

EXPLANATORY STATEMENT

Issued by authority of the AUSTRAC CEO

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

*Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment
Instrument 2021 (No. 1)*

AUTHORITY

Section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), provides that the AUSTRAC CEO may, by legislative instrument, make Anti-Money Laundering and Counter-Terrorism Financing Rules (AML/CTF Rules). The AML/CTF Rules are set out in the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*.

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 1)* (the **Amendment Instrument**) is a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the Amendment Instrument are set out in [Attachment A](#).

A Statement of Compatibility with Human Rights (the **Statement**) is at [Attachment B](#). The Statement has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Amendment Instrument promotes the realisation of human rights, and as such, is compatible with them.

Background

1. The *Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Act 2020* (the Amendment Act) amends the AML/CTF Act to implement the next phase of reforms arising from the recommendations of the Report on the Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations.
2. The Amendment Instrument implements some of the changes made by the Amendment Act by amending chapters 3, 6, 7 and 10 of the AML/CTF Rules.

Amendments to Chapter 3

3. The Amendment Act strengthened protections on correspondent banking by prohibiting financial institutions from entering into a correspondent banking relationship with another financial institution that permits its accounts to be used by a shell bank. The amendments require financial institutions to conduct due diligence assessments before entering into, and for the duration of, any correspondent banking relationship that will involve a vostro account. These changes are consistent with international banking practice and global standards.

4. Chapter 3 of the AML/CTF Rules now requires a correspondent to assess the money laundering, financing of terrorism or other serious crime risks (**ML/TF risks**) of a correspondent banking relationship when carrying out initial due diligence (paragraph 3.1.2) and ongoing due diligence (paragraph 3.2.2) assessments. To assess those risks, the correspondent must consider the factors set out in paragraph 3.1.3, which include:
 - ownership, control and management structures of the other financial institution and any ultimate parent company;
 - nature, size and complexity including products, services, delivery channels, customer types and types of transactions carried out on behalf of underlying customers as part of the correspondent banking relationship;
 - countries or jurisdictions in which the other financial institution operates including quality of AML/CTF regulation and supervision;
 - the adequacy and effectiveness of AML/CTF controls;
 - publicly available information on the other financial institution;
 - the comprehensiveness of the other financial institution's customer due diligence (CDD) records and the reporting entity's level of access to those records.
5. A senior officer of the reporting entity must consider the assessment of these factors in the written record before providing their approval under paragraph 3.1.4. If the correspondent maintains payable-through accounts, the requirements in paragraph 3.1.5 must be met to the satisfaction of the senior officer.
6. With respect to the timing of ongoing due diligence assessments, paragraph 3.2.4 states that assessments should be undertaken periodically, or at least every 2 years. The level of ML/TF risk of the correspondent banking relationship, and any material change in respect of those risks, may require the correspondent to conduct ongoing due diligence assessments on a more regular basis.

Amendments to Chapter 6

7. The Amendment Act clarified the requirement for a reporting entity to complete the applicable customer identification procedure (**ACIP**) before providing a designated service to a customer.
8. Chapter 6 now specifies the requirements for a reporting entity when it has doubts about the veracity or adequacy of previously obtained know your customer information.
9. The amendments to Chapter 6 require consequential amendments to Chapter 10 to update the references made in that Chapter to Chapter 6.

Amendments to Chapter 7

10. The Amendment Act expanded the circumstances in which a reporting entity may rely on the ACIP or other procedure undertaken by another person. This includes

permitting reporting entities to enter into an agreement or arrangement for reliance on another person.

11. Part 7.1 prescribes procedures other than the ACIP that can be relied on under a reliance agreement or arrangement. These are customer due diligence procedures that have been carried out by another person in accordance with one or more laws of a foreign country. The foreign law or laws must give effect to the FATF Recommendations relating to the identification and verification of customers, beneficial owners and agents, and record-keeping of these procedures.
12. Part 7.2 sets out the requirements relating to reliance agreements or arrangements. The written agreement or arrangement must:
 - document the responsibilities of each party; and
 - allow for the reporting entity to obtain all relevant KYC information; and
 - enable the reporting entity to obtain a record of the ACIP or other procedures specified; and
 - be approved by the board or a senior management official of the reporting entity.
13. Part 7.2 requires the reporting entity, when determining if it is appropriate to rely upon another person's ACIP or other procedures (as prescribed in Part 7.1), to consider:
 - the type and level of ML/TF risk that the relying entity may reasonably be expected to face in its provision of designated services; and
 - the nature, size, and complexity of the other party's business, including its products, services, delivery channels, and customer types; and
 - the level of ML/TF risk in the country or jurisdiction in which the other party operates.
14. Part 7.2 also requires that the other person must be subject to, and supervised or monitored for compliance with, AML/CTF obligations relating to customer due diligence and record-keeping and have appropriate measures in place to comply with those obligations.
15. Part 7.3 sets out the requirements that must be met by a reporting entity before the entity relies on the ACIP or other identification procedures carried out by another person on a case-by-case basis.
16. In addition to the same requirements set out in Part 7.2 for determining whether it is appropriate to rely upon another person's ACIP or other procedures, the relying entity must reasonably believe that the data and documents relevant to the verification of KYC information will be:
 - immediately accessible to the relying entity under an agreement; or
 - made available within 7 calendar days of a written request being made.

17. Section 37B of the AML/CTF Act requires a reporting entity that enters into an agreement or arrangement under section 37A to carry out regular assessments of the agreement or arrangement in accordance with requirements in the AML/CTF Rules. This includes the conduct and timing of the assessments, and associated record-keeping.
18. Chapter 7 specifies that the purpose of the regular assessments is to:
- enable the reporting entity to determine the level of ML/TF risk involved in continuing to rely on an ACIP or other identification procedures undertaken by the other person; and
 - identify any deficiencies in the effectiveness of the agreement or arrangement.
19. These regular assessments are to be carried out at appropriate and regular intervals having regard to:
- the type and level of ML/TF risk faced by the reporting entity; and
 - any material change in respect of the matters specified in subparagraphs 7.2.2(2)–(5) of the AML/CTF Rules.
20. However, the assessments must be done at least every 2 years. Chapter 7 also specifies that a reporting entity must ensure that any changes to the agreement or arrangement considered necessary to correct any deficiencies identified as part of the assessment are implemented as soon as practicable.

Amendments to Chapter 10

21. The amendments to Chapter 6 required consequential amendments to paragraphs 10.1.7 and 10.2.7 of the AML/CTF Rules. These paragraphs have been renumbered as paragraphs 10.1.6 and 10.2.6. The consequential amendments also update the references to Chapter 6 in Chapter 10, and do not change the requirements set out in the relevant paragraphs.

CONSULTATION

22. Draft AML/CTF Rules were released on 28 January 2021 for a six-week period of public consultation. Ongoing consultation with industry associations was undertaken following the public consultation period.

REGULATION IMPACT STATEMENT

23. The Office of Best Practice and Regulation has advised that a Regulatory Impact Statement (**RIS**) is not required as the amendments to the AML/CTF Rules are machinery in nature and covered by the RIS prepared for the Amendment Act.

Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 1)

Section 1—Name

This section provides that the name of the Instrument is the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 1)*.

Section 2—Commencement

This section provides for the commencement of each provision in the Instrument, as set out in the table in subsection 2(2).

The amendments in Schedule 1 commence on 17 June 2021.

Section 3—Authority

This section provides that the Instrument is made under section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

Section 4—Schedules

This section provides that the instrument specified in Schedule 1 is amended as set out in the applicable items in that Schedule.

Schedule 1—Amendments

Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)

Notes on items

Item 1—Chapter 3

This item repeals and substitutes a new Chapter 3 of the AML/CTF Rules.

Item 2—Chapter 6

This item repeals and substitutes a new Chapter 6 of the AML/CTF Rules.

Item 3—Chapter 7

This item repeals and substitutes a new Chapter 7 of the AML/CTF Rules.

Item 4—Chapter 10

This item repeals and substitutes a new Chapter 10 of the AML/CTF Rules.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Act 2011

Australian Human Rights Commission Regulations 2019

This Disallowable Legislative Instrument (the **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 Instrument

The Instrument sets out the requirements of the expanded circumstances in which reporting entities may rely on identification procedures undertaken by a third party, and strengthens protections around correspondent banking.

Human rights implications

The *Human Rights (Parliamentary Scrutiny) Act 2011* requires that Statements of Compatibility must be made by the rule-maker with regard to disallowable legislative instruments, and must contain an assessment of whether the legislative instrument is compatible with the rights and freedoms recognised in the seven core international human rights treaties that Australia has ratified.

The amendments to Chapter 7 of the AML/CTF Rules engage the right to privacy in Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)* by expanding the circumstances in which reporting entities may rely on identification procedures undertaken by a third party. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. The right to privacy also requires respect for private and confidential information, including the storing, use and sharing of such information.

The use of the term ‘arbitrary’ means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted ‘reasonableness’ to imply that any limitation must be proportionate and necessary in the circumstances. The right to privacy can be limited by necessity in a democratic society in the interests of national security or public order.

The amendments to Chapter 7 of the AML/CTF Rules are a permissible limitation on the right to privacy because the measures are reasonable, necessary and proportionate in the pursuit of a legitimate objective. The measures will expand the circumstances in which reporting entities may rely on identification procedures undertaken by a third

party. This will include the exchange of personal information such as transactional information. Chapter 7 will also facilitate more efficient information sharing between reporting entities and other entities to ensure the proper identification of customers. This outcome supports cooperation and collaboration to detect, deter and disrupt money laundering, financing of terrorism and other serious crimes.

The limitation on the right to privacy is proportionate and not arbitrary as there are appropriate safeguards and controls. For instance, because of section 6E of the *Privacy Act 1988* (the **Privacy Act**), all reporting entities are subject to the Privacy Act and must abide by the Australian Privacy Principles (**APPs**). This ensures that when reporting entities are subject to APP 8.1 when they engage with foreign entities for the purposes of a reliance agreement or arrangement. To comply with APP 8.1, a reporting entity must take such steps as are reasonable in the circumstances to ensure that an overseas entity does not breach the APPs (excluding APP 1) before it discloses personal information to that overseas entity.

Conclusion

The Instrument is compatible with human rights because, to the extent that the amendments to the AML/CTF Rules may limit human rights, those limitations are reasonable, necessary and proportionate in the pursuit of a legitimate objective.

[signed]

Nicole Rose PSM
Chief Executive Officer
Australian Transaction Reports and Analysis Centre