

# Banking and finance update

December 2015



## Anti-money laundering legislation: period of grace for implementation of new customer due diligence requirements nears an end

Readers may recall that on 1 June 2014 amendments to the Anti-Money Laundering and Counter Terrorism Financing Rules (AML/CTF Rules) commenced. These rules were made under the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (the Act).

While the new requirements were introduced effective as of 1 June 2014 it was decided to give industry a period of grace for implementation of the new changes from 1 June 2014 to 31 December 2015 (implementation period).

That period of grace is now drawing to a close and effective from 1 January 2016 organisations subject to the customer due diligence provisions of the Act will need to be fully compliant with the new customer due diligence procedures.

### WHAT ARE THE MAIN CHANGES?

The main changes to the AML/CTF Rules are to:

- Change various definitions in the Act to facilitate enhancement of customer due diligence procedures.
- Introduce special requirements in relation to “politically exposed persons” and in particular to expand the definition of who falls within the definition of a ‘politically exposed person’.
- Extend the range of general factors to be considered when identifying AML/CTF risk in relation to customers.
- Extend the beneficial owner information requirements to individuals as well as companies.
- Require identification of settlor of trusts where the settled sum is greater than \$10,000, except where the settlor is deceased.

## CONDITIONS OF THE IMPLEMENTATION PERIOD

The period of grace afforded to organisations to fully comply with the new requirements is not a blanket exemption.

In May 2014 the Minister for the Justice issued the Policy (Additional Customer Due Diligence Requirements) Principles 2014 (the "Policy Principles").

The Policy Principles are in place for the duration of the implementation period. Those Policy Principles are designed to provide reporting entities with a level of comfort that certain enforcement action will not be taken by the Australian Transaction Reports and Analysis Centre (AUSTRAC) during that period for any breaches of the new requirements.

The effect of the Policy Principles is that during the "implementation period" AUSTRAC will only take action against a reporting entity for a contravention of the new requirements if it determines that the reporting entity has failed to take reasonable steps to comply.

In determining what are "reasonable steps" the CEO of AUSTRAC must have regard to the matters set out in paragraph 4 of the Policy Principles. Paragraph 4 includes a requirement to consider whether the reporting entity has:

- Complied with the new requirements as soon as practicable in respect of any person who becomes a customer between 1 June 2014 and 1 January 2016 and who is assessed by the reporting entity as being a high money laundering or terrorism risk;
- Established a transition plan before November 2014 to achieve full compliance prior to 1 January 2016; and
- Complied with the new requirements as soon as can be reasonably accommodated through existing obligations.

By now all reporting entities should be well advanced in implementing policies and procedures in order to be fully compliant with the new customer due diligence requirements by 1 January 2016.

## LET'S LOOK AT WHO "POLITICALLY EXPOSED PERSONS" (PEPS) ARE

While most of the changes are relatively clear, it is worth considering briefly what constitutes a "politically exposed person" because the definition of politically exposed person is extremely wide and captures persons that one would not normally expect (in general compliance) to be "politically exposed".

In the Australian context a person is a *domestic politically exposed person* if they are associated with an Australian Government Body. Only two of the three levels of government are covered directly - the Commonwealth and States and Territories.

Not only are heads of state and government ministers or equivalent senior politicians covered, but others such as:

- chief executive, or chief financial officer of, or any other position that has comparable influence in, any State enterprise or international organisation;
- immediate family member of a person holding office; or
- close associates of the person holding office.

Fortunately, local government is not covered directly, unlike the situation internationally (refer to our commentary in the next section).

In January 2015, AUSTRAC issued a draft guidance note dealing with key terms used in the politically exposed person definition.

There has been a long process of consultation on this issue culminating in the announcement by AUSTRAC on 25 November 2015 that it had published new guidance regarding PEPs in Chapter 6 of the AUSTRAC compliance guide (Customer due diligence procedures). [[click here](#) to review chapter 6 on PEPs]

What started off as a draft guidance note ended up being incorporated into the AUSTRAC Compliance Guide – this is because in the long period between the start and the finish of the consultation and review process AUSTRAC changed its policy and decided to no longer have stand-alone guidance notes.

Reporting entities will need to review the matters covered in the Compliance Guide on this issue as it will be relevant to the policies and procedures they adopt.

## LOCAL GOVERNMENT AS AN AUSTRALIAN GOVERNMENT ENTITY, BUT NOT AN AUSTRALIAN GOVERNMENT BODY

However, local government and its officers are still not totally outside the purview of the legislation because the definition of Australian Government Entity extends to include:

*a local governing body established by or under a law of the Commonwealth, a State or Territory, other than a body whose sole or principal function is to provide a particular service, such as the supply of electricity or water.*

That definition is relevant for other purposes. Local government is not an Australian government body.

While the draft guidance note referred to earlier has now been superseded (and is no longer readily accessible), it does contain some interesting observations on the differences between the position in Australia and that which exists overseas.

*4.3 Such positions (PEPs) commonly hold specific powers in relation to approving government procurement processes, budgetary spending, development approvals and government subsidies and grants.*

*4.4 It is noted that although FATF considers that a prominent public function may extend to the municipal or local government level, it is generally considered that this will only apply to persons who have the substantive powers noted in paragraph 4.3 above, relevant to this level of government.*

*4.5 The definition of 'domestic politically exposed person' in the AML/CTF Rules limits such persons to those who hold a position in an 'Australian government body', which is defined in the AML/CTF Act as extending to the Commonwealth, State or Territory levels. This definition does not capture the local government or municipal level.*

*4.6 This is not the case with the definition in the AML/CTF Rules of 'foreign politically exposed persons' who hold positions in a 'government body', which is defined more broadly in the AML/CTF Act to include the 'government of part of a country'.*

## FURTHER CHANGES

The world of money laundering never stays static. There are further changes both proposed and which have recently taken place to Chapter 4 of the AML/CTF Rules, specifically in the areas of:

- Electronic safe harbour procedures – to provide a further version of the electronic safe harbour procedure for customers;

- Collection of information from sources other than the customer -to broaden the ability to collect identification information from sources other than the customer; and
- Extension of exemptions – to extend the current customer identification exemptions to include beneficial owners and politically exposed persons.

There was a public consultation period from 10 June 2015 to 8 July 2015. While the consultation period finished a long time ago 2 of the 3 proposed changes have still not taken effect.

However, we hear that the following is the position on each of these changes:

- Electronic safe harbour procedures - these rule changes are subject to a Regulation Impact Statement which should be published for public consultation shortly.
- Collection of information from sources other than the customer - these rule changes are also the subject to a Regulation Impact Statement. In addition the changes have also been reviewed in terms of Privacy. AUSTRAC released a Draft Privacy Impact Assessment paper. There was a short consultation period which has now ended.
- Extension of exemptions - these were considered to be non-contentious with industry and have recently been made.

Let's just say that the process of implementing change in this area is long and arduous. To be perfectly frank I also find the AUSTRAC change notification procedures to be less than adequate and it is often difficult to find source documents where consultation periods have closed.

## CONCLUSION

Organisations which are reporting entities need to be aware that there will be consequences for non-compliance with the changes to the AML/CTF Rules after 1 January 2016.

In addition it will be useful to review the recently released amended version of the compliance guide, in particular with regard to politically exposed persons.

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