



## **Australian Government**

### **Australian Transaction Reports and Analysis Centre**

#### ***Explanatory Statement – Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2012 (No. 1) amending the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)***

#### **1. Purpose and operation of Anti-Money Laundering and Counter-Terrorism Financing Rules (AML/CTF Rules) amending Chapters 1, 8, 9, 21, 28 and 51 and adding Chapter 67**

1. Section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) provides that the AUSTRAC Chief Executive Officer (AUSTRAC CEO) may, by writing, make AML/CTF Rules prescribing matters required or permitted by any other provision of the AML/CTF Act.

#### **Amendment of Chapter 1**

2. The Chapter 1 amendment arises from consequential changes as a result of the *Human Services Legislation Amendment Act 2011*, which amalgamated Medicare Australia and Centrelink with the Department of Human Services. As a result of the amalgamation, references in documents to ‘Medicare Australia’, ‘Centrelink’ or their ‘Chief Executive Officers’ should now read the ‘Department of Human Services’ or the ‘Chief Executive Medicare’ or ‘Chief Executive Centrelink’.
3. AUSTRAC identified one consequential amendment in the AML/CTF Rules and this is contained in the Chapter 1 definition of ‘primary non-photographic identification document’, where the term ‘Centrelink’ is used. This has been replaced with the phrase ‘the Department of Human Services’.

#### **Amendment of Chapters 8 and 9**

4. Chapter 8 of the AML/CTF Rules relates to Part A of a standard AML/CTF program which requires a reporting entity to identify, manage and mitigate money laundering or terrorism financing risk that a reporting entity may reasonably face in regard to the provision of a designated service.
5. Chapter 9 of the AML/CTF Rules relates to Part A of a joint AML/CTF program which requires a reporting entity to identify, manage and mitigate

money laundering or terrorism financing risk that a reporting entity may reasonably face in regard to the provision of a designated service within a designated business group.

6. Although Chapters 8 and 9 require that reporting entities implement an ‘AML/CTF risk awareness training program’ (paragraphs 8.2 and 9.2 respectively), and specifies that the training program must enable employees to understand ‘the obligations of the reporting entity under the AML/CTF Act and Rules’ (subparagraphs 8.2.3(1) and (9.2.3(1) respectively), there is currently no requirement in Chapters 8 or 9 that reporting entities should list the reporting obligations which specifically apply to them under the AML/CTF Act.
7. In addition, there is currently no requirement under Chapters 8 and 9 that reporting entities should specify in their AML/CTF program the appropriate systems and controls which a reporting entity has in place in order to comply with the obligations which are identified.
8. The amendments to Chapters 8 and 9 require reporting entities to expressly state in their AML/CTF programs what obligations they have under the AML/CTF Act, and specify the appropriate systems and controls which they have implemented in regard to those obligations. Reporting entities have discretion in how they detail the description of the systems and controls which they have put in place, however, they must be an ‘appropriate’ response to the money-laundering/terrorism-financing risk which the reporting entity has identified.
9. A minor typographical error has also been rectified in subparagraph 8.1.6 of Chapter 8, whereby the word ‘or’ should read ‘of’.

### **Amendment of Chapter 21**

10. Chapter 21 of the AML/CTF Rules provides an exemption from the AML/CTF Act in regard to the item 35 designated service (issuing or selling a security or derivative), where such transactions take place on domestic financial markets such as the Australian Stock Exchange.
11. Due to the electronic operation of such markets, the issuer or seller does not know the identity of the buyer or the person to whom the security or derivative is issued. As a result it is impractical to impose obligations under the AML/CTF Act.
12. The amendments to Chapter 21 extend the exemption from domestic financial markets to foreign financial markets. The exemption from the AML/CTF Act will only apply when the foreign financial market uses a proprietary system to undertake the transaction, and it is not reasonably practicable for the reporting entity to identify the customer through the use of that system. If it is reasonably possible to identify the customer on the foreign market using the applicable customer identification procedure as is required under the AML/CTF Act, then the reporting entity cannot use the exemption.

13. The amendments also clarify that ‘stapled securities’ are intended to be covered under the provisions relating to managed investment schemes in Chapter 21. A ‘stapled security’ is one which contains different securities which are ‘bound’ or ‘stapled’ together in a form which means that they cannot be traded separately. The defining of ‘interest’, which includes stapled securities, clarifies that such products are covered.
14. In addition, the amendment of the definition of ‘prescribed financial market’ to include the ‘Australian Securities Exchange’ (formally the ‘Sydney Futures Exchange’), makes it clear that this entity is not excluded from the exemption applying to prescribed financial markets.

### **Amendment of Chapter 28**

15. Chapter 28 provides an exemption from conducting the applicable customer identification procedure in regard to the assignment, conveyance, sale or transfer of business. When a customer of one reporting entity ceases to be a customer of that entity and becomes a customer of another reporting entity, then, under section 32 of the AML/CTF Act, the second reporting entity must conduct the applicable customer identification procedure on that customer *before* providing them with a designated service.
16. Chapter 28 of the AML/CTF Rules exempts the second reporting entity from carrying out the applicable customer identification procedure on transferring customers, and allows the second reporting entity to treat pre-commencement customers of the first reporting entity as if they were its own pre-commencement customers, but only if the second reporting entity has properly considered the ML/TF risk and has appropriate policies and procedures in place in regard to that risk.
17. The amendments to Chapter 28 remove uncertainty as to whether the Chapter applies to voluntary transfers of business under the *Financial Sector (Business Transfer and Group Restructure) Act 1999* by making it clear that such voluntary transfers are covered.

### **Addition of Chapter 67**

18. Chapter 67 provides an exemption from the applicable customer identification procedure in regard to ‘warrants’. A warrant is a financial instrument issued by banks and other institutions and traded on the Australian Stock Exchange. Warrants are a form of derivative, that is, they derive their value from an underlying instrument such as shares, commodity prices or interest rates. Some give holders the right to buy or to sell the underlying instrument to the warrant issuer for a particular price. Alternatively, others entitle holders to receive a cash payment relating to the value of the underlying instrument at a particular time.

19. Warrants are very broadly split into investment-style products and trading-style products. Trading-style warrants are frequently traded and are generally short dated. Investment-style warrants tend to be longer dated and are less frequently traded.
20. An 'instalment warrant' allows holders to gain direct exposure to underlying shares by making an initial payment (first instalment) and delaying the final payment (final instalment) to a later date.
21. On a periodic basis (12, 18 or 24 months) the instalment warrant will undergo a reset of the loan amount. On the annual reset date the investor may choose to either exercise some or all of the instalments and take delivery of the underlying securities, cash out the instalment, roll it into the following year or do nothing. If the investor does nothing, the investor is deemed to accept the new exercise price and the warrant will automatically roll into the following year.
22. When a roll-over takes place in regard to the warrant, the AML/CTF Act treats the roll-over in respect to the relevant designated service as requiring identification of the customer by the reporting entity. The designated services under the AML/CTF Act relevant to warrants are item 35 (issuing or selling a derivative) and item 46 (providing a custodial or depository service).
23. AUSTRAC has accepted industry representations that, at the time of the warrant reset, there is currently a duplication of customer identification by reporting entities. This is because the warrant holder would already have been identified under the AML/CTF Act when the warrant was purchased. Accordingly, Chapter 67 specifies that relevant reporting entities are exempt from customer identification, subject to certain conditions, thereby removing the duplication.

### **Amendment of Chapter 51**

24. Chapter 51 was registered on 20 May 2011 and originally related to Travelex and KEB Australia. The effect of the Chapter is to regulate international funds transfer instructions (IFTIs) processed by Travelex and KEB Australia as electronic funds transfer instructions (EFTIs).
25. As a result of the Chapter, both Travelex and KEB Australia report IFTIs under Chapter 16 of the AML/CTF Rules (reportable details for international funds transfer instructions (items 1 and 2 in section 46), rather than Chapter 17 (reportable details for international funds transfer instructions (items 3 and 4 in section 46). Chapter 16 requires the reporting of less detail to AUSTRAC than that required under Chapter 17. Chapter 16 relates to financial institutions such as authorised deposit-taking institutions (ADIs), banks, building societies and credit unions. Chapter 17 relates to designated remittance arrangements, an area of identified money-laundering/terrorism-financing risk.

26. The proposed amendments to Chapter 51 relate to PayPal and have been made in the context of four PayPal legal entities: PayPal Australia, PayPal Europe, PayPal US and PayPal Singapore. The amendments will resolve an IFTI reporting anomaly in regard to PayPal Australia, whereby IFTIs between PayPal Australia and PayPal Europe are reportable to AUSTRAC, but those between PayPal Australia and PayPal US and PayPal Singapore are not.
27. The reporting anomaly has arisen because PayPal Australia does not supply reports to AUSTRAC about IFTIs under Chapter 17 of the AML/CTF Rules, but instead reports under Chapter 16 as it is an ADI. Therefore PayPal Australia transactions with PayPal Europe are reported under Chapter 16 as PayPal Europe is a 'financial institution' because it is a bank licensed in Luxembourg.
28. However, IFTIs between PayPal Australia and PayPal US and PayPal Singapore are not reportable under Chapter 16, as neither of these entities are regulated as a bank in their home jurisdictions.
29. As a result of the amendments to Chapter 51, transactions which are currently not reportable between PayPal Australia and PayPal US and PayPal Singapore will now be reported to AUSTRAC under Chapter 16.

### **Statement of Compatibility with the *Human Rights (Parliamentary Scrutiny) Act 2011***

30. The *Human Rights (Parliamentary Scrutiny) Act 2011* was passed on 25 November 2011 and came into effect on 4 January 2012. It introduces a requirement for Statements of Compatibility to accompany all new Bills and disallowable legislative instruments.
31. The Statement of Compatibility for *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2012 (No.1)* is included in this Explanatory Statement at page 12. The AUSTRAC CEO as the rule-maker of this legislative instrument has stated that it is compatible with the human rights and freedoms recognised or declared in the international instruments lists in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

## **2. Notes on sections**

### **Section 1**

This section sets out the name of the Instrument, i.e. the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2012 (No.1)*.

### **Section 2**

This section specifies that the Instrument commences on the day after it is registered apart from Schedule 2 which commences on 1 February 2012.

### **Section 3**

This section contains the details of the amendment:

Schedules 1 and 2 amend the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No.1)*.

#### **Schedule 1**

This schedule amends Chapters 1, 8, 9, 21 and 28 and adds Chapter 67.

#### **Schedule 2**

This schedule amends Chapter 51.

### **3. Notes on Paragraphs**

#### **Chapter 1**

##### **Subparagraph 1.2(5)**

This item amends the definition of ‘primary non-photographic identification document’ by removing the word ‘Centrelink’ and replacing it with ‘the Department of Human Services’.

#### **Chapter 8**

##### **Subparagraph 8.1.1**

This paragraph has been amended to notate the addition of new paragraph 8.9 which relates to ‘Reporting obligations.’

##### **Subparagraph 8.1.6**

This item amends a typographical error in the subparagraph. The amendment deletes the word ‘or’ and replaces it with ‘of’ in order to ensure that the paragraph reads correctly.

##### **After Part 8.8**

This item relates to the insertion of new Part 8.9 after Part 8.8. The new Part specifies that reporting entities must include, under their standard AML/CTF program, the reporting obligations which relate to the reporting entity. In addition they must specify the appropriate systems and controls which the reporting entity has in place in order to ensure compliance with those reporting obligations.

#### **Chapter 9**

##### **Subparagraph 9.1.1**

This paragraph has been amended to notate the addition of new paragraph 9.9 which relates to ‘Reporting obligations.’

### **After Part 9.8**

This item relates to the insertion of new Part 9.9 after Part 9.8. The new Part specifies that reporting entities must include, under their joint AML/CTF program, the reporting obligations which relate to the reporting entity. In addition they must specify the appropriate systems and controls which the reporting entity has in place in order to ensure compliance with those reporting obligations.

## **Chapter 21**

### **Paragraph 21.3**

This paragraph has been amended to extend the exemption contained within the chapter from Australian prescribed financial markets to foreign financial markets. The amendments are at subparagraph 21.3(1)(b).

### **Paragraph 21.4**

This paragraph has been amended to include a definition of ‘interest’ (subparagraph 21.4(3)) which specifies that a ‘stapled security’ in a managed investment scheme is covered by the exemption in Chapter 21. The definition of ‘prescribed financial market’ (subparagraph 21.4(4)) has been amended to clarify that the ‘Australian Securities Exchange’ (formerly the ‘Sydney Futures Exchange’) is included under this definition. A definition of ‘proprietary system’ (subparagraph 21.4(5)) has also been inserted as a result of the use of this term in subparagraph 21.3(1)(b)(i) and (ii).

## **Chapter 28**

### **Paragraph 28.3**

This paragraph contains amendments which specify that Chapter 28 does not relate to compulsory transfers under the *Financial Sector (Business Transfer and Group Restructure) Act 1999* (subparagraph 28.3(1)(a)) and clarifies that voluntary transfers under that Act are covered by the Chapter (subparagraph 28.3(1)(b)).

### **Paragraph 28.6**

This paragraph amends the definition of ‘reporting entity one’ to expressly include reporting entities making voluntary transfers under the *Financial Sector (Business Transfer and Group Restructure) Act 1999*. It also amends the definition of ‘reporting entity two’ by expressly excluding reporting entities receiving a transfer of business as a result of a compulsory transfer under the *Financial Sector (Business Transfer and Group Restructure) Act 1999* (subparagraph 28.6(2)(a)) and expressly include reporting entities receiving a voluntary transfer under that Act (subparagraph 28.6(2)(b)).

## **Chapter 67**

### **Paragraph 67.1**

This paragraph specifies that Chapter 67 is made under section 229 of the AML/CTF Act for subsection 39(4), which relates to an exemption from customer identification procedures.

### **Paragraph 67.2**

This paragraph specifies that the applicable customer identification procedure does not apply to reporting entities providing the item 46 (providing a custodial or depository service) designated service, subject to the circumstances specified in subparagraph 67.7(1).

### **Paragraph 67.3**

This paragraph specifies that the applicable customer identification procedure does not apply to reporting entities providing the item 46 (providing a custodial or depository service) designated service, subject to the circumstances specified in subparagraph 67.7(2).

### **Paragraph 67.4**

This paragraph specifies that the applicable customer identification procedure does not apply to reporting entities providing the item 35 (issuing or selling of a security or derivative) or item 46 (providing a custodial or depository service) designated services, subject to the circumstances specified in subparagraph 67.7(3).

### **Paragraph 67.5**

This paragraph specifies that the applicable customer identification procedure does not apply to reporting entities providing the item 46 (providing a custodial or depository service) designated service, subject to the circumstances specified in subparagraph 67.7(4).

### **Paragraph 67.6**

This paragraph specifies that the applicable customer identification procedure does not apply to reporting entities providing the item 35 (issuing or selling of a security or derivative) or item 46 (providing a custodial or depository service) designated services, subject to the circumstances specified in subparagraph 67.7(5).

### **Paragraph 67.7**

This paragraph specifies the circumstances which determine whether the exemption is applicable. These circumstances focus on events following the primary market application process, such as where a corporate event occurs in relation to the underlying asset.



## **Paragraph 67.8**

This paragraph provides definitions of ‘corporate action’, ‘off-market’, ‘prescribed financial market’, ‘warrant’, ‘warrant holder’ and ‘warrant issuer’.

## **Chapter 51**

**(Amendments made as a result of *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2012 (No. 1)*)**

### **Heading**

The main heading has been amended to specify the definitions covered in the Chapter.

### **Sub-Headings**

Sub-headings have been added for Part 51.1, Part 51.2, and Part 51.3 to provide structure and aid in the readability of the AML/CTF Rules.

### **Paragraph 51.1**

This paragraph has been amended to specify the new version of Chapter 51 commences on 1 February 2012. An explanatory note is provided to clarify transitional arrangements which apply under the *Acts Interpretation Act 1901*.

### **Paragraph 51.3**

This paragraph has been added to amend Chapter 51 to ensure that transactions which are currently not reportable between PayPal Australia and PayPal US and PayPal Singapore will now be reported to AUSTRAC under Chapter 16 of the AML/CTF Rules.

## **4. Legislative instruments**

These AML/CTF Rules are legislative instruments as defined in section 5 of the *Legislative Instruments Act 2003*.

## **5. Likely impact**

The amendments to Chapter 21, Chapter 28 and the addition of Chapter 67 will have a positive impact by reducing regulatory burden on any reporting entity that provides a designated service covered by those Rules as they relate to exemptions from obligations under the AML/CTF Act. There is only a negligible impact on reporting entities in regard to the changes to Chapter 8 and Chapter 9. The amendments to Chapter 51 will require PayPal Australia to submit an increased number of IFTI reports to AUSTRAC.

## **6. Assessment of benefits**

### **Amendments to Chapter 1**

The amendments relate to changed terminology as a result of the passing of the *Human Services Legislation Amendment Act 2011*, and therefore provide certainty to industry in respect to the amended definition.

### **Amendments to Chapter 8**

These amendments will provide certainty to industry in regard to their obligations under the AML/CTF Act by requiring that they state these obligations in their standard AML/CTF program. In addition, the amendments require that reporting entities must specify the appropriate systems and controls they institute in order to ensure compliance with those reporting obligations. This will be of benefit to reporting entities by allowing them to avoid potential civil penalties in the AML/CTF Act for non-compliance with those obligations.

### **Amendments to Chapter 9**

These amendments will provide certainty to industry in regard to their obligations under the AML/CTF Act by requiring that they state these obligations in their standard AML/CTF program. In addition, the amendments require that reporting entities must specify the appropriate systems and controls they institute in order to ensure compliance with those reporting obligations. This will be of benefit to reporting entities by allowing them to avoid potential civil penalties in the AML/CTF Act for non-compliance with those obligations.

### **Amendments to Chapter 21**

These amendments extend the current exemption in Chapter 21 from Australian financial markets to those in foreign jurisdictions subject to certain conditions. By exempting relevant reporting entities from the obligations of the AML/CTF Act, there will be a substantial reduction in regulatory burden for such entities.

### **Amendments to Chapter 28**

These amendments provide certainty to industry by clarifying that voluntary transfers under the *Financial Sector (Business Transfer and Group Restructure) Act 1999* are covered by the exemption contained in the Chapter.

### **Chapter 51**

The amendments to Chapter 51 will remove a legal and regulatory anomaly and thereby ensure that certain IFTI reports will now be reported under the AML/CTF Rules. The additional information supplied in such reports will contribute to intelligence information relevant to potential money-laundering and/or terrorism-financing activity.

## **Chapter 67**

The chapter will significantly reduce regulatory burden to industry by eliminating duplication of customer identification under the AML/CTF Act.

### **7. Consultation**

In relation to the amendments to Chapters 8, 9, 21, 28 and 51 and the addition of Chapter 67, AUSTRAC has consulted with the Australian Taxation Office, the Australian Customs and Border Protection Service, the Australian Federal Police, the Australian Crime Commission and the Office of the Australian Information Commissioner.

AUSTRAC also published Chapters 8, 9, 21, 28, 51 and Chapter 67 on its website for public consultation.

AUSTRAC did not consult industry on the amendments to Chapter 1 and the minor amendment to Chapter 8 as AUSTRAC considers that these amendments are of a minor or machinery nature, and do not substantially alter existing arrangements, as allowed under the section 18 of the *Legislative Instruments Act 2003*.

### **8. Ongoing consultation**

AUSTRAC will conduct ongoing consultation with stakeholders on the operation of these AML/CTF Rules.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2012 (No. 1)***

This Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the legislative instrument**

This Instrument makes amendments to Chapters 1, 8, 9, 21, 28 and 51 of the Anti-Money Laundering and Counter-Terrorism Financing Rules and adds Chapter 67 to those Rules.

The amendments relate to substituting one phrase for another in Chapter 1, rectifying a typographical error in Chapter 8 and requiring additional information to be included by reporting entities in their AML/CTF programs in Chapters 8 and 9, extending an exemption from the AML/CTF Act which is currently in place in Chapter 21, clarifying the legal coverage of Chapter 28, amending Chapter 51 to allow the reporting of International Funds Transfer Instructions by a specific reporting entity, and adding Chapter 67 which provides an exemption from customer identification provisions under the AML/CTF Act, for those reporting entities providing designated services in relation to warrants.

#### **Human rights implications**

This Instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Instrument is compatible with human rights as it does not raise any human rights issues.

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