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By email: amlcft.exemptions@justice.govt.nz

Tēnā koe Keeley,

Ministry of Justice review of Part 19 – Anti-Money Laundering and Countering Financing of Terrorism (Class Exemptions) Notice 2018

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) refers to the review of Part 19 of the schedule to the Anti-Money Laundering and Countering Financing of Terrorism (Class Exemptions) Notice 2018 (**Exemption**), made under section 157(1) of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (**AML/CFT Act**).

1.2 The Law Society welcomes the opportunity to provide feedback on the review of the Exemption. The Law Society's comments (incorporating feedback from the profession) are set out below.

1.3 We have set out feedback received from the profession below, rather than submitting it through the online survey form.[1] The Law Society has taken this approach to facilitate the capture of the range of views received from the profession (including on the key question of whether the Exemption is fit for purpose), together with limited additional comment from the Law Society. This submission addresses only the survey questions that are relevant to the legal profession.

2 Survey Question 3: Do you rely on this exemption?

2.1 Feedback from the profession indicated that law firms (and their clients) do rely on the Exemption. As set out below, feedback received from one large law firm indicated that the Exemption is currently too narrow in application.

[1] AML Class exemption: Person acting by electronic means on behalf of customer (Part 19) - Ministry of Justice - Citizen Space.

3 Survey Question 5: Are there any parts of the exemption that need to be amended to achieve their intended purpose?

3.1 In response to this question, one large law firm indicated that the Exemption was generally satisfactory in its current form, stating:

> "*[w]e are happy with how Part 19 operates and rely on it when dealing with large corporates and government entities, especially those with a General Counsel and legal team.*"

3.2 Another large law firm expressed the view that clause 3(b) of the Exemption should be amended so that the person acting on behalf of the customer may be an employee of the customer or an employee of a person that is related to the customer. Clause 3(b) was described as "too narrow in practice", on the basis that corporate groups commonly establish subsidiaries for distinct parts of the business, with personnel provided by another group company, often the parent. Those subsidiaries have no employees of their own, so they cannot access the Exemption, despite facing the same compliance burden it was designed to address. It was proposed that:

(a) Clause 3(b) of the Exemption be amended to read "*the person acting on behalf of the customer is an employee of the customer or an employee of a person that is related to the customer*";

(b) The term "related" be defined consistently with regulation 16 of the Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Regulations 2011;[2]

(c) Clause 3(c) of the Exemption be amended in the same way, so that the written agreement can cover employees of a related entity; and

(d) The other conditions in clause 3 of the Exemption would continue to apply: a senior manager of the customer (in this scenario, a director) must have undergone CDD, there must be a written agreement setting out how employees are delegated and authorised to act, and the senior manger must notify the reporting entity that each employee is authorised to act.

3.3 The view of the law firm proposing these amendments, is that the conditions in clause 3 of the Exemption provides sufficient safeguards that the current low-risk assessment (clause (4)(b) of the Exemption) should apply equally to the amended exemption. The firm also stated that the proposed amendment would be consistent with the purpose of the AML/CFT Act and the Interpretative Note to FATF recommendation 10, which requires verifying both the identity and the authority of a person acting for a customer. The exemption already meets this through the senior manager's CDD and authorisation, a proportionate approach that the Ministry has already accepted. The same reasoning was said to apply whether the employee works for the customer or for a related entity.

3.4 A third large law firm concurred that the Exemption is too narrow in practice, and requires amendment, as described above. That firm noted the following, and suggested additional refinements to the Exemption:

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[2] The Law Society notes for completeness that regulation 16 relates to relevant services provided to related entities.

(a) The requirement in clause 3(b) for the person acting on behalf of a customer to be an "employee" may be unnecessarily restrictive. There is no reason that this could not be extended to contractors, consultants, secondees, attorneys or agents (for example) provided those persons had delegated authority to act on behalf of the customer.

(b) The clause 3(c) requirement for a "written agreement" to contain details about the required steps for employees to be authorised to act on behalf of the customer is impractical. These matters are not typically contained in contractual arrangements, including because of the doctrine of apparent authority (i.e., where a reasonable third party would understand that an agent was acting within the scope of their authority). Whilst in some contexts it is common to provide an authorised signatory list (or similar), these may not form part of the main agreement and so may not meet the requirements of clause 3(c).

(c) The requirement in clause 3(d) for a senior manager to notify the reporting entity that the relevant employee is authorised to act on behalf of the customer may be problematic in larger organisations. In some larger organisations, internal delegation frameworks can delegate various authorisations to lower levels of management. This means it is uncommon for senior leadership team members to sign off on administrative matters such as this notification. The clause 3(d) requirement could be amended to permit a wider range of employees to provide the notification to the reporting entity. The amendment could also introduce a requirement for the employee to confirm that they are authorised by their employer to make the notification.

3.5 Consistent with the views of the large law firms, set out above, that the Exemption requires amendment as it is too narrow in practice, another law firm suggested that the Exemption should be extended to apply to employees (as well as other persons with delegated authority to act on behalf of the customer, including by way of example, contractors, consultants, secondees, attorneys or agents) of members of the same designated business group (**DBG**) as the customer. The observation was made that by definition, each member of a DBG is a reporting entity in its own right, part of a limited class of entities either defined in legislation or prescribed by notice under section 156F of the AML/CFT Act,[3] and DBGs are subject to conditions requiring that the AML/CFT supervisor be notified of changes in their membership.[4] As the members of a DBG are already managing risk for the purposes of the AML/CFT Act on a collective basis, extending the Exemption to employees of members of the same DBG should not impact the low risk assessment set out in clause (4)(b) of the Exemption.

4 Survey Question 6: If you are currently unable to rely on the exemption, what specific costs are you incurring as a result?

4.1 Feedback from one large law firm noted that reporting entities are unable to rely on the Exemption when dealing with many large corporate groups. That firm alone acts for at

[3] See limb (d) of the definition of the term "designated business group" in section 5 of the AML/CFT Act.

[4] Limb (e) of the definition of the term "designated business group", and section 5(3) of the AML/CFT Act.

least a dozen large corporate groups affected in this way, each with many staff giving instructions on behalf of subsidiaries that have no employees. Reporting entities must conduct CDD on each of those individuals, and again whenever staff change. This is onerous for both the reporting entity and clients and affects their ease of doing business. It was observed that the impact is greatest for law firms dealing with clients such as property developers and groups that acquire portfolios of businesses, which commonly hold properties or business divisions in special purpose vehicles with no employees, for legitimate and standard business reasons. These types of clients carry out a high volume of standardised captured transactions, so the burden is recurring and out of proportion to the risk.

5 Survey Question 8: Is the existing notice fit for your sector, or would a new exemption be a better solution? Please provide your reasoning.

5.1 A large law firm expressed the view that amending the existing Exemption, rather than creating a new exemption, is the better solution. The Law Society concurs with this view, on the basis that reporting entities' documents are likely to refer (where relevant) to the existing Exemption and it would be preferable to have a single exemption covering all circumstances in which reporting entities are exempt from conducting simplified customer due diligence on a person who purports to act, by electronic means, on behalf of a customer, unless there is an identified need for a sector-specific exemption or exemptions.

5.2 The Law Society also observes that amendment of the existing Exemption would be consistent with the Ministry's stated approach to considering possible amendments to ensure that the Exemption remains fit for purpose for the remainder of its duration.

6 Next steps

6.1 We would be happy to meet with you to discuss this feedback, or to answer any questions, if that would be helpful. Please feel free to get in touch via the Acting Manager Law Reform and Advocacy, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Nāku noa, nā



Mark Sherry
Vice President