



Australian Government

AUSTRAC

Explanatory note for consultation purposes

Draft amendments to Chapters 4 and 15 of the AML/CTF Rules relating to corporate customers which are custodians

These draft amendments exempt reporting entities from certain identification requirements in Chapter 4 and Chapter 15 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 No. 1 (AML/CTF Rules)* for corporate customers who are ‘custodians’ 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.

The proposed exemption applies to corporate custodian customers that:

- act in the capacity of a trustee;
- are providing a custodial or depository service; and
- hold an Australian financial services licence authorising them to provide custodial or depository services, or are exempt under the *Corporations Act 2001* from the requirement to hold such a licence.

Industry has informed AUSTRAC that there are difficulties complying with the requirements in Part 4.4 (Applicable customer identification procedure with respect to trustees) of Chapter 4, as many custodian arrangements do not have the normal trust features such as trust name, settlor, and a trust deed.

AUSTRAC has considered the issues raised by industry, and is proposing to provide targeted regulatory relief. We have assessed the money laundering and terrorism financing risks associated with the designated services being provided, and consider that any impact on the risk that may result from the proposed exemption is mitigated by limiting its scope to those custodian customers that:

- are providing a custodial or depository service of the kind described in item 46 of table 1 in subsection 6(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act)*; and
- either:
 - satisfy one of the ‘geographical link’ tests in subsection 6(6) of the AML/CTF Act; or

- have certified to the reporting entity that their name and enrolment details are entered on AUSTRAC's Reporting Entities Roll maintained under section 51C of the AML/CTF Act

and are, therefore, 'reporting entities' subject to the requirements of the AML/CTF Act, the AML/CTF Rules, and the oversight of AUSTRAC; and

- have certified in writing to the 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.

The definition of 'custodian' contained in new paragraph 4.4.19(1) limits the exemption to corporate custodians, rather than individuals who provide custodial or depository services.

'Trustee' is defined in section 6 of the AML/CTF Act as having the same meaning as in the *Income Tax Assessment Act 1997 (ITAA 97)*. The ITAA 97 definition relies on a very broad definition of 'trustee' in the *Income Tax Assessment Act 1936*. AUSTRAC considers this definition to be sufficiently broad to cover the range of custodian arrangements intended to be captured by the exemption.

The exemption covers foreign corporate custodians that are authorised to provide custodial or depository services in Australia without an AFS licence under certain provisions of the *Corporations Act 2001 (Corporations Act)*, the *Corporations Regulations 2001*, and specific ASIC Class Orders.

The definition of 'providing a custodial or depository service' in the draft amendments 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, and excludes the conduct covered by subsection 766E(3) of that Act). New paragraph 4.4.19 expressly clarifies that the definition includes the provision of a custodial or depository service as part of:

- an investor directed portfolio service (**IDPS**), or
- a managed discretionary account (**MDA**) service.

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. 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.

New paragraphs 4.4.18 and 4.4.19 have been added to Part 4.4 to exempt reporting entities from carrying out specific applicable customer identification requirements when providing designated services to eligible custodians. As a result of these changes, reporting entities will also be exempt from conducting certain ongoing CDD requirements in Chapter 15 regarding the collection and verification of beneficial owner information (though note that reporting entities will still be required to comply

with obligations in Chapter 15 regarding the collection, verification, update, and review of KYC information on the custodian in its capacity as trustee of the trust).

Additions are in **bold** with deletions in ~~strikethrough~~.

Calculation of Regulatory Costs

These draft amendments may result in regulatory savings if implemented. The Australian Government has implemented an annual \$1 billion red tape reduction target to which agencies such as AUSTRAC are required to contribute if regulatory action by an agency results in a cost reduction to businesses, community organisations or individuals. Any identified savings may also be used by an agency to ‘offset’ regulatory action which may impose regulatory costs.

Further details on the Australian Government policy are available at [Cutting Red Tape](http://www.cuttingredtape.gov.au) (www.cuttingredtape.gov.au).

AUSTRAC requests that industry provide, in any submission on these draft amendments, an estimate of any savings that may result from their implementation. It is preferred that such estimates use the Regulatory Burden Measure (RBM) as a basis for the calculation, as the RBM has been mandated by the Australian Government for use by agencies. Further details on the RBM are available at [Commonwealth Regulatory Burden Measure](https://rbm.obpr.gov.au) (https://rbm.obpr.gov.au).

Proposed commencement date

Subject to comments received during this consultation period, it is intended that these amendments be progressed through an omnibus AML/CTF Rules Amendment Instrument. It is proposed that the measures will take effect 28 days after the Amendment Instrument is registered with the Federal Register of Legislation. Industry feedback is sought on the appropriateness of this commencement timeframe.

Human Rights (Parliamentary Scrutiny) Act 2011 requirements

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.

It is considered that the draft amendments are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of ‘human rights’ in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.



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Draft amendments to Chapter 4 and Chapter 15 of the AML/CTF Rules

Additions are in **bold** with deletions in ~~strikethrough~~.

CHAPTER 4

Part 4.4 Applicable customer identification procedure with respect to trustees

- 4.4.1 In so far as a reporting entity has any customer who acts in the capacity of a trustee of a trust, an AML/CTF program must comply with the requirements specified in Part 4.4 of these Rules.
- 4.4.2 **Subject to paragraph 4.4.18, a**An AML/CTF program must include appropriate risk-based systems and controls that are designed to enable the reporting entity to be reasonably satisfied, where a person notifies the reporting entity that the person is a customer of the reporting entity in the person's capacity as the trustee of a trust, that:
- (1) the trust exists; and
 - (2) the name of each trustee and beneficiary, or a description of each class of beneficiary, of the trust has been provided.

Existence of the trust - collection and verification of information

- 4.4.3 An AML/CTF program must include a procedure for the reporting entity to collect, at a minimum, the following KYC information about a customer:
- (1) the full name (**if any**) of the trust;
 - (2) the full business name (if any) of the trustee in respect of the trust;
 - (3) the type of the trust;
 - (4) the country in which the trust was established;
 - (5) the full name of the settlor of the trust, unless:
 - (a) the material asset contribution to the trust by the settlor at the time the trust is established is less than \$10,000; or
 - (b) the settlor is deceased; or

(c) the trust is verified using the simplified trustee verification procedure under paragraph 4.4.8 of these Rules; **or**

(d) the customer is a custodian.

Note: 'Custodian' is defined in subparagraph 4.4.19(1) of these Rules.

(6) if any of the trustees is an individual, then in respect of one of those individuals – the information required to be collected about an individual under the applicable customer identification procedure with respect to individuals set out in an AML/CTF program;

(7) if any of the trustees is a company, then in respect of one of those companies – the information required to be collected about a company under the applicable customer identification procedure with respect to companies set out in an AML/CTF program; and

(8) if the trustees comprise individuals and companies then in respect of either an individual or a company – the information required to be collected about the individual or company (as the case may be) under the applicable customer identification with respect to the individual or company set out in an AML/CTF program.

4.4.4 An AML/CTF program must include appropriate risk-based systems and controls for the reporting entity to determine whether, in addition to the KYC information referred to in paragraph 4.4.3, any other KYC information relating to the trust's existence will be collected in respect of a trust.

4.4.5 An AML/CTF program must include a procedure for the reporting entity to verify, at a minimum:

(1) the full name (**if any**) of the trust ~~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;~~

(2) if any of the trustees is an individual, then in respect of one of those individuals – information about the individual in accordance with the applicable customer identification procedure with respect to individuals set out in an AML/CTF program;

(3) if any of the trustees is a company, then in respect of one of those companies – information about the company in accordance with the applicable customer identification procedure with respect to companies set out in an AML/CTF program;

(4) if the trustees comprise individuals and companies then in respect of either an individual or a company – the information about the individual or company (as the case may be) in accordance with the applicable procedures with respect to the individual or company set out in an AML/CTF program; and

- (5) the full name of the settlor of the trust, unless:
- (a) the material asset contribution to the trust by the settlor at the time the trust is established is less than \$10,000; or
 - (b) the settlor is deceased; or
 - (c) the trust is verified using the simplified trustee verification procedure under paragraph 4.4.8 of these Rules; **or**
 - (d) the customer is a custodian.**

Note: 'Custodian' is defined in subparagraph 4.4.19(1) of these Rules.

- 4.4.6 An AML/CTF program must include appropriate risk-based systems and controls for the reporting entity to determine whether and to what extent, in addition to the KYC information referred to in paragraph 4.4.5, any other KYC information relating to the trust's existence collected in respect of the trust should be verified.
- 4.4.7 In determining whether, and what, additional information will be collected and/or verified in respect of a trust pursuant to paragraphs 4.4.4 and/or 4.4.6, the reporting entity must have regard to ML/TF risk relevant to the provision of the designated service.
- 4.4.8 If an AML/CTF program includes the simplified trustee verification procedure described below with respect to a trust that is:
- (1) a managed investment scheme registered by ASIC;
 - (2) a managed investment scheme that is not registered by ASIC and that:
 - (a) only has wholesale clients; and
 - (b) does not make small scale offerings to which section 1012E of the *Corporations Act 2001* applies;
 - (3) registered and subject to the regulatory oversight of a Commonwealth statutory regulator in relation to its activities as a trust; or
 - (4) a government superannuation fund established by legislation;
- an AML/CTF program is taken to comply with the requirements of paragraphs 4.4.5, 4.4.6 and 4.4.7 of these Rules in so far as those customers are concerned.

Simplified Trustee Verification Procedure

The reporting entity must verify that the trust is:

- (1) a managed investment scheme registered by ASIC;

- (2) a managed investment scheme that is not registered by ASIC and that:
 - (a) only has wholesale clients; and
 - (b) does not make small scale offerings to which section 1012E of the *Corporations Act 2001* applies;
- (3) registered and subject to the regulatory oversight of a Commonwealth statutory regulator in relation to its activities as a trust; or
- (4) a government superannuation fund established by legislation.

Trustees and beneficiaries– collection and verification of information

4.4.9 **Subject to paragraph 4.4.18, A**n AML/CTF program must include a procedure for the reporting entity to collect, at a minimum, the following KYC information about a customer (other than a trustee in respect of a trust to which paragraph 4.4.13 or 4.4.14 applies):

- (1) the full name and address of each trustee in respect of the trust; and
- (2) either:
 - (a) the full name of each beneficiary in respect of the trust; or
 - (b) if the terms of the trust identify the beneficiaries by reference to membership of a class – details of the class.

4.4.10 An AML/CTF program must include appropriate risk-based systems and controls for the reporting entity to determine whether, in addition to the KYC information referred to in paragraph 4.4.9, any other KYC information relating to the trustees, or beneficiaries will be collected in respect of the trust.

4.4.11 An AML/CTF program must include appropriate risk-based systems and controls for the reporting entity to determine whether and, if so, in what manner to verify the name of any or each trustee or beneficiary, or details of any or each class of beneficiaries, or any other KYC information collected pursuant to a procedure of the kind described in paragraph 4.4.9, from the sources described in paragraph 4.4.15.

4.4.12 An AML/CTF program must include a requirement that, in determining whether and what KYC information will be collected and/or verified in respect of a trust and the extent to which any KYC information is verified, pursuant to a procedure of the kind described in paragraphs 4.4.10 and/or 4.4.11, the reporting entity must have regard to ML/TF risk relevant to the provision of the designated service.

4.4.13 An AML/CTF program need not include the requirements specified in paragraphs 4.4.9 to 4.4.12 in relation to a trust that is:

- (1) a managed investment scheme registered by ASIC;
- (2) a managed investment scheme that is not registered by ASIC and that:

- (a) only has wholesale clients; and
 - (b) does not make small scale offerings to which section 1012E of the *Corporations Act 2001* applies; or
- (3) a government superannuation fund established by legislation.

4.4.14 An AML/CTF program need not include the requirements specified in paragraph 4.4.9 in relation to a trust that is registered and subject to the regulatory oversight of a Commonwealth statutory regulator in relation to its activities as a trust.

Methods of verification

4.4.15 Subject to paragraph 4.4.16, an AML/CTF program must require that the verification of information about a trust be based on:

- (1) a trust deed, certified copy or certified extract of a trust deed;
- (2) reliable and independent documents relating to the trust;
- (3) reliable and independent electronic data; or
- (4) a combination of (1) to (3) above.

4.4.16 For the purposes of subparagraph 4.4.15(2), 'reliable and independent documents relating to the trust' includes a disclosure certificate that verifies information about a trust where:

- (1) the verification is for the purposes of a procedure of the kind described in paragraphs 4.4.6 or 4.4.11 of these Rules; and
- (2) the information to be verified is not otherwise reasonably available from the sources described in paragraph 4.4.15.

Responding to discrepancies

4.4.17 An AML/CTF program must include appropriate risk-based systems and controls for the reporting entity to respond to any discrepancy that arises in the course of verifying information about a customer so that the reporting entity can determine whether it is reasonably satisfied about the matters referred to in subparagraphs 4.4.2(1) and (2).

Trustees who are custodians

4.4.18 An AML/CTF program need not include the requirements specified in the following AML/CTF Rules in relation to the provision by the reporting entity of designated services to a customer who is a custodian:

- (1) subparagraph 4.4.2(2);**
- (2) subparagraph 4.4.9(2);**

- (3) Part 4.12;**
- (4) Part 4.13;**
- (5) Paragraphs 15.2 and 15.3 in so far as they relate to the collection, verification, updating or review of information of each underlying customer to whom the custodian is providing a custodial or depository service;**
- (6) Subparagraphs 15.9(2), 15.10(1)(b), 15.10(1)(c), 15.10(2) and 15.10(4) in so far as they relate to the beneficial owner information of underlying customers to whom the custodian is providing a custodial or depository service.**

Note: The requirements in paragraphs 15.2 and 15.3 and subparagraphs 15.9(2), 15.10(1)(b), 15.10(1)(c), 15.10(2) and 15.10(4) of the AML/CTF Rules continue to apply to reporting entities in relation to the collection, verification, re-verification, clarification, updating, review and detailed analysis of:

- (a) KYC information of customers who are custodians; and*
- (b) beneficial owner information, other than information relating to the underlying customers of custodians.*

4.4.19 For the purpose of Part 4.4 of these AML/CTF Rules:

- (1) ‘custodian’ means a company that:**
 - (a) is acting in the capacity of a trustee; and**
 - (b) is providing a custodial or depository service of the kind described in item 46 of table 1 in subsection 6(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act); and**
 - (c) either:**
 - (i) holds an Australian financial services licence authorising it to provide custodial or depository services under the *Corporations Act 2001*; or**
 - (ii) is exempt under the *Corporations Act 2001* from the requirement to hold such a licence; and**
 - (d) either:**
 - (i) satisfies one of the ‘geographical link’ tests in subsection 6(6) of the AML/CTF Act; or**

- (ii) **has certified in writing to the relevant reporting entity that its name and enrolment details are entered on the Reporting Entities Roll; and**
 - (e) **has certified in writing to the relevant reporting entity that it has 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.**
- (2) **'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;**
- (3) **'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;**
- (4) **'providing a custodial or depository service' has the same meaning as in section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and includes providing a custodial or depository service as part of an IDPS or MDA service;**
- (5) **'Reporting Entities Roll' has the meaning given by section 51C of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.**



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CHAPTER 15 Ongoing customer due diligence

15.1 These Anti-Money Laundering and Counter-Terrorism Financing Rules (Rules) are made under section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act) for paragraphs 36(1)(b), 84(2)(c) and 85(2)(c) of that Act. Sections 136 and 137 of the AML/CTF Act apply to each paragraph of this Chapter. The requirements set out in these Rules do not apply in relation to a permanent establishment in a foreign country at or through which a reporting entity provides designated services. This Chapter commences on 1 June 2014.

KYC information and Beneficial Owner Information

Note: *Reporting entities that provide designated services to customers who are custodians are exempt from the requirements specified in paragraphs 15.2 and 15.3 of these Rules in relation to certain beneficial owner information. These exemptions are set out in paragraph 4.4.1918 of Chapter 4 of these Rules.*

15.2 A reporting entity must include in Part A of its AML/CTF program appropriate risk-based systems and controls to enable a reporting entity to determine in what circumstances further KYC information or beneficial owner information should be collected or verified in respect of customers or beneficial owners of customers to enable the review and update of KYC information and beneficial owner information for ongoing customer due diligence purposes.

Note: 'Beneficial owner information' is the information referred to in Part 4.12 of Chapter 4 of these Rules.

15.3 A reporting entity must undertake reasonable measures to keep, update and review the documents, data or information collected under the applicable customer identification procedure (particularly in relation to high risk customers) and the beneficial owner identification requirements specified in Chapter 4 of these Rules.

Transaction monitoring program

15.4 A reporting entity must include a transaction monitoring program in Part A of its AML/CTF program.

15.5 The transaction monitoring program must include appropriate risk-based systems and controls to monitor the transactions of customers.

- 15.6 The transaction monitoring program must have the purpose of identifying, having regard to ML/TF risk, any transaction that appears to be suspicious within the terms of section 41 of the AML/CTF Act.
- 15.7 The transaction monitoring program should have regard to complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or visible lawful purpose.

Enhanced customer due diligence program

Note: *Reporting entities that provide designated services to customers who are custodians are exempt from the requirements specified in subparagraphs 15.9(2), 15.10(1)(b), 15.10(1)(c), 15.10(2) and 15.10(4) of these Rules in relation to underlying customers of custodians. These exemptions are set out in paragraph 4.4.18 of Chapter 4 of these Rules.*

- 15.8 A reporting entity must include an enhanced customer due diligence program in Part A of its AML/CTF program.
- 15.9 **Subject to paragraph 4.4.18,** the reporting entity must apply the enhanced customer due diligence program when:

- (1) it determines under its risk-based systems and controls that the ML/TF risk is high; or

Note: *Reporting entities should consider whether any beneficial owner of a customer, including domestic or international organisation politically exposed persons, should be considered high risk.*

- (2) a designated service is being provided to a customer who is or who has a beneficial owner who is, a foreign politically exposed person; or
- (3) a suspicion has arisen for the purposes of section 41 of the AML/CTF Act; or
- (4) the reporting entity is entering into or proposing to enter into a transaction and a party to the transaction is physically present in, or is a corporation incorporated in, a prescribed foreign country.

- 15.10 The enhanced customer due diligence program must include appropriate risk-based systems and controls so that, in cases where one or more of the circumstances in paragraph 15.9 arises, a reporting entity must undertake measures appropriate to those circumstances, including a range of the measures in subparagraphs 15.10(1) to (7):
- (1) seek information from the customer or from third party sources in order to undertake one or more of the following as specified in subparagraphs 15.10(1)(a) – (d):
- (a) clarify or update KYC information already collected from the customer;

- (b) **subject to paragraph 4.4.18**, clarify or update beneficial owner information already collected from the customer;
 - (c) **subject to paragraph 4.4.18**, obtain any further KYC information or beneficial owner information, including, where appropriate, taking reasonable measures to identify:
 - (i) the source of the customer's and each beneficial owner's wealth; and
 - (ii) the source of the customer's and each beneficial owner's funds;
 - (d) clarify the nature of the customer's ongoing business with the reporting entity;
- (2) undertake more detailed analysis of the customer's KYC information and, **subject to paragraph 4.4.18**, beneficial owner information, including, where appropriate, taking reasonable measures to identify:
- (a) the source of the customer's and each beneficial owner's wealth; and
 - (b) the source of the customer's and each beneficial owner's funds;
- (3) verify or re-verify KYC information in accordance with the customer identification program;
- (4) **subject to paragraph 4.4.18**, verify or re-verify beneficial owner information in accordance with the beneficial owner identification requirements specified in Chapter 4 of these Rules;
- (5) undertake more detailed analysis and monitoring of the customer's transactions – both past and future, including, but not limited to:
- (a) the purpose, reasons for, or nature of specific transactions; or
 - (b) the expected nature and level of transaction behaviour, including future transactions;
- (6) seek senior management approval for:
- (a) continuing a business relationship with a customer; and
 - (b) whether a designated service should continue to be provided to the customer;
- (7) consider whether a transaction or particular transactions should be processed.

15.11 If the circumstances in subparagraph 15.9(2) arise, in addition to any other appropriate measures in paragraph 15.10, a reporting entity must undertake the measures in subparagraphs 15.10(2) and 15.10(6).

Reporting entities should note that in relation to activities they undertake to comply with the AML/CTF Act, they will have obligations under the Privacy Act 1988, including the requirement to comply with the Australian Privacy Principles, even if they would otherwise be exempt from the Privacy Act. For further information about these obligations, please go to <http://www.oaic.gov.au> or call 1300 363 992.