



Explanatory Statement – *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2019 (No. 2)* amending the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*

Purpose and operation of Anti-Money Laundering/Counter-Terrorism Financing Rules (AML/CTF Rules) amending Chapters 1, 4, 15 and 38

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 to definition of ‘certified copy’ in Chapter 1

2. The definition of ‘certified copy’ in Chapter 1 has been updated to refer to the new *Statutory Declarations Regulations 2018*, which commenced on 18 September 2018. The definition previously referred to the *Statutory Declarations Regulations 1993*, which have since been repealed.
3. This amendment will take effect 28 days after registration of this amendment instrument.

Amendments to Chapters 4 and 15 relating to corporate customers that are custodians

4. These draft amendments provide reporting entities with relief from certain identification requirements in Chapter 4 and Chapter 15 of the AML/CTF Rules for corporate customers who are ‘custodians’ (as defined) by adding new subparagraphs 4.4.3(5)(d), 4.4.5(5)(d) and paragraphs 4.4.18 - 4.4.19 to Chapter 4, making minor amendments to subparagraphs 4.4.3(1) and 4.4.5(1), adding two notes to Chapter 15 and some minor amendments in both Part 4.4 and Chapter 15 to cross-reference exemptions listed in the new paragraph 4.4.18.
5. The amendments respond to issues raised by industry regarding practical difficulties encountered in complying with the previous requirements of Part 4.4 (Applicable customer identification procedure with respect to trustees) of the AML/CTF Rules, as many custodian-type trust arrangements do not have many features of an ordinary trust such as a full trust name, settlor, or trust deed.
6. These issues have been addressed by adding new paragraphs 4.4.18 and 4.4.19 to Part 4.4, which exempt reporting entities from:

- (a) carrying out specific applicable customer identification and verification requirements in relation to the underlying customers of a custodian when providing designated services to eligible custodians; and
 - (b) conducting certain ongoing customer due diligence requirements in Chapter 15 regarding the collection and verification of beneficial owner information in relation to such underlying customers of custodians (though note that reporting entities still need to comply with obligations in Chapter 15 regarding the collection, verification, update, and review of Know Your Customer (KYC) information on the custodian in its capacity as trustee of the trust).
7. AUSTRAC has assessed the money laundering and terrorism financing (ML/TF) risks associated with the designated services being provided, and has determined that any risk is sufficiently mitigated by limiting the scope of relief to those custodian customers that:
- (a) are companies, rather than individuals (that is, they are corporate custodians); and
 - (b) are acting in the capacity of a trustee; and
 - (c) are providing a custodial or depository service of the kind described in item 46 of table 1 in subsection 6(2) of the AML/CTF Act; and
 - (d) either hold an Australian financial services licence authorising them to provide custodial or depository services under the *Corporations Act 2001*, or are otherwise exempt from the requirement to hold such a licence; and
 - (e) either satisfy one of the ‘geographical link’ tests in subsection 6(6) of the AML/CTF Act, or have certified in writing to the relevant reporting entity that their name and enrolment details are entered on the Reporting Entities Roll (and are, therefore, ‘reporting entities’ subject to the requirements of the AML/CTF Act, the AML/CTF Rules, and the oversight of AUSTRAC); and
 - (f) have certified in writing to the relevant reporting entity that they have carried out all applicable customer identification procedures and ongoing customer due diligence requirements in accordance with Chapter 15 of the AML/CTF Rules in relation to its underlying customers prior to, or at the time of, becoming a customer of the reporting entity.
8. The definition of ‘custodian’ contained in new paragraph 4.4.19(1) also limits the scope of the relief to corporate custodians, rather than individuals who provide custodial or depository services.
9. The amendments to Chapters 4 and 15 will take effect 28 days after registration of this amendment instrument.

Amendments not to affect operation of simplified verification procedures

10. Paragraphs 4.4.18–4.4.19 are not intended to override the ability of a reporting entity to rely on either the simplified company verification procedure (SCVP) in paragraph 4.3.8, or the simplified trustee verification procedure (STVP) in paragraphs 4.4.8 and 4.4.13 of the AML/CTF Rules, if it applies to a custodian or custodial arrangement.
11. AUSTRAC notes that the STVP only applies to a limited number of custodians. It is also important to note that despite the potential applicability of the SCVP and the STVP, reporting entities may still choose to collect and verify additional KYC information about the custodian-trustee in accordance with paragraphs 4.4.4, 4.4.6 and 4.4.7 of the AML/CTF Rules, especially where there is higher ML/TF risk.

Amendments to Chapter 38 relating to exemption from applicable customer identification procedures for the sale of shares for charitable purposes

12. Chapter 38 of the AML/CTF Rules provides an exemption from Division 4 of Part 2 of the AML/CTF Act for brokers that sell shares as an agent of a Public Ancillary Fund (PuAF). One condition of the exemption is that the proceeds of the sale of any security must be given to a PuAF that provides an undertaking to distribute proceeds of the disposal of the security to a deductible gift recipient before the end of the financial year in which it receives the proceeds.
13. The month of June is the peak giving period for donations to charity, and the requirement to dispose of the proceeds of the sale of any security prior to June 30 has generated a more ad hoc approach to donating as well as unintended administrative consequences. The amendment removing this requirement will allow PuAFs to adopt a structured and planned approach to donating to charity.
14. This amendment will take effect 28 days after registration of this amendment instrument.

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

15. The *Human Rights (Parliamentary Scrutiny) Act 2011* requires a Statement of Compatibility declaring that the relevant instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.
16. The Statement of Compatibility for the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2019 (No. 1)* is included in this Explanatory Statement at pages 11-12. 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 listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Notes on sections

Section 1

17. This section sets out the name of the Instrument, i.e. *the Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2019 (No. 2)*.

Section 2

18. This section specifies the commencement dates of the amendments.

Section 3

19. This section contains details of the enabling legislation.

Section 4

20. This section contains the details of the amendment:

Schedules 1, 2 and 3 amend the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*.

Schedule 1

21. This schedule amends the definition of “certified copy” in Chapter 1 of the AML/CTF Rules.

Schedule 2

22. This schedule sets out the amendments to Chapters 4 and 15 of the AML/CTF Rules.

Schedule 3

23. This schedule amends Chapter 38 of the AML/CTF Rules.

Notes on items

Schedule 1

Item 1

24. This item updates the definition of “certified copy” in Chapter 1 of the AML/CTF Rules by replacing references to the *Statutory Declarations Regulations 1993* (which have been repealed) with the updated *Statutory Declarations Regulations 2018*, which commenced operation on the 18 September 2018.
25. The *Statutory Declarations Regulations 2018* include a number of additional occupations/persons who are authorised to witness Commonwealth statutory declarations, including:

- (a) architects;
- (b) midwives;
- (c) migration agents registered under Division 3 of Part 3 of the *Migration Act 1958*;
- (d) occupational therapists;
- (e) financial advisers and financial planners; and
- (f) a broader category of engineers.

Schedule 2

Item 1

26. This item clarifies that the obligations of a reporting entity under paragraph 4.4.2 to be satisfied that a trust exists, and that the name of each trustee and beneficiary (or a description of each class of beneficiary) of the trust has been provided, do not apply in the circumstances set out in paragraph 4.4.18 (i.e. where a reporting entity is providing designated services to a custodian acting in the capacity of a trustee).

Item 2

27. This item adds the words “(if any)” to subparagraph 4.4.3(1) in recognition of the fact that not all trust arrangements have a ‘full name’, and clarifies that reporting entities will only be required to obtain this information where it exists.

Item 3

28. This item adds a new paragraph (d) to subparagraph 4.4.3(5) to clarify that when providing designated services to a customer that is a trustee, reporting entities are not required to collect the full name of the settlor of the trust where the customer is a custodian (as defined in subparagraph 4.4.19(1)), in recognition of the fact that many custodial-type trustee arrangements may not have an identifiable ‘settlor’.

Item 4

29. This item adds the words “(if any)” to subparagraph 4.4.5(1) in recognition of the fact that not all trust arrangements have a ‘full name’, and clarifies that reporting entities will only be required to verify this information where it is available and has been collected.
30. This item also removes redundant obligations from subparagraph 4.4.5(1), by omitting the requirement that the full name of the trust deed be verified “from a trust deed, certified copy or certified extract of the trust deed, reliable and independent documents relating to the trust or reliable and independent electronic data”. As this requirement is already contained in paragraph 4.4.15, it has been removed to simplify and streamline the provision.

Item 5

31. This item adds a new paragraph (d) to subparagraph 4.4.5(5) to clarify that when providing designated services to a customer that is a trustee, reporting entities are not required to verify the full name of the settlor of the trust where the customer is a custodian (as defined in subparagraph 4.4.19(1)), in recognition of the fact that many custodial-type trustee arrangements may not have an identifiable 'settlor'.

Item 6

32. This item clarifies that the obligations of a reporting entity under paragraph 4.4.9 to collect the full name and address of each trustee and each beneficiary (or details of the class of beneficiary) of a trust do not apply in the circumstances set out in paragraph 4.4.18 (i.e. where a reporting entity is providing designated services to a custodian acting in the capacity of a trustee).

Item 7

33. This item inserts new paragraphs 4.4.18 and 4.4.19.
34. Paragraph 4.4.18 sets out the requirements in Chapters 4 and 15 that a reporting entity's AML/CTF program does not need to comply with when providing designated services to a custodian that meets the criteria set out in paragraph 4.4.19:
 - (a) subparagraph 4.4.2(2) – the name of each trustee and beneficiary, or a description of each class of beneficiary (noting that paragraphs 4.4.3(6)-(8) still apply in relation to collecting the name of trustees/custodians);
 - (b) subparagraphs 4.4.3(1) and 4.4.5(1) – collecting and verifying the full name of the trust;
 - (c) subparagraphs 4.4.3(5) and 4.4.5(5) – collecting and verifying settlor details;
 - (d) subparagraph 4.4.9(2) – collecting the name of each beneficiary of a trust; and
 - (e) in relation to the underlying customers of those custodians:
 - (i) Part 4.12 (Collection and Verification of Beneficial Owner information) and Part 4.13 (Collection and Verification of Politically Exposed Person information); and
 - (ii) various ongoing customer due diligence requirements in Chapter 15.
35. Notes 1 and 2 to paragraph 4.4.18 clarify that while reporting entities are not required to identify and verify the underlying customers of customers that provide custodial services (as defined in paragraph 4.4.19), reporting entities must continue to apply all applicable customer identification procedures, as well as relevant ongoing customer due diligence procedures, in relation to the custodian itself.

36. Paragraph 4.4.19 sets out definitions of relevant terms used in paragraph 4.4.18, including ‘custodian’, ‘IDPS’, ‘MDA service’, ‘providing a custodial or depository service’ and ‘Reporting Entities Roll’.
37. The definition of ‘custodian’ specifies that the relief in paragraph 4.4.18 is limited to those customers that:
- (a) are companies, rather than individuals (that is, they are corporate custodians); and
 - (b) are acting in the capacity of a trustee; and
 - (c) are providing custodial or depository services of the kind described in item 46 of table 1 in subsection 6(2) of the AML/CTF Act; and
 - (d) either hold an Australian financial services licence authorising them to provide custodial or depository services under the *Corporations Act 2001*, or are otherwise exempt from the requirement to hold such a licence;
 - (e) either satisfy one of the ‘geographical link’ tests in subsection 6(6) of the AML/CTF Act, or have certified in writing to the relevant reporting entity that their name and enrolment details are entered on the Reporting Entities Roll; and
 - (f) have certified in writing to the relevant reporting entity that they have carried out all applicable customer identification procedures and ongoing customer due diligence requirements in accordance with Chapter 15 of the AML/CTF Rules in relation to its underlying customers prior to, or at the time of, becoming a customer of the reporting entity.
38. Custodian industry representatives have advised that there are circumstances where foreign custodians legitimately provide custodial or depository services in Australia without an AFSL. For example, certain provisions in the *Corporations Act 2001* and Corporations Regulations, as well as several ASIC Class Orders, exempt certain persons from the requirement to hold an AFSL authorising them to provide custodial or depository services. Accordingly, these types of custodians are brought within scope of the relief by virtue of subparagraph 4.4.19(1)(c)(ii).
39. The definition of ‘providing a custodial or depository service’ has the same meaning as in section 5 of the AML/CTF Act (which relies on the equivalent definition in subsection 766E(1) of the *Corporations Act 2001*, and excludes the conduct covered by subsection 766E(3) of that Act). Subparagraph 4.4.19(4) clarifies that, for the purposes of Part 4.4 of the AML/CTF Rules, the definition of ‘providing a custodial or depository service’ also includes the provision of a custodial or depository service as part of:
- (a) an investor directed portfolio service (IDPS); or
 - (b) a managed discretionary account (MDA) service.

40. 'IDPS' has the same meaning as in ASIC *Class Order [CO 13/763] – Investor directed portfolio services*, or any legislative instrument that replaces that class order.
41. 'MDA service' has the same meaning as in the *ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968*, or any legislative instrument that replaces that instrument.

Item 8

42. This item inserts a new Note before paragraph 15.2 to clarify that reporting entities are exempt from the requirements in paragraphs 15.2 and 15.3 in relation to certain beneficial owner information which relates to custodian-customers covered by the relief prescribed in paragraph 4.4.18.

Item 9

43. This item inserts a new Note before paragraph 15.8 to clarify that reporting entities are exempt from the requirements in subparagraphs 15.9(2), 15.10(1)(b), 15.10(1)(c), 15.10(2) and 15.10(4) in relation to underlying customers of custodians covered by the relief prescribed in paragraph 4.4.18.

Item 10

44. This item clarifies that the requirement in subparagraph 15.9(2) to conduct enhanced due diligence 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 does not apply in the circumstances set out in paragraph 4.4.18 (i.e. where a reporting entity is providing designated services to a custodian acting in the capacity of a trustee). Reporting entities are not required to apply an enhanced customer due diligence program to the extent it relates to underlying beneficiaries, or classes of beneficiaries of custodial arrangements. It is noted that reporting entities still need to apply enhanced customer due diligence in relation to the custodian entity itself.

Item 11

45. This item clarifies that the requirement in subparagraph 15.10(1)(b) to clarify or update beneficial owner information already collected from the customer does not apply in the circumstances set out in paragraph 4.4.18 (i.e. where a reporting entity is providing designated services to a custodian acting in the capacity of a trustee), to the extent that the information relates to underlying beneficiaries, or classes of beneficiaries of custodial arrangements. Reporting entities are still required to apply enhanced customer due diligence in relation to the custodian entity itself.

Item 12

46. This item clarifies that the requirement in subparagraph 15.10(1)(c) to obtain further beneficial owner information, including taking reasonable measures to identify the source of each beneficial owner's wealth and funds, does not apply in the circumstances set out in paragraph 4.4.18 (i.e. where a reporting entity is providing designated services to a custodian acting in the capacity of a trustee), to the extent that the information relates to underlying beneficiaries, or classes of beneficiaries of custodial arrangements.

Item 13

47. This item clarifies that the requirement in subparagraph 15.10(2) to undertake more detailed analysis of beneficial owner information, or take reasonable measures to identify the source of each beneficial owner's wealth and funds, does not apply in the circumstances set out in paragraph 4.4.18 (i.e. where a reporting entity is providing designated services to a custodian acting in the capacity of a trustee), to the extent that the information relates to underlying beneficiaries, or classes of beneficiaries of custodial arrangements.

Item 14

48. This item clarifies that the requirements in subparagraph 15.10(4) to verify or re-verify beneficial owner information in accordance with the beneficial owner identification requirements in Chapter 4 of the AML/CTF Rules does not apply in the circumstances set out in paragraph 4.4.18 (i.e. where a reporting entity is providing designated services to a custodian acting in the capacity of a trustee), to the extent that the information relates to underlying beneficiaries, or classes of beneficiaries of custodial arrangements.

Schedule 3

Item 1

49. This item amends subparagraph 38.2(4)(a) to remove the timing component of the requirement that an ancillary fund (as defined in the *Income Tax Assessment Act 1997*) distribute proceeds of the disposal of the security to a deductible gift recipient before the end of the financial year in which it receives the proceeds.

Legislative instruments

50. These AML/CTF Rules are legislative instruments as defined in section 8 of the *Legislation Act 2003*.

Likely impact

51. The amendment to Chapter 1 of the AML/CTF Rules is minor and machinery in nature, and is unlikely to have significant direct or indirect regulatory impacts on reporting entities.

52. The Office of Best Practice Regulation (OBPR) advised AUSTRAC that a Regulatory Impact Statement is not required for the amendments to Chapters 4 and 15, as these are likely to also have only minor regulatory impacts.
53. OBPR separately advised that the amendment to Chapter 38 is minor and machinery in nature and is unlikely to have significant direct or indirect regulatory impacts.

Consultation

54. Give the machinery nature of the change, no consultation was undertaken in relation to the amendment to Chapter 1.
55. The amendments to Chapters 4 and 15 have been subject to two rounds of public consultation (3 April 2017 to 1 May 2017, and 3 July 2018 to 31 July 2018). During both rounds of public consultation, the draft amendments were published on the AUSTRAC website.
56. The amendments to Chapter 38 were published for public consultation on the AUSTRAC website from 3 July 2018 to 31 July 2018.
57. AUSTRAC has consulted with the Australian Taxation Office, the Department of Home Affairs, the Australian Federal Police, the Australian Criminal Intelligence Commission and the Office of the Australian Information Commissioner in developing these amendments.

Ongoing consultation

58. 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 2019 (No. 2)

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

The Instrument updates the definition of ‘certified copy’ in Chapter 1 of the *Anti-Money Laundering/Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (AML/CTF Rules) to reflect the repeal of the *Statutory Declarations Regulations 1993* and their replacement with the *Statutory Declarations Regulations 2018*.

The Instrument also amends the AML/CTF Rules to provide reporting entities with relief from certain identification, verification and ongoing customer due diligence requirements in Part 4.4 of Chapter 4 and Chapter 15 of the AML/CTF Rules in relation to custodian customers that satisfy the requirements set out in paragraph 4.4.19.

Subparagraph 38.2(4)(a) is amended by the Instrument to remove the timing component of the requirement that an ancillary fund distribute proceeds of the disposal of the security to a deductible gift recipient before the end of the financial year in which it receives the proceeds. The other requirements in Chapter 38 of the AML/CTF Rules remain unchanged.

Human rights implications

Amendments to Chapters 4 and 15 of the AML/CTF Rules (relating to custodians)

The Instrument engages the following rights:

- Right to privacy and reputation.

The amendments to Part 4.4 (Applicable customer identification procedure with respect to trustees) and Chapter 15 (Ongoing customer due diligence) of the AML/CTF Rules contained within this Instrument positively affect the right to privacy and reputation, by limiting the circumstances in which personal information is required to be collected and used, while ensuring the AML/CTF risk is appropriately identified, mitigated, and managed.

Currently, Part 4.4 of the AML/CTF Rules requires reporting entities to collect and verify ‘know your customer’ information in relation to their customers. Where those customers are trustees, reporting entities are also required to collect identity information on the settlor of the trust, as well as each trustee and beneficiary (whether a legal entity or a natural person). Chapter 15 of the AML/CTF Rules requires reporting entities to undertake ongoing due diligence in relation to these persons.

The amendments to Part 4.4 and Chapter 15 relieve reporting entities from the need to carry out identification, verification and ongoing customer due diligence in relation to the underlying settlor(s), trustee(s), or beneficiaries of a custodian-customer that is receiving designated services in the capacity of a trustee.

Accordingly, this Instrument limits the amount of information that reporting entities are required to collect in relation to natural persons.

Amendments to Chapters 1 and 38

The other amendments contained in this Instrument do not engage any of the other applicable rights or freedoms.

Conclusion

This Instrument is compatible with human rights because, to the extent that it engages the right to privacy and reputation, it promotes a more limited collection and use of personal information while continuing to ensure the appropriate management of AML/CTF risk by reporting entities.

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