

# The New Australian AML & CTF Rules and Their Application to International Business Transactions



In 2013, FTI Consulting participated in a consultation process led by the Australian Transaction Reports and Analysis Centre (“AUSTRAC”) by providing a submission outlining possible areas of enhancement to the Anti-Money Laundering and Counter-Terrorism (“AML & CTF”) financing Customer Due Diligence (“CDD”) regime. A summary of our submission to AUSTRAC may be accessed [here](#).

Following the consultation process, amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (“the Act”) were made and became effective on 1 June 2014. As a result, individuals and companies providing a range of financial and lending services, brokering and exchange, insurance and remittance services – including real estate agents, lawyers, trust and company service providers – are now subject to an enhanced regime of requirements.

FTI Consulting takes a closer look at some of the key amendments to the Act as well as a number of significant existing provisions that companies should be aware of. In particular, we focus on the requirements for Enhanced Due Diligence (“EDD”) which can impact Australian businesses dealing with clients, customers or beneficial owners based in offshore jurisdictions, particularly where the latter may be linked to politically exposed persons (“PEPs”).<sup>1</sup>

In addition to existing sanction regimes, the new AML & CTF rules place substantial emphasis on businesses to take responsibility in fully understanding the control of a company, including the business or trust structure, the origins of wealth or sources of funds for the company. As illustrated by the numerous front page articles and media exposes, businesses and management teams are increasingly being held to a higher level of scrutiny by the courts, corporate and banking regulatory agencies, and anti-corruption commissions. As such, to protect both reputational and enterprise value, the need for enhanced internal compliance processes and comprehensive reputational due diligence analysis is heightened.

## The AML & CTF Rules and Sanctions

The *AML & CTF Rules Amendment Instrument 2014* (No. 3) has amended various sections the Act, and as mentioned, a wide range of value transfer, lending, debt and credit services provided by businesses are subject to the provisions outlined in the updated legislation. A full list of ‘Designated Services’ (Part 1, section 6 of the Act) should be reviewed by business management teams to ensure they are aware of which services provided by their company may fall under the provisions of the Act and its requirements.

Amongst others, chapters 4 and 15 of the revised AML & CTF rules concern customer identification, verification and ongoing customer due diligence. Also addressed in these sections is the need for greater focus on the establishment and verification of the identities of beneficial owners in foreign companies. In this case, the definition of a ‘beneficial owner’ of a company has been expanded from a previously ‘quantified’ 25% shareholding threshold to more ‘qualitative’ forms such as extending to those who directly or indirectly control a company via agreements, arrangements and/or practices whether based on legal or equitable rights or not. During our review, we noted some parallels could therefore be drawn to the provisions of the *Corporations Act* wherein a person might be ‘deemed’ to be a company director through certain actions and conduct, hence establishing control of a company regardless of whether they appear on the corporate register as a director or not.

<sup>1</sup> This Industry Alert is a general guide and commentary only – where applicable, references to the relevant Australian AML & CTF legislation, rules and provisions have been provided for the reader

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The high level of risk associated with dealing with PEPs also triggers the need for enhanced due diligence and as such, a detailed understanding of who a PEP might be, is needed. At a high level, PEPs may be the Head of State, Minister, a senior official or member of the armed services, a board member of a state-owned enterprise and so forth. However, the definition also extends to family members, including spouses, children and parents and 'close associates,' for instance, those known to have joint beneficial businesses or ownership arrangements with political or senior government officials.

Existing rules and policies relating to business dealings or transactions with sanctioned entities remain a high concern for those involved in conducting international business transactions. The Australian Department of Foreign Affairs and Trade's consolidated list contains the names of all persons and entities to which the *Charter of the United Nations Act 1945* and the *Autonomous Sanctions Act 2011* applies and against which there may be targeted financial sanctions or travel bans. There are serious criminal offences for contravening a sanctions measure, which are broad in their application to Australian citizens, as well as to Australian-registered companies overseas.

## The Risks in International Business and Transactions

As mentioned, businesses now also need to have inquiry and monitoring processes designed to identify the origins of wealth and sources of funds. This includes identifying practical triggers to investigate transactions that may appear to be suspicious, unusual, or which might have no apparent economic or visible business purpose. In particular, financial transactions that involve certain sanctioned entities or foreign PEPs will (and should) trigger the need for EDD processes.

It is also indeed critical to show that prudent, reasonable and proportionate efforts have been made in identifying whether a business associate or family member of a PEP may actually control a company on behalf of them. Uncovering whether a PEP is a concealed beneficial owner of a business will likely require an examination of various inter-related corporate, business and family structures and transaction to verify how and by whom the business is actually controlled. One example may be a business account held by the relative of a foreign politician; a situation that will now require an understanding of the business, its market, sources of revenues and funds, the relative's relationship with the foreign

politician, and the potential degree of ostensible control or benefit that the foreign politician might directly or indirectly exercise over the business.

Furthermore, a sanctioned entity or PEP from one country may have a company in another (non-sanctioned) country and undertake business in other neighboring jurisdictions. Australian businesses need to robustly peel back the layers to acquire a complete picture of the international corporate and business structures with whom they may deal. Seeking to verify the actual controllers and beneficiaries of the businesses they work with will ensure they avoid the potential of inadvertently dealing with a sanctioned country or party or fail to adequately address the updated AML & CTF requirements.

## Conclusion

As indicated in [our 2013 AUSTRAC submission](#), there is a wide spectrum of due diligence reports available and each has utility in the right circumstances. We noted that some reports – red flag reports – are 'menu' driven, they highlight potential areas of risk rely and on harvesting information from media sources and other commercial business databases to produce a 'catalogue' of known information. However, in circumstances where a customer's account or the nature of a transaction may be deemed of higher risk, we would recommend the use of a more comprehensive and conclusive report.

There are a number of deficiencies and vulnerabilities to only using 'red-flag' reports without analysis, critical reviews and iterative testing of information that might otherwise be uncovered. Conducting a more enhanced assessment allows a business to seek out grounded conclusions, identify information asymmetry and illuminate situations where there might be anomalous facts or an absence of corroborating evidence with investigative due diligence. A process such as this ensures that businesses are protecting themselves from potential risks and reputational threats, that management teams are making transactions on a well-informed basis, and importantly, confirms that the underlying framework for robust EDD, AML & CTF regulation and sanctions compliance requirements are met.



For more information on our activities across Asia Pacific and how FTI Consulting can help your business, please contact us on [info-ap@fticonsulting.com](mailto:info-ap@fticonsulting.com).

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