Law Council
OF AUSTRALIA
Business Law Section

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 enhanced customer due diligence (ECDD) program

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 ECDD programs 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 Guidance goes beyond the obligations set out in Rules 15.8–15.10 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth) (the **Rules**): for example, mandating board/senior management approval of an ECDD program.

   - The Guidance uses the word "must" in connection with things which are either not stated in the Rules or are 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.

   - The examples in the Guidance do not make any provision for materiality thresholds.

   - The Committee is of the opinion that significant resourcing would be required by all reporting entities to comply with the purported mandatory elements of the Guidance which would be disproportionate to the reasonable money laundering and terrorism financing (**ML/TF**) risk faced by most reporting entities.

3. The Committee's comments on specific matters dealt with in the Guidance are set out below.

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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. For example, see [10]–[11] below with reference to board / senior management approval of an ECDD program.

Examples in the Guidance

5. While is it is not unhelpful to provide examples in the Guidance, the Committee is of the view that the Guidance would benefit from including an element of materiality in examples.

6. For example, a high ML/TF risk situation being one that involves a customer resident in a high-risk jurisdiction should, in the Committee's view, have an element of materiality. The example could include a customer resident in a high-risk country where the size of the transactions (individual or over time) is beyond a materiality threshold.

7. Further, the Committee queries the reference to anonymity, given that the provision of designated services on an anonymous basis is prohibited under sections 139 and 140 of the AML/CTF Act. The page 2–3 example in the Guidance might be amended as follows (changes recommended by the Committee marked up below):

   "Examples of high ML/TF risk situations include:

   - circumstances where you consider the customer's transaction to be complex, unusually large or there is an unusual pattern of transactions which has no apparent logical business purpose, ~~lend themselves to anonymity,~~ or involve a non-immaterial transaction or series of transactions with a customer resident in a higher risk foreign country (e.g. the foreign country has inadequate or insufficient AML/CTF measures and the transaction size is $2,000 or more)"

Good Practices and Bad Practices

8. 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 which 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.

9. 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 to state what is considered necessary to meet a legal obligation and what is not should be provided.

Board / senior management approval of ECDD program

10. The Guidance states that the ECDD program "must" have the approval of senior management. That position is not supported by Rule 15.10.

11. The Committee acknowledges that an ECDD program is an element of Part A of an AML/CTF Program and, therefore, must be approved and adopted by a board/senior management as a function of the overall approval/adoption process. However, there is no legal obligation on a reporting entity to have its ECDD program receive separate discrete senior management/board approval over and above the AML/CTF Program as a whole.

Senior management approval for conducting ECDD

12. The Guidance implies that senior management approval must be obtained for ECDD conducted under mandatory ECDD triggers contained in Rule 15.9. That position is not supported by Rule 15.10, where senior management approval is only mandatory in the following scenario (Rule 15.11)—when: “a designated service is being provided to a customer who is or who has a beneficial owner who is, a foreign politically exposed person” (Rule 15.9(2)).

13. Any such mandatory obligation is not operationally feasible in most reporting entities. If it were, it would cause a significant resourcing and compliance burden not proportionate to the reasonable ML/TF risk faced by a reporting entity.

What to include in the ECDD program

14. The Guidance states that an ECDD program “must” include the list of measures stated. Rule 15.10 does not mandate the precise elements to be included in an ECDD program. Rather, it states that a reporting entity must “include appropriate risk- based systems and controls so that, in cases where one or more of the circumstances in paragraph 15.9 arises, a reporting entity must undertake measures appropriate to those circumstances, including a range of the measures in subparagraphs 15.10(1) to (7)”.

15. It is the Committee’s opinion that Rule 15.10 has been drafted to allow flexibility for a reporting entity to design appropriate risk-based systems and controls based upon the ML/TF risk it reasonably expects to face. The Committee is concerned that prescribing mandatory systems and controls as stated in the Guidance removes the very flexibility that the Rules and the risk-based system are designed to allow.

Relationship between ECDD and suspicious matter reports (SMRs)

16. The Committee submits that the Guidance is at odds with Rule 15.9(3), which requires ECDD to be applied “when a suspicion has arisen for the purposes of section 41 …”; the Guidance states that ECDD must be applied “where a customer’s activity or behaviour form the grounds for suspicion”.

17. The Committee understands that ECDD must be conducted before a reporting entity can form a reasonable suspicion under section 41 of the AML/CTF Act. However, the wording of both the Guidance and Rule 15.9(3) suggests that ECDD must be conducted in the three business day timeframe between a reporting entity forming a reasonable suspicion and the submission of the SMR under section 41 of the AML/CTF Act. In reality, this is not practical and fails to take into consideration that most, if not all, reporting entities will conduct ECDD before (and in many instances in order to make) the decision on whether or not to form the reasonable suspicion which, if formed, triggers the SMR obligation.

18. 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.

19. 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