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Strong banks – strong Australia

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23 May 2017

Director
Rules
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Dear Sir/Madam

Proposed AML/CTF Rules amendments resulting from the Review of the AML/CTF Act

The Australian Bankers' Association (**ABA**) appreciates the opportunity to provide the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) with comments on the proposed rules amendments resulting from the *Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (**the Review**).

With the active participation of its members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

General comments

The ABA continues to support AUSTRAC as it addresses issues identified in the Financial Action Task Force's *Anti-money laundering and counter-terrorist financing measures*, Australia, Mutual Evaluation Report 2015.

The ABA also continues to work with both AUSTRAC and the Attorney-General's Department to progress the implementation of the 84 recommendations identified in the 2016 Report on the Review.

Calculation of regulatory costs or savings

The ABA notes that the draft amendments which are the subject of this consultation do not require changes to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (**AML/CTF Act**) to implement. However, further changes are required, particularly to Chapter 4, before industry could realise any regulatory benefits.

The ABA requests details on the commencement date for the proposed changes as some of those changes may have a significant impact on some of our members, e.g. Part 8.7 Incorporation of information from AUSTRAC or other relevant authorities, which the ABA has provided comments on.

For ease, we have grouped our comments on the draft AML/CTF Rules under the chapter headings.

Chapter 1 (Definitions)

For clarity, future-proofing and in order to facilitate the adoption of emerging technologies and government initiatives in biometrics and digital identities, the ABA recommends the text of the rule should be altered to read:

> *primary non-photographic identification document includes* ***but is not limited to:***
>
> *primary photographic identification document includes* ***but is not limited to:***
>
> *secondary identification document means any of the following includes* ***but is not limited to:***

This will allow reporting entities (**REs**) to quickly adopt new, innovative and cost-effective methods to meet their AML/CTF obligations.

Chapter 4 (customer due diligence)

The ABA believes an opportunity has been missed to further simplify Chapter 4, particularly with regards to collect and verify obligations, as only minor changes have been proposed.

Banks globally, and in Australia, are forefront in adopting and incorporating digital solutions into every aspect of their operations. The staggering pace of emerging technologies with the move to digital within banks, means that any benefit of the proposed reforms has already likely been superseded for ABA members. Therefore there is unlikely to be any regulatory cost savings as a result of these reforms for members.

The proposed amendment to 4.12.2 does not materially alter the current risk-based approach to omit the requirement to verify beneficial ownership of domestic or foreign majority-owned subsidiaries of foreign companies listed on a stock exchange comparable to Australia, and therefore there is no easing of regulatory burden in this regard.

There could be a significant easing of regulatory burden if the Chapter 4 rules were amended to allow a RE on a risk-based approach to confirm the identity of a person/entity to which designated services are to be provided, alongside the removal of the distinction between collect and verify. AUSTRAC's regulatory and enforcement approach to ensure RE's compliance with Chapter 4 rules would also need consideration at the same time.

Part 4.15 - Procedure to follow where a customer cannot provide satisfactory evidence of identity

The ABA does agree that this modification may assist smaller non-bank REs, however the discretion is unlikely to be adopted into the broader AML program of banks as decisions on instances where a customer cannot provide satisfactory evidence of identity would likely remain an escalation point for the AML/CTF Compliance Officer (**CO**) or a decision made in accordance with the existing customer on boarding policies and risk profile of that RE.

Other reasons for banks not adopting this amendment would be the cost and difficulty of ensuring consistency in the use of such a discretion across a large RE, such as a bank.

Alternative Identification Processes

4.15.4

ABA members already have alternative identification processes and therefore have a number of suggestions for 4.15.4. As a general comment, the ABA considers the drafting too broad in some parts and too prescriptive in other areas. The ABA considers that a risk-based exemption (rather than rules) should be allowed. Banks are already well versed with real life examples of situations where alternative identification is needed, examples include prisoners, refugees and individuals in shelters escaping family violence. This is why the ABA recommends that a risk-based exemption (rather than rules) is the more appropriate solution.

This section, as drafted, only applies to individuals and does not cover non-individuals.

Equally, terms such as 'report', 'trusted referee', 'reputable organisation', 'known' are simply too ambiguous for REs to utilise the section as drafted, and is likely to result in inconsistent application and unnecessary regulatory costs across the entire AUSTRAC regulated population.

A suggestion would be to alter the rule to be more principles-based allowing a RE to adopt the process into their own individual risk-based procedures.

Self-Attestation

4.15.5 and 4.15.6

The ABA would recommend that the requirements around self-attestation be clarified with ample guidance to ensure the integrity of the AML/CTF regime.

Chapters 8 and 9 (AML/CTF programs)

The ABA considers that Chapters 8 and 9 could be combined into one.

Should AUSTRAC ultimately decide to remove designated business groups from the AML regime, this would be an appropriate time for the consolidation of these two chapters.

Part 8.5 AML/CTF Compliance Officer

Duties of the AML/CTF Compliance Officer

8.5.3

This rule should be amended to reflect the diversity in size and types of REs and the role of the AML/CTF CO, and principles-based obligations are a better fit for Part 8.5. It is a fact that a CO in a large RE should be ultimately responsible for AML/CTF compliance, but is unlikely to have day-to-day operational focus that the rules imply by using the terms "handle" or "direct".

8.5.4

The ABA's view is that this part has been made too prescriptive. In many large organisations the CO will not 'implement', but does oversee and regularly ensures that appropriate measures are in place. As such the ABA believes that the wording should be amended to reflect this and suggests the following, "The Compliance Officer's responsibilities may include, but are not limited to, ensuring the following are implemented …".

The rules should be amended to reflect the diversity in size and types of REs. The ABA recommends principles-based obligations which could include such terms as monitoring, oversight, compliance and appropriate assurance.

8.5.4 (15)

The ABA questions the inclusion of the obligation that the RE's staff are now to be made aware of any interaction between the RE and its obligations under the *Privacy Act 1988*. The explanatory note does not explain the inclusion of this obligation. This new obligation will require a complete analysis and subsequent revision of all AML/CTF compliance and/or staff training programs across all REs which will come at a significant regulatory cost.

Part 8.7 Incorporation of information from AUSTRAC or other relevant authorities

The ABA has significant concerns with the proposed amendments in Parts 8.7.1 and 8.7.2. The amendments as they stand are simply too broad and too prescriptive, and will require REs to incur a significant regulatory burden.

There is no test of reasonableness, the obligation is one of 'must'. The questions that arise (and give rise to the increased regulatory costs) are:

> Who are 'relevant authorities"?
>
> What constitutes "information"?
>
> What constitutes "published information"?
>
> There is no benchmark as to the quality or sources. For example, does published information include Google, news articles, speeches, media releases, where the relevant authority is cited?

The ABA would also question why a specific documented procedure is explicitly required, and would recommend the removal of any unnecessary prescription on how REs should implement certain aspects of the AML/CTF programs, particularly in the absence of further AUSTRAC guidance on the above questions in Parts 8.7 and 9.7. The ABA also wishes to highlight the difficulties of incorporating a 'document procedure' in REs Part A which would need to be approved annually and would not be able to be amended without Board approval, which is an unnecessary regulatory burden.

Also of concern is the statement "information that may be accessed by the reporting entity". Does this require each and every RE, on a daily basis, to scan each and every relevant authority for information and then incorporate such information in Part A? The ABA strongly opposes the current drafting which will cause all REs to incur a new and significant regulatory burden.

The rules are also silent on a reasonable timeframe for REs to incorporate AUSTRAC or other 'relevant authorities' information i.e. would an RE need to update their risk assessments on the same day. The ABA is of the view that it is best placed for the RE to determine how it uses the information received from AUSTRAC or other authorities, and not prescribe that this be included in the risk assessment.

One alternative is for AUSTRAC, on behalf of its regulated population, to undertake the above analysis work for other relevant authorities, and then distribute that information to its REs. That would also have the added benefit of allowing REs to understand what issues (identified by other relevant authorities) AUSTRAC deems important.

Chapter 9

The ABA's concerns with Part 9.5 AML/CTF Compliance Officer are the same as discussed under Part 8.5 AML/CTF Compliance Officer.

In addition, regarding 9.5.4 (7), the ABA seeks further information from AUSTRAC in relation to 9.5.4 (7) to understand why "permanent establishments in a foreign country" was expressly included.

The ABA also seeks further information in relation to 9.5.4 (12) to understand why "third party AML/CTF compliance-related service providers" was expressly included.

Both 9.5.4 (7) and particularly 9.5.4 (12) are new obligations which will have a new regulatory and cost impact on REs. It is unclear why the CO is required to conduct the due diligence and ongoing evaluation. Large REs with operations in multiple jurisdictions usually have teams in those jurisdictions who conduct the due diligence and ongoing evaluations and are best placed to do so. This new obligation will require a duplication of effort.

Part 9.7 Incorporation of information from AUSTRAC or other relevant authorities

The ABA's concerns regarding Part 9.7 are the same as discussed under Part 8.7.

Chapter 15 (Ongoing customer due diligence)

No comment.

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Chapter 30 (Disclosure certificates)

No comment.

Chapter 36 (Corporate structures)

No comment.

Yours faithfully

Signed by

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