Australian Government
AUSTRAC

Mergers and acquisitions

This guidance assists reporting entities and businesses undertaking the acquisition of a reporting entity better understand and meet their anti-money laundering and counter-terrorism financing (AML/CTF) obligations and responsibilities prior to, during, and following an acquisition.

Commented [A1]: We request clarity on whether this guidance applies if the acquired entity is a non-reporting entity.

It is important that reporting entities and businesses seeking to acquire a reporting entity identify their obligations prior to the acquisition process to prevent non-compliance issues. If you need an exemption from the tipping off provisions to allow you to share certain information with the other entity during an acquisition process, it is important that you identify this and apply for an exemption as early as possible to avoid delays and non-compliance with your AML/CTF obligations.

What is a merger or acquisition?

The terms "mergers" and "acquisitions" are often used together and interchangeably in different environments globally to refer to combining companies or businesses/assets through various types of transactions. For the purposes of this guidance, the term "acquisition" is used throughout to refer to the purchase of equity by one entity of another entity (to become, for example, the controlling shareholder) or the acquisition of the businesses/assets of that entity.

Commented [A2]: We recommend AUSTRAC considers further refinement of the definition. As a merger generally occurs when entities combine to create a new/joint entity. While an acquisition refers to a take over by one entity of another.

We also recommend using regulatory definitions (whether ASIC/ACCC), of mergers and acquisitions.

Further, we ask AUSTRAC provides clarity that this guidance is intended to address scenarios where the controlling interest in the company shifts rather than simply selling a minority interest.

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Acquisitions of reporting entities

If through an acquisition, a business takes on the provision of certain activities in the financial, bullion and gambling sectors known as 'designated services', it becomes an AUSTRAC-regulated reporting entity. Reporting entities have compliance and reporting obligations under the *Anti-Money Laundering and Counter-Terrorism Financing* (AML/CTF Act 2006) and Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2001 (No. 1) (AML/CTF Rules). For a full list of designated services AUSTRAC regulates, see Section 6, tables 1-4 of the AML/CTF Act.

Commented [A3]: Please confirm if this applies to ***'a business'*** that is not already a reporting entity.

What to consider before an acquisition

If you are undertaking the acquisition of a reporting entity, you must adopt and maintain an AML/CTF program that is compliant, effective and appropriately risk-based before starting to provide that designated service (s81 of AML/CTF Act refers). This includes conducting a ML/TF risk assessment before the acquisition.

Commented [A4]: Can we please seek clarity if this relates to a scenario where an entity becomes a reporting entity after acquisition of a reporting entity?

For the scenario where a reporting entity acquires another reporting entity, the latter may just have to adopt the AML/CTF Program of the former one, or remain as two different reporting entities?

You must also appoint an AML/CTF compliance officer. The compliance officer must be at management level and is responsible for making sure your business complies with its AML/CTF obligations.

Updating and revising the ML/TF risk assessment

A key component of your AML/CTF program is how you manage risk in conjunction with the acquisition. You will need to consider how the acquisition will impact your board and/or senior management-approved risk profile and risk appetite and AML/CTF program.

Commented [A5]: We would appreciate further guidance on this point. Whether it would be an impact analysis and/or a revised risk assessment. We would also welcome further guidance on how this aspect applies to asset and share sales.

You must understand and assess the money laundering and terrorism financing (ML/TF) risk arising from the acquisition in order to ensure your AML/CTF program, policies and procedures remain current and fully operational. It is imperative you conduct a risk assessment before the acquisition so you can assess the customer types, products and services including delivery methods and jurisdiction, and how this impacts your senior management-approved risk profile and risk appetite.

Commented [A6]: We would appreciate further guidance on this point on permissible information can be accessed. Acquiring RE's have to comply with s.45 of the Competition and Consumer Act 2010.

When undertaken effectively, these processes will assist your board and/or senior management to:

- identify the key risks and gaps in the systems and controls of the proposed acquired reporting entity and consider any update or remediation to your AML/CTF risk assessment
- enable an assessment of the risks to determine which of those risks you will accept or reject
- conduct due diligence to determine your liability for any historic AML/CTF non-compliance of the proposed acquired reporting entity
- make informed decisions concerning changes to the risk appetite and the implementation of appropriate systems and controls, including supporting processes and procedures
- enable strategic decisions concerning the ML/TF risk profile, and the operation of the AML/CTF program, and,
- ensure that appropriate financial crime resources and priorities are aligned with the updated risk profile and AML/CTF program.

Commented [A7]: We propose this be amended to ***'understand your potential liability'.*** Recognising even with thorough due diligence there can be difficulty to fully determine liability.

Updating and revising the AML/CTF program

You must, adopt and maintain an AML/CTF program that is compliant, effective and appropriately risk-based before you provide any designated service (Section 81 of AML/CTF Act refers).

There are two parts to an AML/CTF program. Part A must include appropriate systems, controls, and processes and procedures to help you identify, mitigate and manage the ML/TF risks that you may reasonably face and as reflected in your updated ML/TF risk assessment. Part B of your program is focused on identifying customers and beneficial owners including politically exposed persons (PEPs).

In the acquisition process, you may decide to create one AML/CTF program incorporating and aligning the risk profile and ML/TF risk assessment or choose to continue to maintain separate programs, supporting documentation and recording keeping. Regardless of whether there is one or two AML/CTF programs, you are required to ensure at all times that your AML/CTF program:

- is based on a current risk assessment of all of your designated services
- includes systems and controls that address and are proportionate to the risks your designated services pose to meet your AML/CTF obligations
- be subject to regular review, including independent review, and,
- be supported by appropriate governance, oversight and accountability, in particular, as it relates to determining your ML/TF risk profile and appetite.

Commented [A8]: We recommend clarity on whether a designated business group is formed in this acquisition. And whether or not the acquiring entity is a reporting entity.

Outsourcing

When updating and revising your AML/CTF risk assessment and program, you will need to consider if the reporting entity you plan to acquire outsources any of their AML/CTF obligations and responsibilities to a third party. You should consider:

- your due diligence and how the outsourced AML/CTF obligations to the third party align with your risk profile and ability to meet your AML/CTF reporting and compliance obligations
- how you will effectively establish procedures for monitoring the third party's AML/CTF compliance under the previous agreement on an ongoing basis
- how or if you plan to integrate the third party provided service into your existing internal mechanisms
- obtaining board and or/senior management approval to engage the services of an external service provider (and document the outcomes), and
- whether you will need to share, or the third party will have access to, information about an SMR or a notice under s49(1) – see 'Tipping off considerations for an acquisition' below.

Commented [A9]: We would welcome further guidance in dealing with circumstances where information on the acquired entity's outsourcing arrangements may not be clearer until day 1 of acquisition or, later.

Customer identification for transferring customers

Reporting entities must undertake applicable customer identification procedures (ACIP) to identify the customers and verify that their information is correct prior to providing them a designated service.

During the acquisition processes, you have an obligation to first understand the risk profile of the customers that will transfer to you to determine if they fall within your ML/TF risk appetite.

Prior to the transfer of all or parts of a reporting entity's assets and liabilities, you must have reasonably determined the ML/TF risk of providing a designated service to all the transferring customers. You must also ensure you have appropriate risk-based systems and controls to identify, mitigate and manage the risks of the transferring customers (Chapter 28 of the AML/CTF Rules refers).

You must also consider whether you rely on the other reporting entity's customer identification assessments or take prompt action if you need to implement ACIP in line with revisions to your risk management program. Where certain identified risks fall outside of your agreed risk appetite, you should document the additional steps you will take to ensure you identify, mitigate and manage the risks. Consider in particular, if they engaged with customers from higher risk regions or groups (e.g. foreign and/or domestic PEPs).

If a suspicious matter report (SMR) obligation arises in relation to a transferring customer and you have reported the SMR to AUSTRAC; you reasonably believe the other reporting entity did not carry out the required customer identification processes; or, you judge the transferring customers pose a significant increase in the level of ML/TF risk, you are expected to undertake one or more of the follow actions within 14-days:

- undertake ACIP
- collect KYC information about the transferring customer, or
- verify, from a reliable and independent source, KYC information about the customer.

These actions are required both in the voluntary and compulsory transfer of business so you can be reasonably satisfied the customer is the person they claim to be (Chapter 66 of AML/CTF Rules refers).

When customers are transferred, reporting entities have other core AML/CTF obligations, including undertaking ongoing customer due diligence (OCDD) and if you identify a high-risk customer, enhanced customer due diligence (ECDD).

Commented [A11]: We would welcome further guidance where customer risk assessment profiling may extend beyond the acquisition process/period.

We would also welcome further guidance on the transfer of ACIP records for a share sale?

Also, if it's the share sale of a subsidiary, can the target company rely on ACIP performed by another member of the prior DBG, as per s38 of the Act.

Commented [A12]: Please provide further clarity where the acquisition does not necessarily result in transference of customers.

Commented [A13]: We note, Chapter 28.4 of the Rules only gives 14 days to complete this after acquisition. We would welcome further guidance in the event such circumstances extend beyond 14 days.

Commented [A14]: We recommend additional information on the need for a single view of a customer in relation to ML/TF risk, for example, adding commentary or a statement around managing common customers, particularly where there are common or duplicate records between the two entities.'

Entities will need to assess the challenges of combining data/databases and/or the challenges of operating databases concurrently, perhaps over an extended period and the impacts of these scenarios on meeting AML/CTF obligations.

Commented [A15]: We would welcome further guidance on whether to use a reliance model approach is required for every transaction.

Commented [A16]: Please clarify what the expectations are regarding pre-commencement customers? Should the acquiring RE be conducting ACIP on these customers?

Your OCDD should identify, mitigate and manage ML/TF risk, as well as maintain up-to-date know your customer (KYC) information, which may include efforts to verify any reporting that may indicate the reporting entity would evaluate the customer as high risk (s36 of the AML/CTF Act and Chapters 4 and 15 of the AML/CTF Rules refers).

When a reporting entity identifies a high-risk customer, the reporting entity needs to apply ECDD, which involves carrying out extra checks on a customer's identification, collecting additional information and doing additional verification. You must also implement a transaction monitoring program to identify, mitigate and manage ML/TF risk, identify and report suspicious matters to AUSTRAC and meet your ongoing customer due diligence and ECCD obligations (chapter 15.9 of AML/CTF Rules refer).

Conducting employee due diligence for transferring employees

Commented [A17]: Please clarify if the risk awareness training expectation is something that needs to be addressed where a RE brings across employees.

As part of your AML/CTF program, you must have an employee due diligence (EDD) program that documents the procedures you use to screen and rescreen employees in roles that pose a ML/TF risk to your business (Part 8.3 and 9.3 of the AML/CTF Rules refers). The EDD program must be based on the ML/TF risk assessment of your business and the employees' roles. It must explain the systems and controls to manage risk, including how you will screen employees and which roles you will screen. This is to identify and minimise exposure to ML/TF risks and protect your business.

As part of the acquisition processes, you must consider the level of risk of transferring employees, particularly if the risk threshold of the acquired reporting entity differs from your own. You must screen or re-screen any employee whose role means they may facilitate the commission of a ML/TF-related offence. This includes prospective employees before they are employed to such a position, and existing employees before they are transferred or promoted to such a position.

Commented [A18]: We welcome further guidance whether this should apply to a share sale transaction, where the employee's role does not change.

Annual compliance report

You must submit a compliance report to AUSTRAC between 1 January and 31 March of each year including information about how you met your AML/CTF obligations during the reporting period (section 47 of the AML/CTF Act and Chapter 11 of the AML/CTF Rules refers).

If you sold or closed your reporting entity in the year prior, you are only required to complete the first question of the compliance report in order to advise AUSTRAC of your updated circumstances.

Designated business group (DBG) compliance reporting obligations

A DGB arrangement does not constitute an acquisition. A DBG may share the administration of some or all of their AML/CTF obligations (such as an AML/CTF program or record-keeping). However, each reporting entity group member is still responsible for meeting its own AML/CTF obligations. Only one member of a DBG should lodge the annual compliance report on behalf of all members in the group. This group compliance report is a consolidated lodgement of all DGB members' reports. Any group member can choose to submit their own compliance report if substantially different from other DBG members.

Record keeping and sharing information

In addition to maintaining good documentation and record keeping of your AML/CTF program, you have additional record keeping and information sharing considerations throughout the stages of an acquisition. You will need to consider if, or how, you plan to share information and maintain accurate record keeping while also complying with the *Privacy Act* and the AML/CTF legislative framework.

You have various obligations to make records of transactions and in connection with your customer identification procedures (under Divisions 2 and 3 of the AML/CTF Act). You may need to consider if and how you will share these records as part of the acquisition process.

You may also consider how you will share any record keeping responsibilities in accordance with your compliance and AML/CTF program obligations if the acquisition is scheduled over a period of months or years and the reporting entity you propose to acquire continues to provide a designated service.

Tipping off considerations for an acquisition

Under the tipping off provisions (section 123 of the AML/CTF Act refers), you must not disclose any information to another person about:

- an SMR you have submitted to AUSTRAC, except in limited circumstances, or
- a notice issued to you under section 49 of the AML/CTF Act that requires you to provide more information to AUSTRAC or a specified agency related to a threshold transaction report (TTR) (s43), a report about an international funds transfer instruction (IFTI) (s45), or an SMR (s41).

This includes any information from which it could be reasonably inferred that you have submitted (or are required to submit) an SMR.

The purpose of the tipping off offence is to: protect the privacy of the subject(s) of SMRs; ensure that the identity of the person submitting an SMR remains confidential; and, ensure that the subject(s) of reporting do not take steps to hide their activities or behaviours from government investigations.

The reporting entity you plan to acquire has likely submitted SMRs, TTRs or IFTIs to AUSTRAC and may receive a section 49 notice from AUSTRAC or specified agencies requiring additional information to assist their investigations.

You will need to carefully consider what information you can and cannot share with the other reporting entity throughout an acquisition process, particularly while you continue to provide separate and distinct designated services.

In most acquisitions while you maintain separate AML/CTF programs, you will likely need to seek an exemption from 'tipping off' for section 49 and SMR-related information. You may require the exemption to assist your due diligence when evaluating the suitability of the other reporting entity you propose to acquire; and, it is critical that you apply for an exemption as early as possible.

However, there are some exceptions under s123(4)-(9) to the tipping off provisions, which include but are not limited to:

- providing legal or financial advice to a client
- engagement with law enforcement and regulatory agencies
- disclosure to court or tribunal for purpose of AML/CTF Act, and
- sharing information within a DBG, corporate group, or remittance network.

DBG members who have reported, or are required to report, can share SMR information with other members of your DBG or corporate group when you meet certain requirements.

Commented [A19]: Competition laws may limit the information that can be shared before the completion date.

Relevant competition law provisions include:

- ss. 45AA to 45AU of *Competition and Consumer Act 2010* (Cth) (**CCA**) - anti-competitive arrangements
- s 45 of CCA – arrangements, understandings or concerted practices that have the purpose, or would have the effect or likely effect, of substantially lessening competition

We would welcome further guidance on how REs can best deal with these matters.

Commented [A20]: We recommend revising to ***'you may need'***. As a well planned acquisition that has considered s. 123 of the Act, and pre-planned to quarantine potential SMR, IFTI, TTR & s. 49 data, will reduce this risk from 'likely' .

Tipping off considerations prior to acquisition agreement

In the process of coming to an acquisition agreement, it is common for you or the other party to conduct due diligence checks of the other party's AML/CTF program, as well update the ML/TF risk assessment. As part of this process, you may decide to engage an independent expert to conduct this review which requires additional 'tipping off' considerations.

This review may require access to, or the sharing of, details of SMRs, section 49 notices, or information that may infer to the reviewing party that the reporting entity has submitted an SMR or received or responded to a section 49 notice. Without first seeking an exemption from AUSTRAC, this activity could be in breach of section 123 of the AML/CTF Act.

Outsourcing and tipping off considerations

If the reporting entity you plan to acquire outsources their AML/CTF obligations to a third party, you will need to consider how this impacts your acquisition and requirements to seek tipping off exemptions.

In addition to the AML/CTF risk assessment and program considerations noted above, you will need to consider:

- the nature of the outsourcing arrangements including what AML/CTF obligations are outsourced
- the nature of the relationship between the proposed acquired reporting entity and the service provider
- the information disclosed to the service provider
- if/how the outsourcing arrangements will be used during the acquisition (for example, the provision of transitional services)
- whether the service provider is based offshore, and
- whether the service provider will require access to databases and systems.

Outsourcing arrangements can be complex and it is important to consider whether you will need an exemption for the transfer of, or access to, SMR and section 49 information.

Tipping off considerations after entering into an acquisition agreement

After completion, you may wish for the other reporting entity to maintain some functionality or business process that is distinct or separate to your reporting entity for a period in order to transfer operations or business processes in a staged process over months or years.

If you remain two distinct reporting entities, you will need to seek an exemption if you wish to share information that would include details of SMRs, information about a section 49 notice or information that the other business could identify or infer you

Commented [A21]: Please refer to the above comment on potential issues brought on by Competition laws in sharing of information.

Commented [A22]: Could the independent review be covered under the section 123 (5B) of the Act?

We recommend this reference should articulate that during an acquisition a reporting entity may engage an external consultant to independently review the design and operating effectiveness of its AML/CTF Program. As part of the assessment the consultant may review SMRs/customer risk ratings etc. However, so long as the reason for the review and access is for the conduct of the independent review and the secrecy of the underlying customer data is not shared with the acquiring entity, then s123(5B) would apply.

Commented [A23]: This section may be inaccurate if done prior to completion, and would apply to post completion. Both entities can't act as one business, they have to be separate until acquisition is complete. We request further clarity to this section.

Commented [A24]: We request further clarity that this only applies where the two reporting entities are not part of the same reporting group (s 123(7)) of the Act.

have submitted a SMR or information related to section 49 material. Before you accept any data or information from the other reporting entity, you should encourage that reporting entity to also seek an exemption if required.

Tipping off considerations for completed acquisition

The 'tipping off' considerations predominantly apply to acquisitions prior to and post completion, particularly where the acquisition may occur over a period of time and entities continue to operate as separate and distinct reporting entities with separate AML/CTF programs. Exemptions are not required from the point when the entities form one reporting entity with a single AML/CTF program.

Commented [A25]: Could this be covered under the exception under section 123 (7) of the Act?

Applying for exemptions and modifications

If the limited exceptions to the tipping off provisions do not apply to your circumstances or the proposed arrangements will breach the tipping off offence, you will need to seek an exemption from the tipping off provisions to disclose and use information as part of the acquisition processes.

You should begin this process as early as possible and must allow AUSTRAC appropriate time to review and assess the application. AUSTRAC may request further information to consider your application and if you are delayed in responding this request, it can impact the processing time.

Commented [A26]: Further specificity in terms of timeframes is appreciated.

The most applicable provision for an exemption from the tipping off provisions is an exemption made under section 248 of the AML/CTF Act. You can apply for an exemption specific to your circumstances addressing the conditions and timeframe of the acquisition. Under section 248 of the AML/CTF Act you can also apply for a modification of provisions.

AUSTRAC has a range of guidance on how to apply for exemptions:

- Exemption policy
- Exemptions from AML/CTF obligations
- Applying for exemptions and modifications
- Application for exemptions and modifications under the AML/CTF Act: guidance note 15/01

Key considerations when applying for an exemption
• If you identify that a tipping off exemption is required, you should begin the process as early as possible. • You must address the key criteria of the exemption request and closely follow the guidance.

- You must allow AUSTRAC appropriate time to review and assess the application. AUSTRAC may seek clarification or further information to consider an application for an exemption and if you are delayed in responding, this can affect processing times.

Independent reviews

Reporting entities must have Part A of your AML/CTF program independently and regularly reviewed. How you do this, and how often you do this, depends on the size, nature and complexity of your business or organisation, including the level of ML/TF risk you might face (Part 8.6 and 9.6 of the AML/CTF Rules refers).

If your business or organisation has changed significantly, such as structural change through an acquisition, you may need to schedule an independent review and repeat the process more frequently.

An independent review could examine and test some or all of the below that are increasingly relevant following an acquisition:

- any changes to your money laundering/terrorism financing risk profile
- any changes to your AML/CTF practices and policies
- how well your employees understand and comply with your program
- whether your AML/CTF employee training program is adequate and effective
- whether your compliance officer has enough seniority and authority
- whether functions you outsourced are complying with Part A of your program, and
- how well your branches and subsidiaries (including those overseas) have implemented Part A of your program.

Example of a tipping off scenario

At the beginning of last year, Reporting Entity 1 (RE1) started the acquisition of Reporting Entity 2 (RE2), which involves the transfer of RE2's banking assets and liabilities associated with RE2's consumer banking business. As part of the acquisition process, RE1 wants RE2 to continue to deliver AML/CTF compliance services for 12 months until the acquisition is completed when they will adopt a single AML/CTF Program. RE2 will then transfer their existing customer base and the majority of their employees to RE1 as part of this acquisition.

In this scenario, there are multiple risks of tipping off that RE1 and RE2 need to consider now they have agreed to the staged acquisition progress. These include:

- RE2 providing information to RE1 about managing the risks of the customer base and RE1 inferring the existence of SMRs

Commented [A27]: We request further clarity that the outcomes of an independent review report (provided there are no underlying references or identifiers with customer data and/or potential SMR/other reports included in it) would not constitute 'tipping off' and an IR report may be shared with an acquiring entity.

Commented [A28]: We would welcome further clarity or specific examples on this point.

Commented [A29]: We welcome further clarify on ***"started the acquisition"*** to the extent, is this after signing but before completion of the sale? Member feedback provided is that, it is more typical for transitional services of the sort described here to be performed by the seller in the period between completion of the sale to separation of the business.

Commented [A30]: Our understanding is that the business needs to be separate and operate independently until completion. The acquiring entity could not even start this type of work until completion. We would appreciate clarity on this point.

- RE2 continuing to provide RE1 with AML/CTF compliance services up until the acquisition completion date so RE1 and RE2 will share information about data and metrics, from which SMRs may be inferred
- potential disclosure of documents relating to a notice under section 49(1) of AML/CTF Act
- RE2 employees potentially becoming RE1 employees in a staged process and could divulge RE2 SMR or section 49 information, and
- potential SMR or section 49 information disclosure, or disclosure of information from which an SMR of section 49 could be inferred, between RE1 and RE2 throughout the course of the acquisition process.

In considering the above, RE1 and RE2 both wish to share historical SMRs with each other as they may affect the acquisition. RE1, as the provider of the designated service, also requires access to the SMRs to manage the ML/TF risks. If this sharing of information occurs prior to the acquisition completion date, it may constitute 'tipping off' under the AML/CTF Act and therefore RE1 and RE2 will need to seek an exemption.

RE1 and RE2 identify these risks very early on in the acquisition and start the exemption process. Both RE1 and RE2 elect to apply for an exemption under section 248 of the AML/CTF Act to enable them to share the required information and not be in breach of the AML/CTF Act and Rules.

Commented [A31]: We welcome further examples of ***'share the required information'.***

Related legislation

AML/CTF Act

- section 32: Carrying out applicable customer identification procedure before commencement of provision of designated service
- section 36: Ongoing customer due diligence
- section 41: Reports of suspicious matters
- section 47: AML/CTF compliance reports
- section 49: Further information to be given to the AUSTRAC CEO etc.
- section 81: Reporting entity must have an anti-money laundering and counter-terrorism financing program
- section 82: Compliance with Part A of an anti-money laundering and
- counter-terrorism financing program
- Division 2 (sections 106 to 110): Records of transactions
- Division 3 (sections 111 to 114): Records in connection with the carrying out of identification procedures
- section 123: Offence of tipping off
- section 229: AML/CTF Rules

AML/CTF Rules

- Chapter 8 and 9. Part 8.3 and 9.3: Employee due diligence program
- Chapter 8 and 9. Part 8.6 and 9.6: Independent review
- Chapter 20. Record-keeping obligations under section 114
- Chapter 28: Applicable customer identification procedures in certain circumstances – assignment, conveyance, sale or transfer of businesses
- Chapter 66: Applicable customer identification procedures in certain circumstances – compulsory partial or total transfer of business made under the Financial Sector (Business Transfer and Group Restructure) Act 1999