



15 September 2010

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Implementation of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 – Regulations and Codes of Practice, Consultation Document August 2010

Introduction

1. The New Zealand Law Society (Society) welcomes the opportunity to comment on the *Implementation of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 – Regulations and Codes of Practice, Consultation Document August 2010* (consultation document).
2. The Society supports the implementation of the new anti-money laundering and countering financing of terrorism (AML/CFT) regime, and the manner in which the Ministry of Justice and regulators have sought industry and professional feedback on the proposed regime.
3. The Society supports the introduction of the AML/CFT Act 2009, with progressive implementation of obligations under the Act. The proposed timeframe of two years from the gazetting of regulations for all obligations under the Act to take effect for Tranche One entities, will provide entities with a realistic timeframe for undertaking risk assessments, and preparation and implementation of AML/CFT compliance programmes.
4. The Society does have some comments to make on the consultation document, in relation to:
 - (a) The Ministry's decision not to publish comments it receives on the consultation document;
 - (b) The consultation timeframe for draft AML/CFT regulations;
 - (c) The timing of national and sector risk assessments (and timing of implementation if they are delayed);
 - (d) The manner in which lawyers will be brought into the regime in Tranche Two;
 - (e) Address verification (non-New Zealand residents);
 - (f) Documentary identity verification (New Zealand driver's licence); and
 - (g) Identity certification.

Comments

The Ministry's decision not to publish comments received on the consultation document

5. The Society is disappointed that the Ministry has decided not to publish comments received on the consultation document. To date, the consultation process in relation to the Act and associated matters has been open and the wider legal and business community has benefited from being able to consider what others have said about the proposed new regime.
6. The Society would like to see the Ministry return to open engagement with submitters, particularly in relation to the draft regulations (although it is recognised that it may now be difficult to publish comments received on the consultation document, given the Ministry's indication in this instance).

Consultation timeframe for draft regulations

7. The consultation document indicates that it is expected the "final decisions" on the regulations will be made and communicated in September, and the regulations gazetted in December 2010 (paragraph 7). The Society considers that consultation on the draft regulations is essential and that sufficient time should be allowed for this. The regulations will deal with a number of matters in more detail than the consultation document. In addition, in some instances new obligations will be introduced by the regulations (such as the inclusion of trust and company service providers as reporting entities (paragraph 269)).
8. A consultation period of less than five weeks would be undesirable with respect to the draft regulations. The Ministry's practice of inviting interested parties to meet with the Ministry to discuss any concerns they have, should apply in relation to the draft regulations.

Timing of national and sector risk assessments (and timing of implementation if they are delayed)

9. The consultation document notes that the Ministry is concerned that entities may be placing too much reliance or expectation on the national and sector risk assessments (paragraph 23).
10. The reality is that whilst entities will be well placed to understand the nature of their business operations and some of the money laundering and terrorist financing risks therein, for many entities the consideration of potential risks for criminal activity will be new.
11. The preparation of a risk assessment for an entity's business is a significant obligation under the Act. The entity is required to comply with the Act's regulatory requirements, but in practice an entity's risk assessment will be one of the cornerstones for developing its AML/CFT compliance programme.
12. In light of this, the Ministry should regard the availability of the national and sector risk assessments as critical, before obligations arise for entities to undertake their own risk assessments. If the national risk assessment and sector risk assessments are not available to entities at the same time as the regulations are gazetted, the two-year timeframe for implementation of the Act should be delayed until they are available.

The manner in which lawyers will be brought into the regime in Tranche Two

13. The Society agrees with the exemptions proposed to be provided to those entities (including lawyers) which might ordinarily fall within the definition of 'financial institution', but which for policy reasons are intended to be introduced in Tranche Two of the reforms (paragraphs 57-59).

14. However, the use of exemptions to achieve this raises a question as to how the inclusion of those entities will be achieved when Tranche Two is implemented. It is unclear whether there will be an amendment Bill introduced (with the opportunity for public consultation), or whether the regulations will simply be amended by Order-in-Council to remove the exemptions.
15. The Society considers it would be desirable for Tranche Two entities to be brought into the regime by a process that allows opportunity for affected entities to make submissions on the regime. That would also provide an opportunity for submissions from industry more broadly on the efficacy of the system, given that it will then have been in operation for a period of time in relation to Tranche One entities.

Address verification (non-New Zealand residents)

16. The Ministry is proposing to exempt entities from having to verify address details for non-New Zealand residents, on the basis that it is often difficult, if not impossible, to do so, given that tourists often do not carry sufficient identification/documentation (paragraphs 128-136).
17. The Society recognises the practical difficulties associated with address verification for tourists. However, we are concerned that this exemption will exacerbate the risk that foreign nationals may be resident in New Zealand and involved in money-laundering or similar activities, but be able to avoid address verification simply by claiming not to be New Zealand residents.
18. If an entity is to rely on the “non-resident” exemption for not verifying a customer’s identity, they should be required to sight the customer’s passport and to record those details as part of customer due diligence. In circumstances where it is clear from the passport that the customer is effectively living in New Zealand (perhaps through the presence of a visa), then the entity should be required to verify address details in the usual way.
19. It would also be beneficial if the government’s proposed data validation service, which we understand will allow entities to confirm that government-issued identification is genuine, also allowed foreign passport details to be entered in the system (paragraph 307). This would allow entities to confirm whether the person is a genuine tourist or is in fact resident in New Zealand (perhaps as an international student or similar).

Documentary identity verification (New Zealand driver’s licence)

20. The Society supports the Ministry’s revised approach, which would allow the New Zealand driver’s licence to be used, with supplementary verification (such as a credit card or birth certificate), to verify the identity of low to moderate risk customers (paragraphs 314.2 and 314.4). The practical reality is that the driver’s licence is the primary (and sometimes only) form of photographic identification held by New Zealand citizens.
21. It would also be useful to add to paragraph 314.2 the following form of supplementary verification: a document addressed to the customer at a physical address in New Zealand, from a registered bank, territorial authority or utility provider (such as a bank statement, rates demand or electricity statement).
22. Consideration needs to be given to the situation where the customer does not have any valid form of photographic identification, or where their government-issued photographic identification has expired. This occurs reasonably frequently with elderly clients, and may become more prevalent as New Zealand’s population ages. The LINZ Standard for Verification

of identity for registration under the Land Transfer Act 1952¹ provides that where a person does not have photographic identification, their identity may be verified by a witness, subject to certain requirements including a signed statutory declaration. Ideally the AML/CFT and Land Transfer Act identity verification requirements should be consistent.

23. The Society considers that the Ministry should undertake further discussions with the relevant government agencies and stakeholders regarding the adequacy of the New Zealand driver's licence as a means of identity verification. It would be desirable to tighten procedures so that the New Zealand driver's licence could be relied on as a primary form of photographic identification.


Document Certification

24. The consultation document proposes that when documentary identification cannot be undertaken by a reporting entity in person, a "trusted referee" should verify copies of identity documents. It is proposed that reporting entities will determine, according to the level of risk, whether the verifier's contact details should be obtained (paragraphs 324, 328).
25. The Society considers that reporting entities should be required to obtain verifiers' contact details in all cases. It would require only a small amount of additional time and resource to record such information, and would potentially be helpful in three ways:
- i. The requirement will enable the reporting entity to follow up with the verifier, should that be necessary.
 - ii. It will provide law enforcement agencies with an avenue of inquiry, should that be necessary.
 - iii. It may also serve as a deterrent to persons who might seek to forge or falsify certification, since the details of the person certifying will be recorded and may be followed up.

Conclusion

26. The Society looks forward to working with the Ministry and regulators to ensure the new AML/CFT regime is practicable and can be implemented without unnecessary delay. We would appreciate the opportunity to meet with you to discuss these issues in more detail. If this would be of assistance, please contact Mary Ollivier (mary.ollivier@lawsociety.org.nz / ph 04 463 2956) to arrange a meeting.

Yours sincerely



Bruce Gilmour
Vice President

¹ Available on the Land Information New Zealand website (www.linz.govt.nz/survey-titles/land-registration/land-titles-standards/index.aspx).