



Submission by the Commissioner of Competition to the Department of Finance Canada

Reviewing Canada's Anti-Money Laundering and
Anti-Terrorist Financing Regime

May 18, 2018

Introduction

1. The Commissioner of Competition (Commissioner) is pleased to make this submission in response to the Department of Finance Canada's (Finance Canada) consultation paper, ["Reviewing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime"](#) (Consultation Paper).
2. The Competition Bureau (Bureau), under the direction of the Commissioner, administers and enforces the *Competition Act* (Act), and is responsible for ensuring that Canadian consumers and businesses prosper in a competitive and innovative marketplace. Section 125 of the Act gives the Commissioner the authority to make representations in respect of competition to federal boards, commissions, or other tribunals. It is in this context that the Commissioner makes this submission.
3. The Commissioner supports Finance Canada's comprehensive review of the Canadian anti-money laundering and anti-terrorist financing (AML/ATF) regulatory framework. Regular review of regulatory frameworks can ensure that rules keep pace with innovation.
4. In December 2017, the Bureau concluded a significant market study of technology-led innovation in the Canadian financial services sector (FinTech Market Study). This submission builds on the findings of the Bureau's [FinTech Market Study Report](#). It also addresses the Bureau's interest for enforcement purposes in becoming a recipient of financial disclosure reports from the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC).
5. The Commissioner is pleased to contribute to the continued dialogue on the important issue of competition and innovation in the financial services sector. In addition to this submission, the Commissioner has recently provided submissions to Finance Canada in response to its consultations on [a new retail payments oversight framework](#), as well as [potential policy measures to update Canada's federal financial sector legislative framework](#).

Overview

6. Competition is good for consumers and businesses. New financial products and services introduce greater competition in the sector. Increased competition and innovation drives lower prices, higher quality, and greater choice and convenience for Canadians. As such, regulation should be minimally intrusive to ensure that market competition is not inhibited or prevented unduly by regulation.
7. The Bureau makes this submission to provide comments on two broad aspects of the AML/ATF regime. **Part I** of this submission addresses changes that can better foster competition and innovation. **Part II** of this submission addresses changes that can assist the Bureau in its work to detect and deter fraud, price fixing and bid rigging.

Fostering Competition and Innovation

8. The AML/ATF regime is an important component of the financial sector's regulatory policy and legislation in Canada. The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) and its Regulations contribute to the safety of Canadians and the protection and integrity of Canada's financial system by detecting, preventing, and deterring money laundering and terrorist activity financing.
9. While the AML/ATF regime is unquestionably important in safeguarding businesses as well as consumers and mitigating risks to the financial system, it is important to ensure that it does not deter innovation and the competitive benefits that follow. The Bureau's recently concluded FinTech Market Study found that certain aspects of the AML/ATF regime can present a barrier to entry and growth for companies using financial technology (FinTech) to innovate and change how Canadians can access and consume financial products and services. For instance, "know-your-client" (KYC) rules set out in the current AML/ATF regime can affect client verification and access to banking services. Additional guidance combined with regulatory "innovations", such as exemptive relief and/or administrative forbearance, could support more effective risk management as well as facilitate new entry.
10. Overall, updating regulation to reflect new market dynamics can help ensure consumers are better protected when using new or innovative financial products or services. The Bureau is encouraged by the potential policy measures discussed in Finance Canada's current review of Canada's AML/ATF regime and believes several of the proposed measures and changes can lead to greater innovation and competition.

Part I - Modernizing the Framework and its Supervision

Enhancing and Strengthening Identification Methods

11. The Bureau's FinTech Market Study Report recommends that industry participants and regulators explore the potential of digital identification verification. This would reduce customer acquisition costs for service providers, ultimately reducing the costs of switching for consumers and facilitating regulatory compliance where identity verification is needed. Clearing the path for increased use of digital identification verification would further the Government's public policy objective of a safe, sound and efficient national financial system.
12. The Bureau welcomes Finance Canada's call for continued progress toward more principles-based requirements and flexible identification measures that would allow reporting entities to take a risk-based approach vis-à-vis new technologies to facilitate and enhance the effectiveness of customer due diligence for the purposes of the AML/ATF regime.

Access to Banking Services for New Entrants and De-Risking

13. In its Consultation Paper, Finance Canada seeks guidance regarding the issue of “de-risking”. The Bureau’s position is that access to banking services for FinTech entrants is essential to competition.
14. The Bureau’s FinTech Market Study considered the recent practice of “de-risking”, whereby financial institutions terminate or refuse to provide banking services to clients engaged in payment or money transfer services, to minimize that institution’s own risk of non-compliance with the PCMLTFA. During the FinTech Market Study, several FinTech companies registered with FINTRAC as money services businesses (MSBs)—particularly those providing payment-related services—expressed difficulties in opening and maintaining accounts with financial institutions.
15. As noted in the Consultation Paper, “de-risking” is linked to the perception that MSBs are inherently high-risk and, in some cases, that financial institutions must “know their customer’s customer”. MSBs require an account with a domestic financial institution in order to operate. Many MSBs offer services, such as electronic funds transfers and international remittances, which may compete with a financial institution’s own product offerings. Owing to this unique dynamic, financial institutions are in a position to potentially foreclose the entry of new competition. The Bureau agrees with Finance Canada that “de-risking” reflects the perception that MSBs are inherently high-risk. It also recognizes that financial institutions could close accounts for reasons unrelated to risk, such as to exclude an existing or potential competitor.
16. The Bureau heard during its FinTech Market Study that financial institutions have, under certain circumstances, closed MSB bank accounts or refused services to MSBs with little or no explanation. The lack of transparency surrounding the reasons for refusal and availability of recourse makes it difficult for new entrants to determine what must be remedied in order to obtain services. The Bureau also heard from industry participants that “de-risking” practices stem from financial institutions’ concern with meeting their own AML/ATF obligations, despite the fact that MSBs, once designated as such, must adhere to AML/ATF obligations themselves, including managing any AML/ATF risks arising from their own customers.
17. “De-risking” can negatively affect MSBs in terms of service level and business model. For example, a remittance business without access to basic banking services does not have the capacity to transfer value in and out of the existing payments infrastructure, which therefore may seriously impact its business model. The uncertainty and possible refusal of banking services adds sunk costs for legitimate new businesses, and may lead them to abandon entry. “De-risking” may also limit the extent to which MSBs can act as a competitive constraint on incumbent financial institutions. This may ultimately result in higher prices as well as reduced innovation, quality and choice for Canadians.

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18. The Bureau welcomes more clarity on the rights and responsibilities of both MSBs and financial institutions, and is encouraged that the Consultation Paper aligns with the Bureau's assessment of the challenges relating to "de-risking" practices. As highlighted in the FinTech Market Study Report, the Bureau recommends that financial institutions be required to provide evidence-based reasons when terminating or refusing to provide account services to businesses such as MSBs, and that there be a suitable course of redress in the event of an undue termination or refusal.
 19. The Bureau applauds Finance Canada's statements in the Consultation Paper reiterating its expectation that, under the PCMLTFA, reporting entities should manage the risk exposure created by their clients, through a risk-based approach on a case-by-case basis.
 20. The Bureau also welcomes continued guidance to industry on the position of both Finance Canada and FINTRAC regarding the issue of "de-risking", as well as the roles, responsibilities and obligations of financial institutions vis-à-vis MSBs. This guidance can help increase the level of trust between all industry participants.

Exemptive Relief and Administrative Forbearance

21. The Consultation Paper proposes regulatory pilots to allow start-ups to operate in a supervised environment without having to necessarily comply with all of the regulatory requirements that may otherwise apply. As mentioned in the FinTech Market Study Report, the Bureau is of the view that development of regulatory pilots, or "sandboxes", is an important step toward making the AML/ATF framework more flexible, risk-based and supportive of innovation.
22. Regulatory sandboxes, such as the Canadian Securities Administrators' [Regulatory Sandbox Initiative](#), or the [Regulatory Sandbox](#) launched by the United Kingdom's Financial Conduct Authority, have the potential to lower barriers to entry, encourage innovation and increase competition. They allow firms to experiment and test services and enable them to familiarize themselves with regulatory standards in the early stages of development. They simultaneously reduce regulatory uncertainty for new entrants with potentially innovative solutions and improve regulators' understanding of the marketplace and associated risks. The result is policy- and decision-making that better facilitates the development and evolution of new business models or technologies.

Consultation Process for the Development of Guidance

23. Providing guidance to the industry is an important component of effective principles-based regulation. During the Bureau's FinTech Market Study, industry participants reiterated the importance of timely and effective guidance that identifies areas of concern for regulators and potential resolutions. For example, whether new customer identification methods or technologies are acceptable, or if new business models, such as peer-to-peer lending or

crowdfunding platforms, are considered MSBs, are both examples of important guidance to industry players. Timely and effective guidance encourages innovators to explore new business ideas, minimize the compliance costs, and adopt risk mitigation strategies as needed, which in turn provides the benefits of competitive pressure on the status quo.

24. Diverse stakeholder consultation is critical to establishing rules (and guidance) that “level the playing field”. Consultation with all players in the industry—big and small (including consumers) —helps ensure that guidance does not favour any set of stakeholders over others. The Bureau welcomes measures that facilitate broader and diverse consultation and dialogue, including supporting fora and consultations that bring together Canada’s regulators, portfolio agencies, policymakers, industry participants and consumers.

PART II – Detecting and Deterring Fraud and Cartels: The Competition Bureau’s Case for Becoming a FINTRAC Disclosure Recipient

Background

25. The PCMLTFA ensures that personal information under its control is protected from unauthorized disclosure, and that information may only be disclosed to recipients identified in the PCMLTFA when FINTRAC determines that there are reasonable grounds to suspect that the information would be relevant to the investigating or prosecuting of a money laundering offence or a terrorist activity financing offence.
26. As set out in subsection 55(3) of the PCMLTFA, disclosure recipients include “the appropriate police force” and, under specified circumstances, designated information can also be disclosed to the Canada Revenue Agency, the Canada Border Services Agency, the Communications Security Establishment Canada, foreign agencies with mandates similar to FINTRAC’s, the Canadian Security Intelligence Service, and an agency or body that administers the securities legislation of a province. The Bureau is not currently one of the bodies to whom FINTRAC can disclose designated information under the PCMLTFA.
27. The Bureau is therefore seeking to obtain status as a direct disclosure recipient of financial intelligence from FINTRAC, the case for which is outlined below.

Legislative Objectives

28. The PCMLTFA, which established FINTRAC, has the following objectives:
- a. To implement specific measures to detect and deter money laundering and the financing of terrorist activities and to facilitate investigations and the prosecution of the related offences;
 - b. To respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while protecting individual privacy;
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- c. To help fulfill Canada's international commitments to fight multinational crime; and
 - d. To enhance Canada's capacity to take targeted measures to protect its financial system and to facilitate Canada's efforts to mitigate the risk that its financial system could be used as a vehicle for money laundering and the financing of terrorist activities.

29. The following points of information set out how the Bureau is well positioned to help advance the PCMLTFA's objectives.

The Competition Bureau's Status as a Federal Law-Enforcement Agency

- 30. Headed by the Commissioner of Competition, the Bureau is an independent federal law-enforcement agency that enforces the criminal and civil provisions of the Act. The purpose of the Act is to maintain and encourage competition in Canada in order to, among other things, promote the efficiency and adaptability of the Canadian economy and provide consumers with competitive prices and product choices.
- 31. The Bureau is responsible for investigating criminal offences outlined in the Act, including Mass Marketing Fraud¹ (MMF), deceptive online representations, cartels (including price-fixing conspiracies, market allocation and output restrictions) and bid-rigging (collectively the "offences"). These crimes amount to special types of fraud and are serious, indictable criminal offences under the Act, with most carrying penalties of up to 14 years in prison and/or significant fines.
- 32. By their nature, these offences often involve a significant money laundering component. Money obtained through the commission of any of these criminal offences is, by definition, proceeds of crime (i.e. the proceeds of any offence that may be prosecuted as an indictable offence in Canada). In the Bureau's experience, this money is often placed into the financial system and laundered in order to disguise its source, before being used for other purposes under the veil of legitimacy. These offences directly and indirectly impact Canadian consumers, either through their impact on victims of fraud, or by making consumers pay more for goods and services than they otherwise would, absent the existence of a cartel or bid-rigging arrangement.
- 33. The Bureau's ability to deter and detect these offences and to protect Canadian consumers, businesses and public bodies would be strengthened with access to financial intelligence from FINTRAC. A single FINTRAC disclosure may contain information on several related transactions, often broken down by person, entity or institution where the transactions occurred, as well as a graphic chart illustrating the network of transactions undertaken.

¹ Mass Marketing Fraud is defined as fraud committed via mass communication media using the telephone, mail, and the Internet. Provisions under the criminal regime of the Competition Act prohibit materially false or misleading representations made knowingly or recklessly, deceptive telemarketing and deceptive prize notices.

34. Receiving such intelligence from FINTRAC could assist the Bureau in making investigative links and connecting money to specific MMF or other criminal conduct, including cartels, price-fixing conspiracies and bid-rigging. Not only would this provide a significant deterrence effect, it would also allow the Bureau to target proceeds of crime and associated assets (by exposing the flow of suspicious funds and accounts) in order to maximise its effectiveness in bringing offenders to justice and ensuring that they do not financially benefit from their crimes.

The Bureau's Role in Combating Mass Marketing Fraud

35. Each year thousands of Canadians become victims of fraud, the types of which include, but are not limited to, MMF, drip-pricing, false or misleading advertising, and pyramid schemes. MMF, in particular, causes significant damage to both individuals and the Canadian economy more broadly. The Royal Canadian Mounted Police (RCMP) estimates that MMF costs Canadian businesses and individuals more than \$10 billion each year.²

36. In 2015, FINTRAC published its Typologies and Trends Report entitled *Mass Marketing Fraud: Money Laundering Methods and Techniques*³ (MMF Report), which identified the clear links between MMF and money laundering:

“Mass marketing fraud operations make considerable use of businesses to launder illicit proceeds. Businesses are involved in nearly all cases where suspected mass marketing fraud perpetrators show a minimum degree of sophistication.”

37. The MMF Report also points out that:

“Several categories of mass marketing fraud exist, each with particular characteristics designed to defraud victims. Almost all of the cases analysed for this report involved businesses, and the automotive sector is one of the main sectors suspected of being used to launder the proceeds of mass marketing fraud. Structuring and the use of nominees are two money laundering methods which have been observed by FINTRAC. While financial institutions appear to be used for suspected money laundering associated to certain mass marketing fraud schemes, many schemes appear to leverage money service businesses not only to receive funds from victims, but to launder the illicit proceeds as well. These reporting entities in particular should note the “red flags” included this report, and ensure that similar suspicious activity is reported to FINTRAC.”⁴

38. FINTRAC'S 2017 Annual Report⁵ also highlights the fact that fraud offences constitute the highest number of predicated offences related to financial intelligence disclosures from FINTRAC (27%) compared to the next highest predicated offence, namely drugs (20%). This

² <http://www.rcmp-grc.gc.ca/scams-fraudes/mass-marketing-de-masse-eng.htm>.

³ http://publications.gc.ca/collections/collection_2015/canafe-fintrac/FD5-1-7-2015-eng.pdf.

⁴ http://publications.gc.ca/collections/collection_2015/canafe-fintrac/FD5-1-7-2015-eng.pdf.

⁵ <http://www.fintrac-canafe.gc.ca/publications/ar/2017/ar2017-eng.pdf>.

serves to demonstrate the significance of fraud offences as they pertain to the work of FINTRAC.

39. In light of the established connections between MMF and money laundering, the Bureau's ability to investigate and detect MMF offences could be significantly enhanced were it to become a direct FINTRAC disclosure recipient. Financial intelligence received from FINTRAC would be used by the Bureau to, among other things:

- Identify key individuals and companies within criminal (MMF) organizations.
- Identify new and previously unknown suspects (targets) within an investigation.
- Identify the amounts of funds being generated by MMF schemes and the links between these funds and other commercial entities.
- Identify the methods of money laundering being employed to hide or mask the source of illicit money obtained through an MMF scheme.

40. While this list is by no means exhaustive, it serves to demonstrate that the direct receipt of intelligence from FINTRAC would enhance the Bureau's ability to target criminal groups who are involved in MMF or other fraud schemes and in turn to protect individual Canadian citizens and the Canadian economy from the negative impact of such crimes.

41. This is also consistent with the objectives of the PCMLTFA legislation in respect of responding to the threat posed by organized crime (which includes criminal groups engaging in fraud to fund other illegal activities) and helping Canada fulfill its obligations on combatting multinational crime. Indeed, in its aforementioned report, FINTRAC recognized that there is a clear international dimension to the MMF schemes originating in Canada:

“Most mass marketing fraud observed by FINTRAC is based in Ontario and Quebec. The analysis also revealed that in nearly all cases, the mass marketing fraud operated primarily from an urban area....FINTRAC's data indicates that United States residents are a significant target of mass marketing fraud operations based in Canada.”

Information Sharing Between FINTRAC and the Bureau

42. As previously stated, by their very nature, criminal offences committed under the Act often generate proceeds of crime that can then be laundered. Many of the Bureau's investigations involve frauds of significant value, ranging from the hundreds of thousands to the hundreds of millions of dollars. Providing information to FINTRAC, through the submission of Voluntary Information Records (VIRs) about these investigations, would likely lead to the identification by FINTRAC of relevant financial transactions and networks that would assist the Bureau in furthering its investigations.

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43. It is important to note that the Bureau is bound to conduct all inquiries in private as designated in subsection 10(3) of the Act. In addition, section 29 of the Act protects from disclosure information obtained by or provided to the Bureau in the course of executing its mandate, including the identities of the persons who provided the information, and any information that could reveal their identities.
44. However, subsection 29(1) of the Act also provides exceptions for the communication of information to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act. In the case of dealings with agencies, such as FINTRAC, information can be communicated by the Bureau where such action is necessary to transfer a matter not within the Bureau's mandate to the appropriate agency, or when the Bureau and the agency are engaged in cooperative action with respect to an investigative matter. This includes transferring information that the Bureau believes is required for the enforcement operations of the agency, where the information reveals an apparent criminal offence and, particularly, where there is a threat to public security or safety. It also includes sharing intelligence, through the Bureau's law enforcement partners, to combat more effectively MMF, deceptive marketing practices, bid-rigging and cartels.⁶
45. Ensuring such information sharing would allow FINTRAC to realise one of the primary objectives of the PCMLTFA legislation; that is, providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while protecting individual privacy.
46. Additionally, the Bureau can contribute to FINTRAC's mandate of contributing to the public safety of Canadians and protecting the integrity of Canada's financial system by enhancing financial intelligence reports with respect to areas such as MMF, given that a large percentage of Bureau criminal cases include proceeds of crime and money laundering components. This also serves the Bureau's own administration and enforcement objectives of protecting Canadian consumers, businesses and public bodies.

Enforcement Cooperation - The Bureau's National and International Partnerships

47. The globalization of trade, the rise of multinational corporations, the increased mobility of consumers, and now the rapid growth of e-commerce and the ongoing development of information and telecommunications technologies have increased the necessity for law enforcement agencies, both nationally and globally, to cooperate and share information where appropriate. To fulfill its mandate, the Bureau maintains close working relations with a number of key partners, most notably, the Canadian Anti-Fraud Centre, Canada's central fraud data

⁶ *Information Bulletin on the Communication of Confidential Information under the Competition Act*, available at www.competitionbureau.gc.ca.

repository criminal intelligence on MMF, internet fraud and identity theft, which the Bureau manages in conjunction with the RCMP and the Ontario Provincial Police.

48. The Bureau also collaborates with numerous domestic and international criminal enforcement agencies, including the RCMP, Toronto Police Service, provincial police forces, the United States Department of Justice, the Federal Bureau of Investigation, the United States Postal Inspection Service, and various competition authorities worldwide.
49. The Bureau also plays a leading role in the International Mass Marketing Fraud Working Group, the latter including representatives from various international enforcement agencies and other organizations, including FINTRAC, who use cross-border intelligence sharing and strategy development to combat fraud.
50. Status as a FINTRAC disclosure recipient would allow the Bureau to strengthen its role as a leading figure in the international fight against fraud and to work collaboratively with global partners to increase the effectiveness of its enforcement activities, particularly in respect of the use of illicit funds obtained through fraudulent activity.

Conclusion

51. The AML/ATF regime is unquestionably important in safeguarding consumers and mitigating risks to the financial system. As noted in the Consultation Paper, there are opportunities to improve upon the existing framework to promote innovation and competition in Canada's financial services sector. Competition and innovation ultimately benefit both consumers and businesses, through greater choice, increased convenience, improved efficiency, and lower costs and prices. The Bureau is encouraged by Finance Canada's direction and the questions posed in its review of Canada's AML/ATF regime. The Bureau supports the approach taken by Finance Canada in the Consultation Paper to encourage greater competition and innovation in the financial sector while ensuring the safety and soundness of this essential industry.
52. The Bureau welcomes further engagement and collaboration with Finance Canada to advance the ongoing dialogue on competition and innovation in the financial services sector.