

02 September 2021

Director, Policy and Rules
AUSTRAC
PO Box 5516
West Chatswood NSW 1515



By email: aml_ctf_rules@austrac.gov.au

Dear Sir/Madam,

Consultation on proposed draft to add Chapters 79 and 80, and amend Chapters 21 and 48 of the AML/CTF Rules

1. This submission concerning Consultation on proposed draft to add Chapters 79 and 80, and amend Chapters 21 and 48 of the *Anti-Money Laundering and Counter-Terrorism Rules Instrument 2007 (No. 1) (Cth)* (the **AML/CTF Rules**) is made by the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **FSC**).
2. We thank AUSTRAC for allowing the FSC to make a submission after the consultation deadline.

Proposed new Chapter 79

3. The Explanatory Note to the proposal indicates that proposed amendments to Chapter 46 will not proceed following feedback received, and that the new chapter 79 is proposed as an alternative approach.
4. Proposed amendments to introduce Chapter 79 of the AML/CTF Rules would allow accounts at ADIs and other financial institutions to be opened (Table 1, item 1 in section 6 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)* (**AML/CTF Act**)) and transactions conducted (Table 1, item 3 in section 6 of the AML/CTF Act) without customer identification, provided certain preconditions are met and no transaction other than the initial deposit made at the time of opening is conducted on the account. The safeguards proposed require that the reporting entity:
 - a. determine that to open the account and accept the initial deposit is 'essential to avoid interrupting the ordinary course of business';
 - b. implement appropriate risk management procedures; and
 - c. ensure the applicable customer identification procedure is carried out as soon as practicable.
5. For the reasons set out below, it is not apparent to the FSC why this amendment, which largely returns to the position that existed under the *Financial Transaction Reports Act 1988 (Cth)* prior to the enactment of the current AML/CTF laws and was a significant reason for its development, is now considered necessary after so many years of experience with the implementation of customer due diligence procedures.
6. AUSTRAC has previously taken the view that withdrawal or return of such deposits when the customer is unable to provide identification sufficient for the reporting

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entity to be satisfied that they are who they purport to be is not a 'transaction'. Reporting entities which have accepted deposits in these circumstances have no basis on which to retain the relevant funds, and, in the absence of a court order to do otherwise, have no other option than to return them to the customer, while lodging a suspicious matter report if the circumstances require it. A money launderer whose funds are returned to them after a period of time has nevertheless gained the benefit of both 'storing' the relevant funds for a (possibly quite significant) period of time and of a transaction contributing to the separation of the funds from their original source.

7. The safeguards proposed are not likely to address the risk of reporting entities facilitating money laundering or terrorist financing that is presented by the opportunity to integrate criminal funds into the financial system without the need to provide identification, and then to receive them back with their illicit source obscured.
8. Customer due diligence by its nature interrupts the ordinary course of business, particularly in cases where the customer in question does not wish to cooperate with the requests made of them. Some reporting entities may regard AML/CTF compliance requirements as having less commercial benefit to their business than consumer protection and prudential regulation requirements.
9. The requirement to determine that to open the account and accept the initial deposit is 'essential to avoid interrupting the ordinary course of business' is a subjective standard which is fatally impacted by the fundamental conflict of interest facing any organisation attempting to reach such a decision. The outcome is, in the FSC's view, likely to be determined not by an objective assessment of the ML/TF risk against the business inconvenience of customer due diligence, but by the competence, courage and authority of the AML/CTF Compliance Officer and the risk appetite of the board or top management in relation to accepting the risk of being involved in the facilitation of money laundering.
10. In the experience of FSC members, where reporting entities do not conduct customer identification procedures prior to providing designated services, this may not be due to any special circumstances arising from their business model that make these measures particularly inconvenient, but more likely attributable to reasons of culture and maturity in relation to matters of risk management and governance.

Proposed new Chapter 80

11. Amendments to introduce Chapter 80 of the AML/CTF Rules currently under consideration by AUSTRAC seek to implement exemptions from the definition of stored value card, which the Explanatory Note for consultation indicates were unintentionally captured by the current definition. These exemptions would remove 'accounts' (as defined in the AML/CTF Act) and certain electronic gaming instruments from the scope of the current definition.
12. This proposal eliminates problematic overlap between Table 1 and Table 3 designated services under Section 6 of the AML/CTF Act, for the providers of gaming services and is supported by the FSC.

Continued display of Consultation materials

13. We are pleased that, as at the date of this letter, the Consultation materials are still available on the AUSTRAC website.
14. When AUSTRAC conducted consultation on the AML/CTF Rules which closed in March of this year, the consultation materials were removed from the website after consultation was closed. This made it difficult for the industry to prepare for the amendments, which were only released a very short time prior to their commencement.
15. The practice of other regulators is to keep consultation materials available on their website after the conclusion of the consultation process. We would encourage AUSTRAC to also adopt this practice. Our experience is that from time to time it is helpful to look back on consultation materials in order to better understand the approach a regulator has taken and/or how to interpret particular content in delegated legislation and policy documents.

Conclusion and further contact

16. The FSC, in summary, supports the efforts of AUSTRAC to establish simpler, less prescriptive requirements but believes these efforts should leverage the existing risk-based approach enshrined in the legislation rather than increase the potential for arbitrage between designated services by 'favouring' account-based products issued by ADIs over other designated services and the incentives for reporting entities to rely on business convenience as grounds for decision-making in relation to AML/CTF control measures.
17. The FSC would be pleased to discuss any aspect of this submission.
18. Please contact the Chair of the FSC, Pip Bell, at pbell@pmclegal-australia.com, if you would like to do so.

Yours faithfully



Greg Rodgers
Chair, Business Law Section