

21 December 2022

Director, Policy and Rules
Australian Transaction Reports and Analysis Centre
PO Box 5516
WEST CHATSWOOD NSW 1515

By email: guidance_consultation@austrac.gov.au

Dear Director,

Consultation on proposed guidance relating to employee due diligence (EDD)

1. This submission is made by the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**). The Committee thanks the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) for the opportunity to comment on the proposed guidance on EDD in the anti-money laundering and counter-terrorism financing (**AML/CTF**) compliance framework issued for consultation on 3 November 2022 (the **Guidance**).
2. The Committee has the following four general comments and observations in relation to the proposed Guidance:
 - The Committee is of the view that, in reality, many small to medium reporting entities will treat all employees with the same risk rating for both EDD and training purposes, which the Guidance does not appear to contemplate. The Committee submits that this approach is reasonable under a risk-based approach.
 - The Committee is of the opinion that significant resourcing would be required by all reporting entities to comply with the mandatory elements of the Guidance, which would be disproportionate to the ML/TF risk most reporting entities would reasonably expect to face.
 - The Guidance goes beyond the obligations in Rules 8.2 and 8.3 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth) (the **Rules**): for example, the suggestion that training include topics outside those in Rule 8.2.3 (training program objectives).
 - The Guidance uses the word “must” with respect to things which either are not stated in the Rules or are appropriately risk-based. The Guidance therefore is suggesting that a reporting entity is required to do these things under the Rules when that is not the case.
3. The Committee’s comments on specific matters dealt with in the Guidance are set out below.

Interpretation of the Rules

4. The Committee is of the opinion that care should be taken to ensure that the Guidance does not imply that there are Rules that do not in fact exist, or adopt an interpretation of a Rule which is too narrow given the risk-based approach upon which the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**) and the Rules are based.

Good practices and bad practices

5. The Committee is concerned that the “Good Practices” heading could easily be construed as being legal or meeting a legal obligation, and that the “Bad Practices” heading could be construed as being illegal or not meeting a legal obligation. Neither are the case. There are examples in the “Bad Practices” section that are entirely compliant with a strict reading of the Rules, but which may not be considered best practice or are not feasible due to operational considerations.
6. The Committee submits that the Guidance would benefit from a change of wording from “Good Practices” and “Bad Practices” to “Best Practice” and “Not Best Practice” or the like. Alternatively, some clarification should be provided about what is considered necessary to meet a legal obligation and what is not.

Employee due diligence

7. The Guidance states that:

“It is expected you will engage employees who possess the necessary skills, knowledge and expertise to carry out any anti-money laundering and counter-terrorism financing (**AML/CTF**) functions or responsibilities effectively.”
8. This suggests a very high bar for a reporting entity to meet with respect to all employees “who may be in a position to facilitate the commission of a money laundering or financing of terrorism offence.” It may however be appropriate guidance for a position in a financial crime function of a larger reporting entity.

Identifying roles that pose a risk to the business

9. The Guidance does not contemplate the fact that many small to medium reporting entities will assign the same risk rating to all employees for EDD. Therefore they will apply the same screening check to all prospective employees.
10. The Committee is of the opinion that this approach is reasonable under a risk-based approach, provided that it is suitable for those employees whose roles present the highest level of ML/TF risk faced within the reporting entity’s organisation.

National police checks

11. The Committee is of the opinion that the Guidance should include suggestions for reporting entities that employ recent migrants to Australia.
12. These migrants may not have been in Australia for sufficient time to allow a police check to be of any value, for example if the person has migrated in the previous 6 or 12 months.

13. A police check from the person's previous country may provide evidence of a relevant conviction which would not be apparent from an Australian police check. The Guidance could usefully address what might be appropriate, noting that there are international police check processes currently available in Australia. It could at the same time take into account that all visa applicants must pass the character test to live in Australia.¹

Who conducts checks

14. The Guidance does not contemplate the operational business reality that many reporting entities will outsource some or all of their EDD employee due diligence and recruitment functions. The Committee suggests that the Guidance ought to address this situation.
15. The Committee notes that the 2022 AML/CTF Compliance Report for the purposes of section 47 of the AML/CTF Act asked a question on outsourcing of employee due diligence checks.

Scope of AML/CTF risk awareness training program

16. The Guidance states that "you must provide anti-money laundering and counter-terrorism financing (AML/CTF) risk awareness training for your employees to ensure that your employees understand and are aware of Rule 8.2.3" and "you should give all your employees regular AML/CTF risk awareness training".
17. Rule 8.2.2 does not require a reporting entity to train all employees, as the Guidance suggests, rather it requires that the reporting entity "gives its employees appropriate training at appropriate intervals". If an employee has a function which is considered to be of no risk, then it is appropriate for that employee to receive no training.
18. Mandating AML/CTF risk awareness training for every employee of a reporting entity is not contemplated by Rule 8.2 and, if it were, the Committee is of the view that it would impose a considerable and disproportionate burden on all reporting entities.
19. We trust AUSTRAC will find the above comments of interest. Members of the Committee would be pleased to make themselves available to discuss them with AUSTRAC at your convenience.
20. Please contact the Chair of the Committee, Pip Bell, at pbell@pmclegal-australia.com if you would like to further engage with the Committee.

Yours faithfully



Philip Argy
Chairman
Business Law Section

¹ Under the *Migration Act 1958* (Cth), s 501.