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February 21st, 2012

Leah Anderson
Director, Financial Sector Division
Department of Finance
L'Esplanade Laurier
20th Floor, East Tower
140 O'Connor Street
Ottawa, Ontario K1A 0G5

Dear Ms. Anderson,

**RE: Consultation Paper: Strengthening Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime ("November Consultation")**

**- and –**

**Consultation Paper: Proposed Amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* on Ascertaining Identity ("December Consultation")**

The Canadian Institute of Chartered Accountants ("CICA") appreciates the opportunity to comment on the consultation papers on proposed changes to Canada's anti-money laundering and anti-terrorist financing regime. We trust that this submission will assist the Department of Finance as it prepares for the upcoming parliamentary review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act ("PCMLTFA")*. In particular, we will address in this submission the proposals relevant to accountants and accounting firms.

Together with the provincial CA institutes/Ordre, the CICA represents approximately 80,000 Chartered Accountants in Canada. Our members are committed to working together in the fight against money laundering and organized crime.

In addition to the comments sought in respect of the December Consultation, we have included comments in respect of the November Consultation. We recognize that comments were requested in respect of the November Consultation before December 16, 2011; however, the need to comment on its proposals did not become apparent until read in conjunction with the December Consultations. We request your kind consideration of our comments in respect of the earlier consultation.

## DECEMBER CONSULATION

### 2.8: Clarifying Reporting Obligations for the Accountant Sector

As stated in the December Consultation, certain activities performed by accountants currently trigger reporting requirements beyond the original policy intent. As a result, the Government is giving consideration to amending the *Proceeds of Crime (Money Laundering) and Terrorist Financing*

*Regulations* ("*PCMLTFR*") to exclude from reporting requirements additional activities undertaken by the accounting sector.

According to Proposal 2.8 "Clarifying Reporting Obligations for the Accountant Sector":

> "The Government is giving consideration to amending the *PCMLTFR* to exclude from reporting requirements activities undertaken by the accountant sector when providing trustee in bankruptcy services. The characteristics of the above activities are similar to those of other activities performed by accountants that would not trigger reporting requirements. As such, the proposed amendment would ensure a consistent application of requirements for these entities."

FINTRAC Interpretation Notice no. 7 ("FIN no. 7") dated February 17, 2011, "Insolvency Practitioners Providing Trustee in Bankruptcy Services" provides clarification regarding the application of the *PCMLTFA* relating to insolvency practitioners offering bankruptcy services. Accordingly, bankruptcy services provided by accountants or accounting firms as insolvency practitioners do not fall within the triggering activities under the *PCMLTFA*.

An "accounting firm" is defined under the *PCMLTFR* as "an entity that is engaged in the business of providing accounting services to the public and has at least one partner, employee or administrator that is an accountant". According to FIN no. 7, accountants or accounting firms are not considered to be "providing accounting services to the public" when acting:

- As receiver, pursuant to the provisions of a Court order or by way of a private letter appointment pursuant to the terms of a security interest,
- As trustee in bankruptcy, or
- As monitor under the provisions of the Companies' Creditors Arrangement Act or any other proceeding that results in the dissolution or restructuring of an enterprise or individual and to which the firm, individual or insolvency practitioner serves as an officer of the Court or agent to a creditor(s) or the debtor.

Accountants or accounting firms have obligations under the *PCMLTFA* if they engage in any of the following activities ("Triggering Activities") on behalf of any individual or entity or give instructions in respect of those activities on behalf of any individual or entity:

- receiving or paying funds,
- purchasing or selling securities, real property or business assets or entities, or
- transferring funds or securities by any means.

The *PCMLTFR* also specifically excludes certain activities carried out by accountants under Section 34.(3) as follows:

> "For greater certainty, subsection (1) does not apply in respect of audit, review or compilation engagements, carried out in accordance with the recommendations set out in the CICA Handbook."

FIN no. 7 clarifies that an accountant or an accounting firm appointed by a Court, or acting as a trustee in bankruptcy, is not considered to be acting on behalf of any other individual or entity. However, according to FINTRAC's website, FINTRAC Interpretation Notices ("FINs") such as FIN no. 7 do not have the force of law and are issued to provide technical interpretations and positions regarding certain provisions contained in the *PCMLTFA* and associated Regulations. While the comments in a particular paragraph in a FIN may relate to provisions of the law in force at the time they were made, FINTRAC further states that these comments are not a substitute for the law and the reader should consider the comments in light of the relevant provisions of the law.

Proposal 2.8 clarifies that "activities undertaken by the accountant sector when providing trustee in bankruptcy services" would be excluded from reporting requirements. FIN no. 7 recognizes that, in addition to trustee in bankruptcy services, acting as a receiver or monitor as stated above would not be considered to be "providing accounting services to the public" and are, therefore, not Triggering Activities.

We seek clarification as to whether, in addition to the exclusion regarding the provision of trustee in bankruptcy services, the proposed amendments would also exclude the services of accountants and accounting firms when acting:

- As receiver, pursuant to the provisions of a Court order or by way of a private letter appointment pursuant to the terms of a security interest, and
- As monitor under the provisions of the Companies' Creditors Arrangement Act or any other proceeding that results in the dissolution or restructuring of an enterprise or individual and to which the firm, individual or insolvency practitioner serves as an officer of the Court or agent to a creditor(s) or the debtor.

Given FINTRAC's interpretation under FIN no. 7, we would suggest the above services should be specifically excluded from the Triggering Activities as well as the trustee in bankruptcy services included in Proposal 2.8.

<u>Other relevant services by accountants in the insolvency practice:</u>

In addition to acting as a receiver, trustee or monitor as discussed above, an accountant can also be appointed as a Receiver-Manager. Although similar to a receiver, in the capacity of a Receiver-Manager, accountants can manage or operate the company.

Accountants can also act as an Interim Receiver appointed by the Court to oversee the assets of a debtor during that time between the application to the Court for a Receiving Order and the time where the Receiving Order is handed down. Accountants can be appointed an Interim Receiver where a secured creditor is about to send out, or has sent out, a Notice of Demand under the Bankruptcy and Insolvency Act of its intention to enforce its security, or the debtor has filed a Notice of Intention to Make a Proposal or has filed a proposal. An Interim Order is a temporary Court Order intended to be of limited duration, usually until the Court has had an opportunity to hear the full case and make a Final Order.

Where a creditor has made a petition for a receiving order, the court may appoint an interim receiver, if it is shown that it is necessary for the protection of the estate of the debtor at any time after filing of a petition. The court may appoint the trustee in bankruptcy as a receiver of the debtor's property. The receiver can take conservatory measures and dispose of perishable property, but the receiver cannot

unduly interfere in the carrying on of the debtor's business, except as is necessary for conservatory measures. The court may appoint a receiver where a secured creditor seeks to enforce his security.

We are unclear as to whether services as an Interim Receiver and as a Receiver-Manager would be exempted under Proposal 2.8. Should they not be exempt, this could have a significant impact on the work that accountants would be required to undertake. For example, we are of the view that the requirement to comply with the receipt of funds requirements when receiving funds from customers in the normal course of business that would not have been subject to the receipt of funds requirement had they occurred in the business prior to becoming Receiver-Manager may trigger requirements beyond the original policy intent.

If the Receiver-Manager is required to carry out enquiries to fully comply with the record keeping requirements, and where the estate funds are exhausted in carrying out this exercise, the Receiver-Manager could be required to continue to carry out the required record keeping at its own expense.

Further, we would like clarity on the extent of the exclusions related to insolvency services. While FIN No. 7 excludes the listed insolvency services from all obligations under Part I of the *PCMLTFA*, the proposal only refers to reporting activities. For consistency, we would suggest that those insolvency engagements which are not Triggering Activities should be specifically excluded from all Part I obligations.

**5.1/5.2: Countermeasures**

Proposals 5.1 and 5.2 of the December Consultation explain a regulatory framework to accompany the Ministerial Powers which were introduced in 2010, but have not been brought into force. The powers permit the Minister of Finance to require regulated entities to take or refrain from certain activities with respect to designated foreign jurisdictions and entities via directive ("Countermeasures"), and the authority to recommend regulations limiting or prohibiting reporting entities from entering into transactions originating from or destined to designated foreign jurisdictions and foreign entities.

While the December Consultation sets out six categories of Countermeasures, that list is declared as not being exhaustive. Without knowing the full range of possible Countermeasures or regulations which could be enacted, we are concerned that we are unable to provide full analysis or comment on the practicality of our members' compliance, or the time it might take to develop systems and processes to deal with those obligations.

**6.1: Broadening the Requirement to Report Suspicious Transactions**

The December Consultation proposes broadening the requirement to report suspicious transactions to encompass activities conducted for the purpose of a financial transaction.

As mentioned above, accountants and accounting firms are only subject to Part I of the *PCMLTFA*, which requires the reporting of suspicious and attempted suspicious transactions, when engaged in Triggering Activities. According to section 7 of the *PCMLTFA*, accountants and accounting firms are required to report every financial transaction that occurs or that is attempted in the course of their activities in respect of which they have reasonable grounds to suspect that the transaction is related to the commission or the attempted commission of a money laundering or terrorist financing offence.

We are of the view that there is currently confusion surrounding the concept of attempted in the noted provision, in particular, regarding the scope of activities which could constitute an attempt. We are concerned that the concept of an "activity conducted for the purpose of a financial transaction" adds additional confusion to the scope of reporting requirements. Additionally, that confusion may complicate training and compliance efforts. We would appreciate additional clarity with respect to the full range of activities that could be conducted for the purpose of a financial transaction that would trigger reporting obligations.

Additionally, we are concerned that the concept of "activity conducted for the purpose of a financial transaction" might inadvertently draw excluded activities of accountants into the scope of Triggering Activities. Again, it is the ambiguity of the phase which leads to our request for clarification. In particular, "conducted for the purpose" might be taken to encompass a wide range of remote activities that are not directly related to the Triggering Activities, and in so doing, expand the range of reportable activities to things such as assurance services. If that phase were broadly interpreted, the extent of responsibilities would be vast relating to triggering activities, and accountants would have little choice but to delineate, for example, activities that would fall under reporting requirements due to their connection to receiving or paying funds, or purchasing or selling securities, real properties or business assets or entities *PCMLTFA* from those that originated in audit, review or compilation engagements, carried out in accordance with the recommendations set out in the CICA Handbook (which are specifically excluded from reporting requirements). This artificial separation would create administrative burden, but we are unclear how the objectives of the *PCMLTFA* would be advanced.

**NOVEMBER CONSULTATION**

As discussed above, we have also included comments on the November Consultation, for which written comments were requested by December 16, 2011. Although the CICA had originally not chosen to comment, some of the November Consultation proposals now appear more significant in light of the proposals set out in the December Consultation. We appreciate your consideration of these comments. Our comments are limited to three proposals in the November Consultation which deal with the concept of a business relationship, and the obligations which might flow from its introduction.

**1.1: Introduction of 'business relationships'**

**3.2: Extend Ongoing Monitoring Obligations to all Risk Levels of Customers and Activities to which the *PCMLTFA* Applies - and –**

**3.3: Conduct Ongoing Monitoring in respect of Business Relationships**

Proposal 1.1 introduces the concept of a business relationship as being "*...any financial relationship established to provide financial activities or transactions*", arising between an entity and a client when a reporting entity "...conducts any financial activity or transaction in respect of which it is required to a keep a record under the *PCMLTFR*". The proposal contemplates that designated measures are applicable beginning at the point that the business relationship arises.

Proposal 3.2 would amend the *PCMLTFR* to require ongoing monitoring of all clients and activities to which the *PCMLTFA* applies, and Proposal 3.3 would specify that ongoing monitoring must be conducted in respect of a business relationship as a whole. The extent of the proposed ongoing monitoring measures is not explained in the November Consultation, but rather, reference is made to FATF recommendation 5.7, which would include scrutiny of all transactions conducted against expectations, and the requirement that customer identification information is kept up-to-date.

We are concerned that the requirement to conduct ongoing monitoring of all clients and activities to which the *PCMLTFA* applies would create significant burden for accountants and accounting firms, even absent the concept of a business relationship. Evaluating and documenting the evaluation of *each* transaction conducted against expectations, and keeping client identification information up to date would be time consuming, onerous, and seemingly inconsistent with the application of the risk based approach. Currently, that level of scrutiny applies only to high risk activities, designated as such because of a documented assessment of risk. While this measure is justifiably currently taken for high risk clients, and those for which suspicious transactions and large cash transactions are reported, the proposal seeks to apply these same prescribed enhanced measures to low risk transactions. We are concerned that updating all client identification information regularly would also create additional burden for our members that would outweigh the potential benefits.

Additionally, we are concerned that the concept of a business relationship would broaden accountants and accounting firms' obligations for Part I of the *PCMLTFA* from Triggering Activities, to Triggering Activities and all other aspects of the relationship with a client. Assurance services, for example, are excluded from Triggering Activities, but may be considered to be part of the clients business relationship if the proposal were adopted. Consideration of every transaction in the course of an assurance engagement for money laundering risk would render the service offering uneconomical. These proposals are related to proposal 6.1 in the December Consultation, which looks to expand the concept of a suspicious transaction to include activities conducted for the purpose of financial transactions. Any suspicious transaction report filed with FINTRAC currently creates a record-keeping responsibility under the *PCMLTFR*, and would trigger a business relationship, according to the definition of that term in the November proposal. As mentioned earlier, we are concerned that activities conducted for the purpose of financial transactions might draw in currently excluded services to the realm of Triggering Activities. If those activities in turn led to suspicious transaction reports, and the inception of a "business relationship" with a client, the ongoing monitoring responsibilities could encompass both Triggering Activities and currently excluded activities. Again, accounting firms might artificially segregate their activities between those which are covered by the Act, and those which are excluded.

Furthermore, we are concerned that given the size of some accounting firms, tracking the extent of a business relationship across functional units and geographic boundaries would be practically difficult to implement.

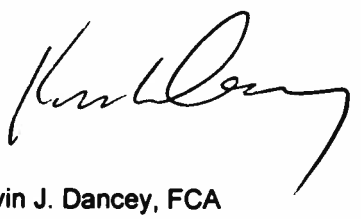
Ultimately, we would like clarification that the concept of a business relationship would not be applied to accountants and accounting firms, for consistency with the legislative structure, given the limited scope of Triggering Activities.

## CONCLUSION

We thank you for considering our comments. We appreciate the Government of Canada's concern for maintaining the balance between the need to deter and detect money laundering and terrorist financing activities while minimizing the compliance burden on the private sector. We welcome further dialogue with the Department of Finance, specifically to gain clarity on the potential effects on accountants and accounting firms.

CICA is pleased to grant permission for the posting of this submission on the Department of Finance website.

Sincerely,



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