Financial Planning Association of Australia Limited
ABN 62 054 174 453
Member freecall 1800 337 301
Consumer freecall 1800 626 393
fpa@fpa.asn.au • www.fpa.asn.au

GPO Box 4285
Sydney NSW 2001

Ph: 02 9220 4500
Fax: 02 9220 4580

9 March 2006

Mr Jonathan Curtis
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Curtis

ENQUIRY INTO THE ANTI-MONEY LAUNDERING/COUNTER TERRORISM FINANCING (AML/CTF) EXPOSURE DRAFT BILL AND RULES

Thank you for your letter of 16 February 2006 inviting the Financial Planning Association of Australia (FPA) to provide input to the Senate Legal and Constitutional Committee's enquiry into the AML/CTF exposure draft bill and rules (Exposure Draft). It is widely expected that financial planners will often provide the first interface with the AML/CTF requirements for many ordinary members of the public when they want to acquire commonly used financial products. Therefore, as the peak professional association for financial planners in Australia (see Attachment B for more details), FPA is well placed to comment on the practical impact of the Government's proposed AML/CTF regime.

Development of the draft AML/CTF regime has involved an intense series of discussions between the Minister for Justice and Customs, Senator the Hon Chris Ellison; Commonwealth departments; and industry for more than a year. These discussions have continued almost unabated since release of the draft exposure bill and rules on 16 December last year. All parties have made great efforts to create sufficient detail of the proposed regime to enable industry to comment meaningfully on its likely effectiveness and practical impact.

The scale of the contributions required from those involved is illustrated by the extent of FPA's participation. As well as being a member of the Ministerial AML/CTF Advisory Group, FPA also participates in the regular meetings between officials and the financial services industry; the fortnightly AML/CTF Programs Working Group; the fortnightly Customer Identification and Verification Working Group (including the fortnightly Third Party Verification Sub Group); and the fortnightly Risk Principles Working Group.

FPA appreciates the dedication which Minister Ellison and his officials have shown to working collaboratively with industry to create an effective AML/CTF regime. There appears to be a common goal of ensuring that the ensuing compliance burden on industry and its clients does not outweigh the public benefit obtained in terms of increased intelligence and successful enforcement action against ML and TF activities.

Given the scale of the task, it is not an indictment of the effort put in by all parties that much remains to be done before industry can comment definitively on the proposed regime. In line with other industry participants, FPA strongly believes that the Government should extend the consultation period beyond the current deadline of 13 April 2006 in order for a comprehensive analysis to be undertaken into how all the components of the AML/CTF regime would work together. The effective implementation of this legislation is too critical to Australia's welfare to be jeopardised by unnecessary deference to legislative timelines.

FPA has publicised the Exposure Draft to its members through items and articles in the Association's newsletters and magazine. We have also engaged members in considering the practical impact of the proposed regime through member forums and professional development seminars. A special FPA AML/CTF Taskforce has guided the development of FPA positions on AML/CTF issues since mid 2005.

The key concerns identified by FPA members are explained in Attachment A. I would like to emphasise that the views expressed are necessarily preliminary given that it is not yet possible to analyse the complete draft AML/CTF regime. FPA will provide a submission to the Government at the end of the consultation which puts the considered views of its members and is endorsed by the FPA Board as FPA policy. However, it was felt that an explanation of the FPA's current thinking on AML/CTF issues would provide useful input to the Committee's deliberations. FPA would welcome an opportunity to discuss its views with the Committee.

From its participation in the meetings of the financial services industry, FPA is aware of the submission which the Australian Bankers' Association (ABA) has made to the Committee on many important issues which are relevant to the wider financial services industry. The positions put in the ABA submission are consistent with the approach being developed by FPA. In order to avoid repetition, Attachment A focuses in those issues of principal concern to FPA members.

If the Committee wishes to discuss further any of the issues raised in this submission, please contact me on tel: 02 9220 4513 or email: john.anning@ fpa.asn.au .

Yours sincerely

John Anning
Manager Policy and Government Relations

ATTACHMENT A

KEY CONCERNS OF THE FINANCIAL PLANNING ASSOCIATION WITH THE AML/CTF EXPOSURE DRAFT

THE AML/CTF LEGISLATION SHOULD BE PRINCIPLES-BASED WITH THE IMPORTANCE OF A RISK-BASED APPROACH EXPLICITLY RECOGNISED

In its submission to the recent enquiry into Business Regulation, FPA argued strongly for the Government to adopt a more truly principles-based approach to legislation. In order for principles-based legislation to work effectively, the legislation should be restricted to the main concepts. The detail of implementation would then be fleshed out in the subordinate regulations, with most of the procedural provisions contained in guidelines developed by industry in co-operation with the regulator.

The financial planning sector is still coming to terms with implementation of the Financial Services Reform Act 2001 (FSRA). While FSRA purports to be principles-based, much of the detail of implementation is actually prescriptive in nature and embedded in the legislation and subordinate regulations which severely restricts flexible administration and makes timely amendment difficult.

Also, the financial services regulator has taken an overly prescriptive and rigid approach to the guidance it has provided under FSRA. ASIC's Policy Statements purportedly set out its "expectations" of good compliance with the regulatory requirements. However, ASIC's inflexible "expectation", when the entities it regulates may differ markedly for example in terms of size and business model, have exacerbated the impact of the prescriptive approach it takes when enforcing FSR provisions.

The inflexibility which results from an overly prescriptive approach to the financial services regime runs a great risk of stifling innovation in the development of new and improved ways in which to service the needs of clients. One of the key benefits of principles-based legislation is that it should be able to be confidently applied in a flexible manner by the different participants to suit the needs of their business and their clients.

By being overly prescriptive, whether in standards or legislation, businesses irrespective of size, structure or business model, are unable to determine appropriate ways of incorporating the requirements into their businesses. It should be possible to innovate within the broad bounds of Government policy without having to seek explicit approval from the regulator.

FPA is therefore concerned that the Exposure Draft does not set out all the principles which should form the basis for the AML/CTF regime. In particular, it has been often said that the regime will be risk-based i.e. that Reporting Entities will be able to determine the extent of their obligations and how they are satisfied consistent with their assessed risk of ML and CTF activity.

However, the Exposure Draft is written in prescriptive, mandatory terms with provision made for exemptions to be obtained from the Regulator on grounds not specified in the draft legislation. If the AML/CTF regime is to be truly principles-based then it should explicitly recognise the role of risk in determining the extent of obligations.

Due to the shortcomings of the Exposure Draft in recognising the role of risk, it is only natural that industry has sought to see the whole of the draft regime – the Exposure Draft and subsidiary draft rules and guidelines – before committing themselves to definitive comments on the proposed legislative package. For example, many superannuation products involve minimal risk of being used for ML/TF purposes and the obligations connected to their provision should be adjusted accordingly. This would be obvious if a risk-based approach was enshrined in the proposed regime. However,

with the current text of the Exposure Draft, industry must look at the draft rules and guidelines to assess their likely responsibilities.

With its focus on getting the details of the draft rules right, the current process has also inhibited industry from developing guidelines on how the AML/CTF regime will work for particular industry sectors or in particular situations. This guidance is crucial if the regime's provisions are to be implemented efficiently and consistently and not leave smaller players wondering how they should meet their obligations. Obtaining consensus on this guidance will be a time consuming process and adequate time must be allowed when setting the transitional periods for introduction of the various AML/CTF obligations.

THE PROVISION OF ADVICE SHOULD NOT BE A DESIGNATED ACTIVITY

Currently Section 6 of the Exposure Draft which defines a "designated service" includes personal advice given by a licensed financial planner in relation to securities and derivatives (Item 38); life policy or sinking fund policy (Items 42 and 43); a superannuation fund (Items 48 and 49); and Retirement Savings Accounts (Items 52 and 53).

This appears to be contrary to the assurance given several times to industry by the Minister and officials that the Australian AML/CTF regime would not go beyond the requirements needed to implement the Financial Action Taskforce (FATF) recommendations.

The activities relevant to financial planners which are specified in the FATF recommendations are, under the definition of "Financial Institution" (set out in the Glossary):

- participation in securities issues and the provision of financial services related to such issues;
- individual and collective portfolio management;
- safekeeping and administration of cash or liquid securities on behalf of other persons;
- otherwise investing, administering or managing funds or money on behalf of other persons;
- underwriting and placement of life insurance and other investment related insurance;

and from the activities of "designated non-financial businesses and professions" (Recommendation 12):

- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

It is clear from the activities listed above that it is only with a very wide reading of the FATF recommendations is a connection drawn to the provision of advice. It is also notable that the FATF Report released last year into Australia's compliance with the FATF recommendations did not identify any shortcoming in terms of the obligations pertaining to the provision of financial advice.

After listening to the views of its members, FPA is **not** considering that it should argue to the Government that financial planners be exempted from having AML/CTF obligations. FPA members recognise that they will often be in the best practical position to identify their clients before implementation of their financial strategy through, for example, taking out a life insurance policy or changing their superannuation arrangements. Members would generally want to save clients the vexation of having to verify their identity a number of times in relation to separate financial products.

However, there does not seem to be any convincing reasons why the provision of financial advice in itself should trigger the AML/CTF obligations. The obligations for financial planners should instead rest on actions taken to implement their client's strategy.

As the monitoring of a client's ongoing behaviour will in most cases be performed most effectively by the financial institution with which the client has, for example, their superannuation invested, the key AML/CTF activity to be undertaken by a financial planner will be the initial identification of the client. However, it is highly unlikely that identification at the advice stage would result in greater benefits in terms of AML/CTF intelligence than identification at the implementation stage.

The triggering at the advice stage of identification and all the other proposed obligations, particularly in relation to having in place a AML/CTF program, would put an onerous burden on all financial planners. There would be particularly no point to those obligations for those planners who only provide financial advice to their clients.

Often consumers are advised by consumer advocates and authorities such as ASIC to visit a number of financial planners to find one with whom they feel most comfortable. Under the current proposals, these people are likely to be asked for no good reason to identify themselves each time they meet a different financial planner. There would be other practical difficulties of having advice caught as a designated activity. For example, under Section 39(1)(c) of the Exposure Draft merely asking a financial planner whether they would be prepared to advise on a superannuation product triggers the obligation to consider whether the request might be suspicious.

FPA favours the position that the provision of advice should not be a designated service. It may be that financial planners undertake identification at the commencement of the client relationship but this should be left for them to determine in accordance with their own practice management requirements.

AML/CTF OBLIGATIONS SHOULD NOT REST SOLELY ON INDIVIDUAL PLANNERS

As the Exposure Draft is worded currently, the Reporting Entity which bears the AML/CTF obligations would be the "licensed financial adviser" referred to in Section 6. It could be taken that the obligations would rest solely on the individual financial planner i.e. the authorised representative of the Australian Financial Services Licensee rather than the Licensee themselves.

Given the extensive obligations for example required in connection with AML/CTF programs, it would be clearly impractical for financial planners to bear all of these obligations individually. FPA considers that effective fulfillment of the AML/CTF obligations will require recognition in the legislation of the pivotal role played by the AFS Licensee in the provision of financial services.

TIME NEEDED TO RESOLVE PRACTICAL IMPLEMENTATION ISSUES

Apart from the key issues discussed in this paper, FPA would appreciate the Committee noting there remain many practical issues of how the AML/CTF provisions will apply to financial planners. An important example is the role that financial planners would play in third party identification. Section 34 of the Exposure Draft would enable financial planners to undertake identification on behalf of another Reporting Entity as a Reporting Entity in their own right or as an external agent.

As the Exposure Draft currently stands, it appears that the authorisation for the identification to be done on behalf of another Reporting Entity will need to be in place before identification takes place. In reality, a financial strategy evolves and all the financial products and services which a

client wants may not be decided when identification takes place. It would be vexatious to the client for them to have to undertake a series of identifications as they decide to take up additional products.

Similarly, Reporting Entities may have different risk assessment processes which require varying levels of identification. It would be a burden for the financial planner and annoying for the client to have to provide further information after initial identification has taken place to satisfy the risk assessment requirements of a particular Reporting Entity. Considerable discussion will be needed to work out practical arrangements, perhaps in the form of agreed risk matrices, to avoid these difficulties.

In view of the practical implementation issues which need to be resolved and the time needed for financial planners to implement the necessary changes, FPA urges the Government to set an implementation timetable for the AML/CTF legislation which allows for the longest feasible transitional period (or transition periods if a staged approach to implementation is adopted).

As the financial services industry must necessarily work closely together on implementation, FPA considers that full implementation of the AML/CTF regime should not be expected before all arrangements are complete across the industry. FPA understands that three years is the current estimated time required for full compliance because of the extensive systems changes which need to be implemented by the major financial institutions.

ATTACHMENT B

About the FPA

The Financial Planning Association of Australia Limited (FPA) is the peak professional association for the financial planning sector in Australia. The FPA represents qualified financial planners who manage the financial affairs of over five million Australians with a collective investment value of more than $560 billion.

The FPA has approximately 12,000 members:

- Approximately 600 are Principal Members. These are individuals and companies which hold an Australian Financial Services Licence (AFSL) to provide personal financial planning advice to retail clients.
- Approximately 7,500 are financial planning practitioner members, of whom close to 5,400 are CFP® practitioner members (Certified Financial Planner). The CFP® designation is reserved for those professionals who have achieved the highest educational requirements and fulfilled extensive industry experience criteria. The CFP® mark is the internationally recognised practitioner certification and is a symbol of the premier level of professionalism for financial planning practitioners.
- The remaining members are general members (many of whom are para-planners and/or those training to be CFP® practitioner members), academics and retired practitioners.

The FPA membership is organised through a network of 31 Chapters across Australia together with a state office in each capital city located in:

- ACT; Albury-Wodonga; Ballarat; Bendigo; Brisbane; Cairns; Far North Coast; Geelong; Gippsland; Gold Coast; Goulburn Valley; Hobart; Mackay; Melbourne; Mid North Coast; New England; Newcastle; Northern Tasmania; Northern Territory; Riverina; Rockhampton; South Australia; South Eastern Melbourne; Sunraysia; Sunshine Coast; Sydney; Toowoomba; Townsville; Western Australia; Western Division; Wide Bay; and Wollongong.

The FPA has taken a leading role in protecting consumer interests by raising the standard of financial planning in Australia through:

- first introducing financial planning standards in 1991 and then continuing to work with government and regulators to develop robust standards which are considered world's best practice;
- receiving the first international licence outside the US for the CFP® designation;
- creating formal education programs for financial planners;
- investing $3 million dollars in the establishment of an alternative complaints resolution scheme in Australia in 1993 (later to merge with FICS); and
- providing stringent audit and disciplinary controls for members.

The FPA continues to contribute to policy development in the financial services industry and the broader community whilst providing essential services and guidance to our members. The FPA will work for improvements in the industry and ensuring the continuing availability of qualified financial advice to consumers.