Australian Banking Association

03 September 2021

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Proposed Draft AML/CTF Rules – Chapters 79, 80, 21 and 48

The Australian Banking Association (**ABA**) welcomes the opportunity to provide comment on the Australian Transaction Reports and Analysis Centre's (**AUSTRAC**) consultation on the proposed rules and explanatory note that adds Chapters 79 and 80, and amends Chapters 21 and 48 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules 2007* (**AML**/**CTF Rules**).

Our position and recommendations

The ABA supports recently enacted legislative changes to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (**AML**/**CTF Act**) that require reporting entities to verify their customers' identity before providing designated services.

The ABA also supports the provision for special circumstances that justify carrying out applicable customer identification procedures (**ACIP**) after the commencement of a designated service. While generally in support of this Chapter, the ABA seeks additional clarity over the scope of the proposed special circumstances, particularly in relation to opening an account and the initial deposit.

We also support broader changes proposed to Chapters 21 and 48 of the rules. The submission puts forward a proposal regarding Chapter 80 on the basis that there may be unintended consequences with the current drafting, such as exempting a broader range of activities.

Considerations on each of the Chapters is provided below.

Chapter 79 - special circumstances - account opening and initial deposit

Additional guidance

The proposed 79.2(1) provides that a reporting entity (**RE**) may carry out the applicable customer identification procedure in respect of a customer after commencing to provide a designated service if it has determined on "reasonable grounds" that doing so is "essential to avoid interrupting the ordinary course of its business". While the ABA notes that these are objective tests, industry discussions with AUSTRAC highlight the importance of clarity across the sector to ensure a consistent understanding and approach is applied.

Given this, the guidance should provide further clarity on scope of Chapter 79 through additional examples so industry can understand and apply it in a manner consistent with AUSTRAC's intentions.

Recommendation 1 - Guidance to the rules should expand the range of circumstances and examples to better highlight the intended scope of the rules, including classes of customers.

Opening an account

The ABA considers specific guidance should also be provided on the intended scope of the special circumstances in relation to opening an account.

For context, ABA members have developed systems over many years to enable customers to open accounts across different channels and conduct electronic customer verification (**ECV**) to meet ACIP requirements.

With recent changes to legislation that prohibit the provision of a designated service until ACIP is completed,[1] an entity may be at risk of contravening the law because an account identifier or 'prospective' account is created during the application of a customers' account in the same process of conducting the ACIP.

ACIP may be successfully completed in the same process through ECV or may fail requiring the customer to complete it later. In either case bank systems automatically generate the account, with controls placed on customer accounts where ACIP is not finalised.[2] While posing low risk due to these controls, this process may still contravene the law since an account may have been 'created' as per the definition in the Act and it is 'immaterial whether the account number has been given to the holder of the account, or any other signatory to the account can conduct a transaction in relation to the account.[3]

This issue may be best addressed through legislative change to this definition of opening an account to ensure it is aligned with different account opening and operational processes across RE's. However, the ABA considers Chapter 79 may provide relief if RE's can finalise ACIP on these accounts that fail ACIP and limit transactions in the interim to an initial deposit with a 'hold' placed on any further transactions including withdrawals.

Should REs not be able to rely on Chapter 79 where a customers' ACIP fails, they will need to make significant system changes or make risky manual interventions on a case-by-case basis that will interrupt the ordinary course of their businesses. With appropriate risk-based controls in place, the ABA considers this to be an important use-case for Chapter 79.

We consider the use of Chapter 79 in these circumstances is consistent with the Financial Action Task Force (**FATF**) recommendation on ensuring that measures to mitigate money laundering and terrorism financing are commensurate with the risks identified.[4] This is also consistent with the intent of Section 32 of the Act and FATF's Recommendation 10 on Customer Due Diligence.[5] However, we request that AUSTRAC guidance clarify whether this is consistent with the intended scope of the rules to provide certainty to industry on its application in these circumstances.

Recommendation 2 – An RE should be able to rely on Chapter 79 when ACIP fails while opening an account, as it would otherwise need to make significant systems changes that would interrupt the ordinary course of its business. AUSTRAC guidance should confirm this to ensure industry has certainty in applying the rules to these circumstances.

The initial deposit

The ABA notes three issues in relation to the initial deposit. The first is on timing, the second relates to the interaction with other legal requirements, and the third is in relation to the form in which the initial deposit is made.

Timing

The proposed 79.2(4) appears to imply the opening of an account and the initial deposit are contemporaneous. Depending on the method of deposit used, it may not be instantaneous. For example, in relation to migrant banking a transfer made internationally may not be received by an RE for an undetermined period. This may be a particular issue for entities that are reliant on other RE's to facilitate international transfers such as those in the mutual banking sector. An RE is also not able to control the promptness with which a customer generates an instruction to make the initial deposit.

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[1] Section 32 of the AML/CTF Act.

[2] It should also be noted that many bank systems do not open a 'customer file' before creating an account and this may happen simultaneously to make the process of opening an account as simple as possible to support all customers that seek to open an account. As such, it may not be practical for banks to create a customer file, then do ACIP, then create the account as per Section 5 definitions in the AML/CTF Act.

[3] Section 5 of the AML/CTF Act.

[4] Financial Action Task Force (2021), *International standards on combating money laundering and the financing of terrorism & proliferation*, p.10, available here: file (cfatf-gafic.org)

[5] Ibid, p.14

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The ABA also notes that, in the case of vulnerable customers that need to open an account to have welfare or other Government-related payments provided to them before they can finalise their ACIP, the initial deposit can take weeks to arrive. The financial institution may not be aware at the time an account is opened that the initial payment relates to a government payment.

The ABA considers there is no need to specify or require the deposit to be placed by a particular time given there is limited ML/TF risk of an account being opened without any funds in it, and the RE is not in control over the time in which the deposit is made. Instead, it should be clarified that the deposit be made as soon as practicable after opening the account.

Recommendation 3 - The rules and guidance should make clear that the timing of the initial deposit should be made as soon as practicable after the account is opened.

Interaction with other legal requirements

The ABA notes there are a range of broader legal requirements that may be impacted by a Chapter 79 determination. For example, one of the reasons to use Chapter 79 is in the case of statutory trusts where a trustee needs to include the details of an account into their legal agreement with the beneficiaries. ACIP in these circumstances cannot be performed until the agreement is finalised.

While Chapter 79 would be essential to apply here in order not to interrupt the ordinary course of business, the initial deposit limitation per 79.2(4) may cause issues for trustees that are required by law to deposit funds received by their clients in the next business day or as soon as possible thereafter.[6] Where an ACIP is not completed early (or it is not possible for any reason), the account will only be able to receive a single transfer which would constitute the initial deposit, when in fact the client often provides funds over a number of transfers over several days particularly where it is a large sum.

This may place trusts in breach of regulatory time limit requirements as they may be forced to hold onto funds for several days longer than prescribed by law.

The ABA considers early finalisation of ACIP would ameliorate this issue in most instances. However, we note such interactions between Chapter 79 and other legal requirements such as this may arise, and there is a need for a period of transition to ensure customers such as trustees understand their obligations and practices when a Chapter 79 determination is made.

Provision of Item 30 designated service

The rules currently provide the use of special circumstances is in relation to the provision of an Item 1 or Item 3 designated service. The explanatory note provides that the rules do not restrict the forms in which the initial deposit is made. However, it is not clear whether this would then extend to electronic transfers that fall under Item 30 of designated services.

The ABA supports the idea that the rules be amended to allow for a broader range of designated services to be provided where they are necessary or incidental to the provision of the initial deposit. This also recognises that in practice the designated service that will be required to be provided will often be in the form of an electronic transfer.

Recommendation 4 - The rules and guidance should make clear that the provisions of an Item 30 designated service in connection to the initial deposit (i.e., making funds received from an electronic funds transfer available to the customer's new account) is permitted.

Chapter 80 – stored value card

The proposed Chapter 80 states that 'an account' is to be excluded from the definition of 'stored value cards' (under the definition of that term in Section 5 of the AML/CTF Act). The explanatory note states the change is to 'exempt' certain types of products which are unintentionally captured. However, the proposed change may exclude more activity than intended.

The ambiguity arises from the broad definition of 'account' and whether if something is a stored value card, it can be excluded from the definition of 'account'. The significance of this is whether the ACIP

[6] For example, Section 21 of the Conveyancers Licensing Regulation 2015 (NSW), Section 16 of the *Agents Financial Administration Act 2014* (Qld), Section 59(1) of the Estate Agents Act 1980 (Vic).

needs to be conducted for these products where the threshold value is below $1,000/$5,000 as set out in Items 21-24 (for stored value cards).

The exclusion of 'account' from the definition of 'stored value card' does not appear to alleviate this ambiguity. In addition, the difference between regulation of authorised deposit-taking institutions (**ADI**s) and non-ADIs by virtue of this ambiguity does not appear to be supported by any difference in ML/TF risk.

To address the ambiguity, the ABA proposes that in place of drafting Chapter 80 of the AML/CTF Rules, the change be made through a rule exempting certain types of services (by description) from the operation of the AML/CTF Act without changing the definition of 'stored value card'. This change could take effect under section 247 of the AML/CTF Act. This would achieve both:

- a targeted exemption from the AML/CTF Act, and
- a competitively neutral application of the AML/CTF Act which is based on ML/TF risk associated with a type of product, not with the issuer.

There are certain services which, without this proposed change, may involve the provision of both an 'account' and a 'stored value card' and therefore designated services under Items 1-3, 18-20A, 29-30 (accounts, debit cards, EFTs) as well as under Items 21-24 (stored value cards). A key example is the issue of prepaid cards by an ADI.

In addition to the products set out in draft Chapter 80 of the AML/CTF Rules, we consider the following additional products for express exemption from the AML/CTF Act, and in each case applying the $1,000 (cash withdrawable) and $5,000 (non-cash withdrawable) thresholds already well established under the stored value card regime and allowing for both physical and virtual 'cards' or 'accounts':

- stored value cards issued by an ADI
- transit cards, and
- electronic road toll devices

Recommendation 5 – In place of Chapter 80, we recommend a rule be made to exempt identified services (by description) from the operation of the AML/CTF Act without changing the definition of 'stored value card.' Through this rule, stored value cards issued by an ADI, transit card and electronic toll devices should be identified services exempt from the AML/CTF Act.

Chapter 48 and 21

The ABA supports the two remaining amendments to Chapters 48 and 21. We note that the exemption for salary packaging and payroll administration services (per Chapter 48) as being designated services under a designated remittance arrangement also gives rise to other exemptions that may be warranted under the remittance arrangement given the broad nature of these provisions, which may create issues for businesses and ADIs that seek to engage their services.

For example, one concern that results from the broad nature of the remittance provisions is the potential ancillary liability for ADIs who bank third parties that may be technically caught as a remittance arrangement.

Where an entity (which may or may not be a reporting entity) has not registered as a remitter in accordance with Section 74 of the Act, but technically is providing a designated remittance service, there may be ancillary liability for the ADI under Part 2.4, Division 11.2 of the *Criminal Code Act 1995 (Cth),* if it aids, abets, counsels, or procures the commission of the offence.

An example of this could be where the ADI knowingly provides a payment facilitator or aggregator with a merchant facility and/or bank account which is used to collect and distribute payments on behalf of third parties. In these circumstances, the legal uncertainty of whether an entity is required to be registered as a remittance arrangement may lead ADIs to not engage these businesses where an entity may not be registered but might be caught under the broad remittance provisions.

Addressing this issue in a similar manner to Chapter 48 for payment facilitators, and other categories will provide legal certainty for ADIs to provide services to these entities. Consideration should also be given to the remittance provisions to ensure they do not capture an unnecessarily broad set of services that may currently be caught (e.g. food delivery apps, ride hailing services, etc).

Recommendation 6 – Further consideration should be given to a broader set of services that should be exempted from the remittance provisions. This may be done through legislation or through expanding Chapter 48, given the risks to ADIs of banking certain businesses such as payment facilitators that may not be engaged due to potential exposure to ADIs of ancillary liability.

Transitional arrangements

As we have outlined in our previous submissions on this topic, these amendments will require financial institutions to make changes to their processes and procedures. These processes and procedures will include system changes at bank branches and digital banking platforms and on-boarding processes such as staff training. The global pandemic has seen bank staff redeployed and working remotely as they continue to support customers and the economy, and as such the ABA recommends a transition period of 12 months to ensure effective implementation of the rules.

Additional documents

Thank you for the opportunity to provide feedback. If you have any queries, please contact me at Prashant.ramkumar@ausbanking.org.au

Yours sincerely,

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About the ABA

The Australian Banking Association (ABA) advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers.

We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.