the practicalities of the proposed amendments and how they interact with other legal and professional obligations of financial planning professionals and the services they provide to their clients.

If you have any questions, please contact me on 02 9220 4500 or heather.mcevoy@fpa.com.au.

Yours sincerely

Heather McEvoy
Policy Manager
Financial Planning Association of Australia[1]

[1] The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Mark Vincent, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board.

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Phase 1 amendments to the AML/CTF Act 2006

FPA submission to the Attorney-General's Department

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Aligning government policy proposals

Treasury - Protecting reporting entities

Many laws, such as the Anti Money Laundering and Counter Terrorism Financing (AML/CTF) Act, mandate professional service providers to report the suspicious behaviour of customers. This compels the service provider into the role of whistleblower.

The disclosure of information by whistleblowers plays a vital role in uncovering and addressing suspected misconduct or wrongdoing to protect consumers, businesses, and the provision of government services. Weeding out illegal and unethical behaviour and practices is essential for the strength of Australia's economy and prosperity of the community.

However, the experience of high profile whistleblowers clearly shows there is a high price to pay, professionally and personally, for turning whistleblower under the current system, especially when the whistleblower uses official channels available such as reporting to a Regulator.

Service providers, such as financial planners, are required by law to act as a whistleblower on clients for tax evasion, Centrelink fraud, ML/TF suspiscious matter reporting, etc. This places livelihoods at risk from reprisal as many financial planning practices and other professional service providers are small businesses reliant on a strong reputation and client referral. Clients who feel 'dobbed in' by a financial planner, or other professional service provider, may inflict damage on a business' reputation.

Financial planners are required to enquire about various aspects of their client's circumstances in order to provide personal advice that meets the best interest obligations in the Corporations Act. Lawyers and tax agents who are accountants have similar reporting obligations to financial planners however, lawyers and tax agents who are accountants operate under legal privilege. Financial planners do not operate under legal privilege.

Companies and service providers must be afforded protection, particularly from retaliation, to encourage them to disclose information as a whistleblower and meet their AML/CTF reporting obligations. This includes the individual or small business representatives of AUSTRAC reporting entities. For example, an individual financial planner and financial planning practice may be easily identifiable to a client if the licensee's identity is known. This is particularly important given that suspicious matter reporting can include criminal elements.

The proposed amendments do not appear to consider the perspective of the reporting entity as a whistleblower, or provide appropriate protections. Whistleblower protection is a clear agenda of the Government as evident by the current consultation released by the Assistant Treasurer, Kelly O'Dwyer on 20 December 2016; and the Parliamentary Joint Inquiry which is due to report on 30 June 2017.

While regulators and other agencies, such as AUSTRAC may be able to act on reported information, such organisations are not able to protect whistleblowers. Innocuous pieces of information can give rise to suspicion about the whistleblower's identity and can cause irreparable professional and personal damage and risk.

We understand then need to ensure procedural fairness through the ability to share information under strict confidentiality provisions to facilitate effective and timely investigation of claims of suspected

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wrongdoing. However, information sharing arrangements must be appropriate and protect the whistleblower's / reporting entity's identity as the priority and at all times.

Recommendation

The FPA recommends the Attorney-General's Department work with the Treasury to ensure whistleblower protections are integrated into the amendments to the AML/CTF Act and Rules, to protect the identity of the reporting entity and their representatives.

RESPONSE TO CONSULTATION PAPER PROPOSALS

Secrecy and Access

New objects for Part 11

The consultation paper proposes the new objects could include elements that support:

- the collection of financial intelligence
- effective and efficient information-sharing to underpin collaborative efforts to combat and disrupt money laundering, terrorism financing, and other serious crimes
- enhanced information-sharing partnerships between government and the private sector
- robust safeguards to protect AUSTRAC information from inappropriate and unauthorised disclosure.

However, the objects are silent in relation to safeguards to protect the identity of the source of the information. That is, the reporting entity and their representatives.

Recommendation

The Attorney-General's Department should work with the Treasury to ensure the new objects for Part 11 include safeguards to protect the source of the information, including reporting entities and their representatives, from being identified and from reprisal.

Expanded power to disseminate AUSTRAC information

While we support the necessity for information sharing to combat serious and organised crime in Australia, the FPA is concerned about the risks to reporting entities and their representatives as the discloser and original source of the information.

Expanding the CEO's powers to disseminate AUSTRAC information must include a risk based assessment framework for assessing the public risk of the misconduct or suspicious behaviour; and assessing the risk of the reporting entity and their representatives being identified and the nature of any potential consequences to them as whistleblowers.

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Serious and organised crime often involves criminal behaviour by the individuals involved. The AML/CTF Act forces individuals who are professional service providers with direct relationships with clients, and organisations, to report against such individuals, placing them at risk of reprisal should their identity be discovered or suspected. The broader the dissemination of reported information, the more heighten the risk is to a reporting entity or their representative being identified.

This risk must be considered when determining the appropriateness of information dissemination, particularly to the following parties, as proposed:

- reporting entities and other private sector bodies, and
- the general public, including academic and research bodies.

The provision of AUSTRAC information to these parties must be under strict conditions and only if necessary for the success of investigation. In line with the Government's proposed whistleblower protections, consent for the dissemination of the reported information should be gained from the source of the information, prior to dissemination to other parties

A risk based assessment framework and controls around the dissemination of information should apply to all AUSTRAC information, not just sensitive AUSTRAC information as proposed.

The consultation paper proposes that "*when disseminating 'sensitive AUSTRAC information' the AUSTRAC CEO would need to be satisfied that the recipient has given appropriate undertakings for:*

- *protecting the confidentiality of the information*
- *controlling the use of the information, and*
- *ensuring the information will be used only for the purpose for which it is communicated."*

Overriding these conditions should be the protection of the source of the information from identification and reprisal at all times.

Recommendations

The Attorney-General's Department should work with the Treasury to ensure strong whistleblower protections are appropriately incorporated throughout the provisions of the AML/CTF Act, including:

- The protection of the source of the information (such as reporting entities and their representatives) from identification and reprisal
- A risk based assessment framework and controls around the dissemination of all AUSTRAC information, not just sensitive AUSTRAC information
- The dissemination of AUSTRAC information to other parties must be under strict conditions and only if necessary for the success of investigation.
- In line with the Government's proposed whistleblower protections, consent for the dissemination of the reported information should be gained from the source of the information, prior to dissemination to other parties.

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Access to and use of AUSTRAC information by other Agencies

The FPA supports the need for information sharing with appropriate organisations. The information reported by an individual or entity may represent only one piece of the puzzle. This piece of the puzzle may be pertinent to other information received by another authority or from another completely unrelated source. It may take multiple pieces of information from multiple sources provided to different agencies for authorities to make sense of the information and identify the wrong doing or criminal behaviour.

However, protection of the identity of the source of the information must be paramount when granting access to AUSTRAC's intelligence database and information by taskforces and other agencies/authorities.

The FPA also has concerns about the protection of the source of the information created by the proposal to allow an agency to on-disclose AUSTRAC information to another Australian government agency.

Recommendations

Direct access to, and on-disclosure of, AUSTRAC information must only be permitted under strict conditions based on a risk assessment for each particular investigation and agency, and in line with the Government's pending whistleblower protections. The source of the information, such as reporting entities and their representatives, must be protected from identity and reprisal at all times.

Information sharing within the private sector

The Department has asked whether Australian reporting entities should be explicitly able to disclose details about customers or transactions that formed the basis of a suspicious matter report (SMR) to other reporting entities (similar to provisions in the US Patriot Act).

A SMR often involves criminal behaviour by organised crime and the individuals involved. This places the reporting entity's representative who holds the relationship with the customer at risk of possible reprisal should they be identified.

Reporting entities are small, medium and large businesses specialising in their specific industry. They are not law enforcement agencies and therefore may not have the legal knowledge or the skills to handle the information in the most appropriate manner to investigate the matter and protect the representative who identified and reported to customer's behaviour.

It is the authority that receives the information (such as AUSTRAC and other law enforcement related agencies) that has the expertise to determine whether there has been a breach of the law and how to respond appropriately to the suspicious activity. It must be the role of the authority receiving the SMR to determine if there is a need to share information with other parties. It should not be up to reporting entities to decide to share SMR with other reporting entities or private parties.

The broader the dissemination of reported information, the more heighten the risk is to a reporting entity or their representative being identified and at risk of reprisal.

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Recommendation:

The FPA does not support the introduction of provisions permitting reporting entities to disclose details about customers or transactions that formed the basis of an SMR to other reporting entities.

Definitions

Investigating officer

The Department proposes that the AML/CTF Act be amended to extend the definition of an 'investigating officer' to include a member of the staff of the Australian Commission for Law Enforcement Integrity (ACLEI). The ACLEI serves a vital role in protecting Australians, however the proposed expansion of the investigating officer definition should be restricted to appropriate ACLEI staff only. For example, ACLEI staff involved in the investigation of illegal or suspicious matters.

It should not apply to all ACLEI staff as some roles (eg. Receptionist, etc) may not require the skills, knowledge, or duties relevant to investigating such matters. Extending the definition as proposed implies the inclusion of all ACLEI staff, and increases the potential risk of identification of the source of the information.

Recommendation

The definition of 'investigating officer' be extended to include ACLEI staff involved in the investigation of illegal or suspicious matters, only

Information sharing across corporate groups

Corporate groups generally have extremely diverse business operations, with Designated Business Groups and subsidiaries within the group commonly operating on different and separate systems and processes, offering a significant range of unique services to the end consumer, and working under very distinct management, rules, obligations (legal, professional, and organisational) and culture. These distinctions deliver different interactions with customers and therefore potentially create distinct AML/CTF risks.

Permitting corporate groups to share information across more than one DBG may assist such corporations to gain a better understanding of their overall AML/CTF risk. However, to ensure the detailed AML/CTF risk assessment of specific business areas remains effective, the information sharing at the DBG level must remain sufficiently detailed enough to ensure the accuracy and reliability of the true overall risk for the DBG and the corporation. That is, the AML risk of each DBG should not be abbreviated or watered down for the benefit of shorter reading for corporate management.

It should be a decision for each corporate group as to whether they choose to share AML/CTF information across the Group based on regulatory efficiencies. It should not be a mandatory obligation or place additional reporting obligations on the DBG as long as such obligations are met by the relevant businesses within the corporation.

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Maintaining reporting requirements at the DBG level will give a more accurate picture of the AML/CTF risk at an industry level based on the type of service provided to the customer. For example, many AFS license holders have separate DBGs providing financial advice, banking, insurance, and superannuation, all of which are very separate and unique service interactions with customers and present a very different AML/CTF risk.

There must also be consideration given to the type of information to be shared across the corporate group to ensure the identity of representatives involved in reporting ML/TF risks or suspicious customer behaviour is protected at all times.

Recommendation

The ability of corporate groups to share AML/CTF information across more than one Designated Business Group should not be mandatory or create additional reporting obligations, and must protect the identity of representatives involved in reporting AML/CTF risks or suspicious customer behaviour at all times.

CEO Powers

Expanding the remedial direction power

The AML/CTF Act, Rules and Regulations are complex and use different terminology to other laws businesses operate under, such as the Corporations Act, which impacts the ability of some service providers to understand and adhere to the regime.

The FPA commends AUSTRAC for the educational and cooperative approach it has taken in relation to compliance to date. This approach has significantly increased our members' engagement with AML/CTF obligations and the importance of embedding appropriate risk programs in their business and reporting relevant information to AUSTRAC.

However, the proposed expansion of the contraventions to 'encourage compliance', and the retrospective expansion of the CEO's powers, threatens to change AUSTRAC's regulatory approach to the detriment of all parties. We would strongly encourage AUSTRAC to maintain its focus on engaging with and educating the business community to improve AML reporting compliance.

Recommendations

The FPA strongly encourage AUSTRAC to maintain its focus on engaging with and educating the business community to improve AML reporting compliance, rather than prescribing a hard line approach to AML/CTF compliance in the Act.

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Infringement notices and civil penalties

Expanding the infringement notice provisions

The FPA notes the expanded range of contraventions for which an infringement notice can be given to include a broader range of minor offences that are regulatory in nature.

However, it is unclear how the proposal to expand the list of contraventions applies alongside the proposed expansion of the AUSTRAC CEO's power to issue directions for a reporting entity to retrospectively comply with an obligation. Will the proposal to expand the range of contraventions also be applied retrospectively?

Recommendation

The FPA seeks clarity as to whether the proposal to expand the range of contraventions is to be applied retrospectively.

Power to issue infringement notices and apply for civil penalty orders

The Department has proposed to extend the power to issue infringement notices and apply for civil penalty orders for non-compliance to partner agencies that are able to issue written notices and directions under sections 49 and 50 of the AML/CTF Act (the Australian Tax Office, the Australian Federal Police, the Australian Criminal Intelligence Commission and the Australian Commission for Law Enforcement Integrity).

However, the FPA seeks certainty as to whether the extension of these powers is to be applied prospectively or retrospectively (as per the increased powers of the AUSTRAC CEO).

Recommendation

The FPA seeks clarity as to whether the proposal to extend the power to issue infringement notices and apply for civil penalty orders for non-compliance to partner agencies under sections 49 and 50 of the AML/CTF Act, is to be applied retrospectively.

Customer Due Diligence

Reliance - third party

Reliance is the process where a reporting entity relies on a third party to conduct customer due diligence (CDD). The FPA supports the concept of expanding the reliance on third parties as it is an important process that can deliver significant regulatory efficiencies and benefits for both reporting entities and customers.

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However, the AML/CTF Act applies to an extremely diverse range of business activities and reporting entities. The interactions each reporting entity has with its customers will differ to those of other reporting entities as it is dependent on the services it provides. Such customer interactions may elicit slightly different information or even subtle ques and signs that could lead to a suspicious matter identification that may not be picked up by a reporting entity that offers different services.

Some business activities also carry a higher or lower ML/TF risk.

Therefore, appropriate conditions must apply to the proposed reliance amendments that take into account the diversity of the reporting entities and the ML/TF risks of the range of business activities covered by the AML/CTF regime. For example, a reporting entity with a higher ML/TF risk must be completely liable for that risk even when relying on third party CDD information. Any additional CDD required because of the higher ML/TF risk should be conducted by the responsible reporting entity.

Recognition should also be given to the supply chain of the provision of some services to ensure reporting entities with direct relationships with customers are not unduly relied upon or pressured by other reporting entities to conduct extra CDD that would not usually be necessary for the services they themselves provide. For example, requiring the third party to collect the CDD information or the reporting entity will not accept or process a customer order, even when the reporting entity could do the CDD themselves.

The FPA supports the conditions proposed by the Department, particularly the requirement for customers to provide explicit and informed consent to having their customer identification information provided to the reporting entity and acknowledge the alignment of this provision with the Tax Practitioners Board (TPB) confidentiality requirements for tax agents including tax (financial) advisers. It is also consistent with professional obligations: as professionals, financial planners have an obligation to protect their clients' information unless consent is provided.

Recommendation:

Reliance on third party CDD - consideration be given to:

- additional conditions for instances when the reporting entity's AML risk is higher than that of the third party and may require additional CDD information to be collected
- pressures within the service provision supply chain.

Prohibition on providing a service if CDD cannot be performed

The Department proposes that the AML/CTF Act be amended to *make it clear that, if a reporting entity is unable to carry out the applicable customer identification procedure for a customer, the reporting entity must:*

- *not commence to provide the designated service*
- *must not establish a business relationship, and*
- *consider making a suspicious matter report in relation to the customer.*

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A civil penalty provision should apply to breaches of this requirement.

While the FPA does not have direct concerns about this proposed amendment, it highlights the need for AUSTRAC to undertake a strong communication and education approach to implementing the proposed amendments to the AML/CTF regime to ensure both reporting entities and customers are aware of the requirements.

For example, a reporting entity may not be aware that a suspicious matter report should be made to AUSTRAC if it is unable to carry out the applicable customer identification procedure.

The FPA would welcome the opportunity to work with AUSTRAC to enhance the training and awareness of financial planners' obligations as a designated service.

Recommendation:

AUSTRAC be required to undertake an ongoing communication and education program to ensure:

- reporting entities understand their AML/CTF requirements at a practical level
- customers are aware of the types of information they will be required to provide service providers for AML/CTF purposes.

Designated business groups

Definition of Designated Business Group

We note the Department is seeking feedback on how the definition of Designated Business Group (DBG) under the AML/CTF Act could be amended to better reflect business relationships between entities and enable greater use of the reliance provisions.

The FPA provides the following considerations in preparation for the proposed separate consultation process on an amended definition of DBG.

Chapter 3 - Designated Business Groups, of the AUSTRAC Compliance Guide defines the requirements of a DBG, which applies to law practices and accounting practices that provide a designated service under a joint venture agreement. However, the current definition does not recognise the operating structure of the financial advice licensing regime under the Corporations Act.

While some financial planning practices operate under their own licence, the majority of financial planning practices are Authorised Representatives of an Australian Financial Services (AFS) licensee, and provide direct services to clients under contract with a separate business who holds the required licence.

Recommendation:

A revised definition of Designated Business Group should include financial planning practices operating as an authorised representative or corporate authorised representative under the Australian Financial Services License (AFSL) held by a separate entity.

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Reliance – within the corporate group

As previously stated, the FPA supports the concept of expanding the reliance provisions as it is an important process that can deliver significant regulatory efficiencies and benefits for both reporting entities and customers.

Designated services are provided to customers under a range of business models by small, medium and large businesses. The FPA believe the reliance provisions should apply equally to all entities so as not to provide advantage or disadvantage to one group of reporting entities.

For example, many large AFS license holders have separate DBGs providing financial advice, banking, insurance, and superannuation and would benefit from efficiencies gained by the ability to rely on CDD information provided by DBGs within their group.

A small financial planning practice may also hold their own AFS licence and should be able operate on a level playing field and also be permitted to benefit from the ability to rely on CDD information provided by a third party, such as a bank for example.

Corporate groups, and reporting entities who rely on third party CDD information, should have equal access to the reliance provisions, under strict and appropriate conditions.

Recommendation:

The expansion of reliance provisions should apply equally within a corporate group, and for reporting entities who rely on third party CDD information.

The reliance provisions must also ensure corporate groups fulfil their role as the third party collecting the CDD information - and be required to provide the CDD information to reporting entities outside the corporate group when requested.

Appropriate conditions for reliance on CDD information should apply equally to Designated Business Groups within a corporate group, and to reporting entities reliant on third party CDD information.

Principles of the Act

The FPA supports the inclusion of principles of the Act, in particular:

> *obligations under this Act, and any Rules and Regulations made under this Act should be proportionate to the money laundering and terrorism financing risks faced by reporting entities.*

A risk based approach to regulation is paramount.

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