



## No-action letters

*Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

### 1 Introduction

- 1.1 The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) is designed to assist in combating money laundering and the financing of terrorism. To achieve these aims, the AML/CTF Act places certain obligations on 'reporting entities' (defined in section 5 of the Act).
- 1.2 It is not the role of AUSTRAC to provide reporting entities with legal advice on the interpretation and application of the laws it administers. In certain cases, AUSTRAC may express a view that a particular act or omission of a reporting entity gives rise to certain regulatory consequences.
- 1.3 This guidance note is intended to provide information and assistance to reporting entities regarding how AUSTRAC may administer the AML/CTF Act in situations where:
  - (a) a reporting entity has breached, or anticipates a future breach of the AML/CTF Act
  - (b) the reporting entity concerned requests that AUSTRAC does not take enforcement or other regulatory action as a result of that breach, or anticipated future breach.
- 1.4 This guidance note should be read in conjunction with the AUSTRAC guidance note *Application of the Policy (Civil Penalty Orders) Principles 2006*.

### 2 No-action letter

- 2.1 AUSTRAC will assess on a case-by-case basis what action (if any) it should take regarding individual breaches of the AML/CTF Act. After considering whether to take any action in relation to a breach of the AML/CTF Act, AUSTRAC may consider, having regard to all the circumstances, the provision to a reporting entity of a no-action letter relevant to the identified breach or anticipated breach. Generally, AUSTRAC is prepared to consider issuing a no-action letter where there is doubt as to whether a particular act or conduct would be lawful and AUSTRAC is of the view that enforcement action in relation to that act or conduct would not advance the policy of the AML/CTF Act. There may be other circumstances where AUSTRAC would be prepared to consider issuing a no-action letter.
- 2.2 By issuing a no-action letter, AUSTRAC is stating to a specific reporting entity that it will not take regulatory or enforcement action over a particular act or omission by that reporting entity. A no-action letter is a statement of AUSTRAC's regulatory approach with respect to the particular circumstances which have resulted, or are likely to result, in a breach of the AML/CTF Act. It is not an expression of legal views on the particular matter that resulted in AUSTRAC issuing the no-action letter.

### **3 AUSTRAC's approach to assessing requests for no-action**

3.1 All requests for no-action letters must be in writing and should contain information pertaining to the quantification and qualification of the issue in question and a proposed solution. In providing such information, reporting entities should provide details including but not limited to:

- (a) details of the provision(s) of the AML/CTF Act in relation to which the no-action letter is sought
- (b) a description of the relevant designated service(s)
- (c) if applicable, a description of the circumstances in which the relevant designated service(s) is, or is to be, provided
- (d) a detailed explanation as to why the no-action letter is sought
- (e) any assessment that has been prepared of the level of money laundering and/or terrorism financing risk faced in relation to the provision of the designated service(s) for which the no-action letter is sought
- (f) if relevant, whether any third party rights may be adversely or favourably affected should a no-action letter be issued and if so, how those rights are affected
- (g) a full disclosure of all relevant information including any other factor(s) that may be pertinent in the circumstances
- (h) a consideration of relevant matters of policy and law which would assist AUSTRAC in making a decision
- (i) the reporting entity's contact details, including a mailing address to enable AUSTRAC to confirm receipt of and respond to the application
- (j) details of any steps taken to alleviate the consequences resulting from the conduct to which the no-action letter is sought
- (k) details of the cost of any corrective action.

3.2 In assessing whether a no-action letter should be issued, AUSTRAC may also consider the following general matters, within the context of AUSTRAC's supervisory framework and education, enforcement, monitoring and reporting policies:

- (a) on a case-by-case basis, the circumstances of a particular reporting entity, including the size, nature and complexity of its business (among other factors) and relevant provisions with which the entity is required to comply
- (b) whether the reporting entity can show that it takes responsibility for ensuring it understands and complies with its obligations under the AML/CTF legislation seriously and adequately
- (c) whether the reporting entity can show a commitment to fostering a culture of voluntary compliance with the AML/CTF Act; if it is considered necessary and appropriate, AUSTRAC will provide guidance and education services to aid reporting entities to gain the appropriate knowledge and understanding of their obligations under the AML/CTF Act.

- 3.3 AUSTRAC will consider all relevant matters when determining whether to issue a no-action letter, including (but not limited to):
- (a) the merits of the request having regard to the matters referred to in paragraphs 3.1 and 3.2 above
  - (b) whether the request contains adequate relevant information supporting any of the matters referred to in paragraphs 3.1 and 3.2 above
  - (c) whether a no-action letter is more practical and proportionate than regulatory or enforcement action, in all the circumstances, considering the nature and impact of the breach and the policy intent and spirit of the AML/CTF Act
  - (d) circumstances particular to the reporting entity
  - (e) impact on the marketplace and competitive neutrality
  - (f) regulatory burden
  - (g) risk profile of the applicant and services provided
  - (h) any other relevant factor(s) that may be pertinent in the circumstances.

\*\*\*\*\*

## **NEW TEXT FOR CONSULTATION IS ITALICISED**

### **4 *No-action letter or exemption***

- 4.1 *In some circumstances, a no-action letter may be considered as an alternative to, or instead of, an exemption request under sections 247 or 248 of the AML/CTF Act. Below at paragraphs 4.2 to 4.4 are practical examples of this distinction.*
- 4.2 *A reporting entity experienced an impractical outcome resulting from an interaction between the FTR Act and the AML/CTF Act. Where a reporting entity blocked an account, to unblock the account it was required to apply the customer identification process that was valid at the time the account was blocked. Technically, the reporting entity was required to perform the 100 point check on customers whose accounts were blocked before 12 December 2007, or the applicable customer identification procedure under their AML/CTF program on customers whose accounts were blocked after 12 December 2007. The reporting entity expressed a desire to apply the AML/CTF process on all customers, irrespective of when the account was blocked, as to maintain two parallel processes presented an operational burden for no regulatory benefit. A no-action letter was more suitable than an exemption in this instance as the reporting entity was still required to identify the customer, but AUSTRAC was applying its discretion as a regulator, consistent with the Enforcement Policy.*
- 4.3 *During an audit in July 2008, a reporting entity became aware of deficiencies in the customer identification process it had applied to customers of about 200 transactions (from a total of several thousand transactions). The entity advised AUSTRAC of this breach, provided a copy of its assessment of the money laundering or terrorism financing (ML/TF) risk posed by the breach, set out the steps it had taken to manage that risk and advised how it had modified its internal processes to prevent such breaches from occurring again. The entity advised it was unable to reach the affected individuals to perform additional steps that would resolve the non-compliance (as customers had performed a one-off transaction and did not have an ongoing relationship with the reporting entity). A no-action letter was more suitable than an exemption as the legal obligation should still apply, but the breach was historic and was not anticipated to be an ongoing offence.*
- 4.4 *A reporting entity was winding down its business in December 2007 when the AML/CTF program obligations came into effect. The entity planned to provide a designated service to a pre-commencement customer on three occasions between 12 December 2007 and April*

2008, as required by a pre-existing contract. The reporting entity did not intend to develop an AML/CTF program and requested a no-action letter. In this instance, an exemption was more appropriate because the breaches were not merely technical as the reporting entity was required to implement a program but did not think this was necessary in the circumstances. In this instance, the level of administrative burden relative to the ML/TF risk was considered by AUSTRAC when assessing the application for exemption.

\*\*\*\*\*

## **5 Other relevant matters**

### *Withdrawal or revision*

- 5.1 AUSTRAC may at any time withdraw or revise a no-action letter. In doing so, AUSTRAC will take account of and make allowances for the consequences for the reporting entity to whom the no-action letter was given (and any others to whom the reporting entity may have disclosed the no-action letter) and who has acted in reasonable reliance on AUSTRAC's stated view. AUSTRAC will not exercise this power arbitrarily and will adopt a reasonable approach.
- 5.2 Before withdrawing or revising a no-action letter, AUSTRAC will seek and take into account the views of the reporting entity to whom the no-action letter was issued, regarding AUSTRAC's proposed action, before making a final decision.

### *AUSTRAC's right to take action*

- 5.3 A no-action letter from AUSTRAC is a statement of its intentions based on the information available to it at the time the no-action letter was issued. AUSTRAC reserves the right to take any action it considers appropriate, particularly if there has been incomplete disclosure from the reporting entity requesting the no-action letter at the time the request was submitted.

### *Relevance to particular circumstances*

- 5.4 No-action letters are issued on a case-by-case basis and are specific to the circumstances of a particular reporting entity and the relevant obligations under the AML/CTF Act with which the reporting entity is required to comply. The letter must not be taken as AUSTRAC's position on the particular matter and should not be relied upon as a precedent.

### *Third-party actions*

- 5.5 An AUSTRAC no-action letter in relation to a certain set of circumstances conveys a decision based on the individual facts of the situation and is not a legal opinion. It does not preclude third parties from taking action in relation to the reporting entity and the circumstances involved.

### *Prejudice and confidentiality*

- 5.6 A request for a no-action letter by a reporting entity cannot be made on a 'without prejudice' basis and material contained in the application may be used by AUSTRAC for any of its statutory functions.
- 5.7 A no-action letter will usually be treated as confidential between the parties, but may be used by AUSTRAC in performing its statutory functions. This includes any information provided by the reporting entity in support of its request for a no-action letter. However, a reporting entity may disclose details of any no-action letter issued, where disclosure is reasonably required for regulatory purposes (such as dealings with other regulators including the Australian Prudential Regulatory Authority and the Australian Securities and Investments Commission), or for its commercial purposes (such as dealing with third-party providers in situations where the reporting entity has outsourced some, or all, of its compliance functions).

- 5.8 Applicants should note that the Australian Taxation Office (ATO), under section 125 of the AML/CTF Act, is entitled to access information held by AUSTRAC for any purpose relating to the facilitation of the administration or enforcement of a taxation law. In addition, the AUSTRAC Chief Executive Officer (CEO) may authorise a specified designated agency to have access to AUSTRAC information for the purposes of performing that agency's functions and the exercise of that agency's powers. Designated agencies are defined in section 5 of the AML/CTF Act.
- 5.9 Accordingly, it should be noted that any information provided in support of an application for a no-action letter may be passed to the ATO and/or relevant designated agency as a result of the provisions of the AML/CTF Act noted above.

#### *Priority*

- 5.10 If a reporting entity considers that its application should be considered as a matter of priority, then this should be stated in the application and supported by reasons for the priority. Applications for priority consideration will be assessed on a case-by-case basis. The reporting entity must demonstrate to AUSTRAC that there will be significant commercial or legal consequences to the reporting entity if the application is not assessed as a matter of priority and that the reporting entity has not unreasonably delayed its application.

### **Further information**

AUSTRAC officers are able to assist reporting entities, their staff and the public in providing general information relating to the AML/CTF Act. Enquiries can be directed to the AUSTRAC Help Desk via:

- email to [help\\_desk@austrac.gov.au](mailto:help_desk@austrac.gov.au)
- telephone 02 9950 0827 or 1300 021 037 (a local call within Australia).

The information contained in this document is intended only to provide a summary and general overview on these matters. It is not intended to be comprehensive. It does not constitute, nor should it be treated as, legal advice or opinions. This document may contain statements of policy which reflect AUSTRAC's administration of the legislation in carrying out its statutory functions. The Commonwealth accepts no liability for any loss suffered as a result of reliance on this publication. AUSTRAC recommends that independent professional advice be sought.

The information contained herein is current as at the date of this document.

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 National Privacy Principles, even if they would otherwise be exempt from the Privacy Act. For further information about these obligations, please go to <http://www.privacy.gov.au> or call 1300 363 992.

May 2009

© Commonwealth of Australia

Australian Transaction Reports and Analysis Centre (AUSTRAC)  
PO Box 5516  
West Chatswood NSW 1515

Telephone: 1300 021 037  
Facsimile: 02 9950 0071  
Website: [www.austrac.gov.au](http://www.austrac.gov.au)  
Email: [help\\_desk@austrac.gov.au](mailto:help_desk@austrac.gov.au)