Australian Banking Association

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Director
Policy and Rules
AUSTRAC
PO Box 5516
West Chatswood NSW 1515
By email: Guidance_Consultation@austrac.gov.au.

Draft guidance on providing financial services to remitters, digital currency exchanges and fintech businesses

The Australian Banking Association (**ABA**) welcomes the opportunity to comment on the Australian Transaction Reports and Analysis Centre's (**AUSTRAC**) consultation on proposed guidance for providing financial services to remitters, digital currency exchanges (**DCEs**) and fintech businesses subject to AUSTRAC regulation.

The ABA supports responsible innovation across the Australian financial services sector. Regarding DCEs and virtual assets, the ABA supports the adoption of the Financial Action Task Force (**FATF**) Guidance as applied to virtual asset providers, which includes a risk-based licensing framework coupled with effective monitoring and regulatory supervision.[1] Adopting this stronger regulatory approach as recommended by FATF has the potential to mitigate some of the associated money laundering and terrorist financing risks inherent in virtual assets.

Our position

The ABA supports AUSTRACs intention of providing guidance to reassure reporting entities (**RE**s) and clarify expectations in relation to providing services to remitters, DCEs and fintechs. However, we do not consider the proposed guidance as sufficiently reassuring or clarifying.

Banks provide services to businesses from all sectors applying a risk-based approach, and all prospective customers are assessed on their ability to mitigate ML/TF risks. Where a bank is

- unable to manage the ML/TF risk of certain customers within its risk appetite while meeting its legal obligations under the AML/CTF Act and elsewhere, and/or
- has ascertained that the cost of the ongoing monitoring and enhanced due diligence for some high-risk customers operating in markets with low or no regulatory oversight significantly makes a product or service commercially unviable,

it may choose not to provide services to those customers.

Banks also need to comply with obligations or maintain good standing with their international partners. Australian banks rely on a vast number of international correspondent banking relationships to facilitate significant numbers of daily international services and transactions. These foreign banks often require Australian banks to abide by strict standards to meet their own ML/TF and sanctions obligations, which can also include minimisation of ML/TF risk.

The ABA considers the proposed guidance does not provide any additional assurances to banks that change the way they adhere to their legal obligations under the AML/CTF Act and other laws or meet the expectations of international partners, as described above.

The ABA also notes the Council of Financial Regulators (**CFR**) has been recently directed by the Treasurer to inquire into the causes and possible policy responses to the problem of de-banking.[2] Given the significance of this work and the important role that AUSTRAC will play in this inquiry, we

[1] See FATF (2021), Updated Guidance for a Risk- Based Approach to Virtual Assets and Virtual Asset Service Providers, Paris, https://www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-rba-virtual-assets-2021.html
[2] See "Transforming Australia's Payments System" (8 Dec 2021) – the Government response to the Farrell Payments Review and the Senate Inquiry on Australia as a Technology and Financial Centre Final Report. Available at https://treasury.gov.au/publication/p2021-231824

recommend that AUSTRAC defer further work on this proposed guidance until after the completion of the CFR inquiry. This will provide the opportunity to incorporate the findings of this work in AUSTRAC guidance and ensure a consistent response across government.

The ABA further considers that this guidance should align with other AUSTRAC guidance for the remittance and DCE sector to ensure that AUSTRAC covers the broad range of risks and key messages. In particular, it would be useful for AUSTRAC to convey the need for these businesses to be open with banks in sharing their AML/CTF risk assessment outcomes, details of their AML/CTF programs, and other information demonstrating their compliance with their obligations.

Noting these general comments, the ABA makes some specific technical comments on the draft guidance in the attachment.

Thank you for the opportunity to provide feedback. If you have any queries, please contact me.

Yours sincerely,

Prashant Ramkumar,

Associate Policy Director

Attachment – specific comments

The scope of the draft guidance

The draft guidance notes remitters, DCEs and fintech business as the sectors that fall within the scope of this guidance. While these are the sectors focused upon by a recent report of Senate Select Committee on Australia as a Technology and Financial Centre,[3] it is not clear why this guidance focuses on these to the exclusion of other high-risk sectors.

The ABA is concerned that it may appear to signal that AUSTRAC considers these sectors warrant favourable treatment and that it requires banks to have a different risk assessment to these businesses vis-à-vis other high-risk sectors. The ABA does not consider this to be desirable or an appropriate regulatory setting and recommends that AUSTRAC alter the guidance or consider expanding the scope of the guidance to capture other high-risk sectors.

Furthermore, the proposed guidance requires a clearer definition of the scope of 'fintechs' subject to this guidance. The guidance states that "*providers of other designated services including some fintech businesses are not required to register with AUSTRAC, but must be enrolled*," but it is not clear which fintechs should be registered as remitters and which need to enrol for other services.

The ABA would also welcome detailed guidance on which non-money service businesses (MSBs) are caught by the remittance provisions in the AML/CTF Act. The proposed guidance would benefit from detail on how REs should manage the compliance risks associated with fintechs, payment aggregators and other similar business models who may be caught by these provisions. Without this clarity, banks are likely to be cautious of the potential accessorial criminal liability (i.e., the risk that they are held to have aided or abet the commission of an offence under s74 of the AML/CTF Act).

Finally, the guidance also refers to "*AUSTRAC-regulated fintech businesses*," but it is not clear how REs should apply the guidance in relation to fintech businesses that are not regulated by AUSTRAC. Further, it is not clear whether registration with a foreign regulator would be seen as equally a mitigating factor versus AUSTRAC registration.

AUSTRAC registration

The draft guidance indicates that registration with AUSTRAC could be a mitigating factor for remitters and DCEs. The ABA notes the limitations of the assurance that AUSTRAC registration provides, given other AUSTRAC guidance material which suggests that a DCE's registration status does not constitute an endorsement of that business by AUSTRAC or certify its compliance with AML/CTF obligations.[4]

However, a business registered with AUSTRAC does provide some comfort in that the business is obligated to ensure some compliance with the AML/CTF Act, even if it does not avoid the need for banks conducting their normal due diligence processes on that customer irrespective of their registration status.

To support greater reassurance for banks, we would support AUSTRAC providing guidance on how an entity's registration with AUSTRAC should be used as a mitigating factor and what specific elements of the registration process would be relevant to the assessment of residual ML/TF risk. AUSTRAC could also set out its registration requirements so banks can appropriately assess the value of registration and tailor any due diligence accordingly.

Banks would also value AUSTRAC implementing a more robust registration process which could be relied upon for the purposes of understanding a DCE/remitter's compliance and the appropriateness of its risk management approach. This would be consistent with FATF recommendations and provide a significant level of reassurance when banks are assessing customers from these high-risk sectors.

The above suggestions would be further enhanced by making the AUSTRAC DCE register publicly available. Unlike the remittance register, the DCE register has not been made public, and while banks

[3] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Financial_Technology_and_Regulatory_Technology/AusTechFinCentre
[4] See AUSTRAC webinar to DCEs, 7 Aug 2018. Available here: https://www.youtube.com/watch?v=ihAmYLPDNgU (see from 41.20)

can require evidence of registration from a DCE customer and then monitor the register of cancellations, banks cannot independently verify whether a virtual asset service provider or DCE business is registered. Making the DCE register public will assist banks when trying to assess the ML/TF risks of DCEs.

More detailed guidance for different sectors

The draft guidance provides a few limited examples outlining AUSTRAC's view on some broad circumstances. The guide would further benefit from including bespoke risks in the remittance/DCE and the Fintech sectors (and the products and services they offer) and insights into how to address these risks. If AUSTRAC has identified compliance standards vary amongst businesses operating in these different sectors, it would be of benefit for the remittance/DCE and the fintech sectors that the guidance provide clarity on what constitute best practices from a compliance perspective.

We note the guidance provides some indications for remitters and DCEs on the types of information that should be included in their AML/CTF programs such as how a DCE uses blockchain analysis tools. We think this is useful and the guidance would benefit from more detailed case studies, based on real examples, on how the guidance can be operationalised for different types of customers. For example, the case studies can include best practice on where applicant businesses in these sectors are being banked and meeting compliance obligations, or where AUSTRAC considers it appropriate for banks to off-board customers to mitigate their risk.