27 June 2025

AUSTRAC
323 Castlereagh St
Sydney NSW 2000

Dear AUSTRAC,

**Consultation on the Second AML/CTF Rules Exposure Draft**

The Australian Financial Markets Association (AFMA) represents the interests of over 130 participants in Australia's wholesale banking and financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. Our members are the major providers of services to Australian businesses and retail investors who use the financial markets. A significant proportion of AFMA's members are reporting entities for the purposes of the AML/CTF Act.

We are pleased to provide a submission to AUSTRAC's consultation on the Second Exposure Draft of the AML/CTF Rules.

At the outset, AFMA acknowledges the enhancements that have been made to the draft AML/CTF Rules relative to the First Exposure Draft and is committed to continuing to work with AUSTRAC as the AML/CTF Rules are finalised.

**Introductory Comments**

AFMA appreciates the continued engagement with AUSTRAC in relation to the AML/CTF Rules.

In drafting AFMA's submission to the Second Exposure Draft, we have sought to highlight the goal of the AML/CTF Simplification and Modernisation process, being primarily to restore the primacy of the risk-based approach and to reduce prescription in the requirements contained in the Act and the Rules.

AFMA's priority issues below are circumstances where, in AFMA's view, the proposed Rule significantly exacerbates the compliance burden for reporting entities relative to the status quo and/or results in an approach which is materially misaligned with the approach adopted in comparable jurisdictions. AFMA supports a set of Rules that gives effect to the FATF recommendations, respects the primacy of comparable FATF-compliant jurisdictions and facilitates compliance in a risk-based manner.

Notably, our submission does not touch on matters of timing/implementation, nor does the submission address matters on which AUSTRAC guidance will be sought or implications for the AUSTRAC industry contribution. These matters are crucial to the success of the reforms and AFMA looks forward to continuing to collaborate with AUSTRAC and the Department of Home Affairs on these issues as the Rules are finalised.

AFMA notes that the Second Exposure Draft was the first opportunity for consultation on the class exemptions. Noting our comments below in relation to Chapter 21 and Chapter 22, AFMA and its members are keen to continue to engage on the scope and drafting of these exemptions, particularly given the time that has passed since they were last amended and the changes to market structures in the intervening period.

In preparing the submission, AFMA has worked closely with the Australian Banking Association (ABA) and the Customer Owned Banking Association (COBA) and notes the strong alignment in the overall perspective provided by these organisations, acknowledging the particular priorities of each association and their respective members.

**Customer Due Diligence**

***Establishing the Identity of Agents, Beneficial Owners, Trustees, Etc.***

Draft Rule 5-3 provides that, in relation to Section 28 of the Act, a reporting entity must, in relation to establishing the identity of a person other than the customer:

- Collect the same information about the identity of the person that it would be required to collect in undertaking initial due diligence if the person was a customer;
- Verify the information in the same way as if the person was a customer; and
- Apply the same AML/CTF policies in relation to identifying the person that it would apply in undertaking initial customer due diligence if the person was a customer.

We note that Rule 5-3 is silent as to the types of persons to whom the draft Rule applies, while the Explanatory Statement states that the draft Rule applies to "a person acting on behalf of the customer (e.g. an agent or a person appointed under a power of attorney) or a beneficial owner of a customer." It is further noted that the term "agent" is not defined in either the AML/CTF Act or the draft Rules.

The lack of definition of "agent" means that draft Rule 5-3 applies equally in a broad spectrum of circumstances, without any differentiation of risk. AUSTRAC is aware of examples raised by AFMA members such as the holder of a corporate credit card in a diversified financial institution or a markets dealer being authorised to commit an institution to a particular transaction as examples of where an individual is authorised to bind the entity for whom the individual works. These examples give rise to very limited ML/TF risk, either due to the monetary quantum of the authority or the infrastructure associated with institutional payments that limited the ability for institutional flows to be applied for inappropriate purposes.

AFMA members advise that, to the extent that holders of corporate credit cards are considered to be "agents" and the requirements of proposed Rule 5-3 are applied, then this would necessitate collections/verification of identity information for hundreds of thousands of card holders. In addition, the proposed Rule will also create issues for custodians, who in the performance of services to customers, will request that customers appoint personnel from within the customer organisation to provide instructions for the custodian to act upon. Under the proposed Rule, it would appear that

the reporting entity would be required to collect and verify identity information for that person as if it was the customer, which is contrary to existing practice.

In that light, it is AFMA's view that draft Rule 5-3 be drafted in a way that is reflective of the risk-based approach and allows the collection and verification of information that is referable to the risk of the person.

In the context of a trader in a markets transaction, the application of such a risk-based approach would be consistent with the approach in other jurisdictions. For example, the equivalent of "agent" for Hong Kong AML/CTF purposes is a "person purporting to act" on behalf of the customer and the SFC's AML guidelines state "dealers and traders in an investment bank or asset manager who are authorised to act on behalf of the investment bank or asset manager would not ordinarily be considered PPTAs[1]." Similarly, New Zealand has a Class Order exemption in place removing the due diligence requirements for persons that purport to act via electronic means where the identity information of the senior manager has been obtained/verified and the reporting entity and the customer have a written agreement specifying the employee's authority.[2] The Class Order states that the basis for the exemption is that the risk of money laundering and the financing of terrorism is low.

The JMLSG guidance in the UK is also aligned to the AFMA position with respect to persons authorised to execute transactions on behalf of financial institutions within wholesale markets. The guidance states (at 18.31):

> "when undertaking CDD on regulated financial institutions within the wholesale markets, the identities of internal personnel who are authorised to sign contractual documents may be collected by a firm for AML/CTF purposes on a risk-based approach. Any further verification measures for those individuals should be undertaken based on an assessment of the risks posed by the correspondent financial institution, contextualised by the nature of the relationship. There is generally no requirement to identify and verify internally authorised market-facing traders or day-to-day operations staff of regulated financial institutions from an AML/CTF perspective.

Therefore, the inclusion of a risk-based approach to the proposed Rule 5-3 would ensure that Australia is not out of step with comparable jurisdictions that transact in global financial markets.

Our other concern with draft Rule 5-3(2) is the proposed requirement that the reporting entity must apply the same AML/CTF policies in relation to identifying the person that it would apply in undertaking initial customer due diligence if the person were a customer." Reporting entities, particularly those that operate in multiple jurisdictions, may apply AML/CTF policies that go beyond the requirements in Section 28, such as the collection of source of funds/source of wealth information for customers that are not high risk. Similarly, refresh periods for KYC information for agents/beneficial owners/trustees should not be aligned to customers. The requirement in draft Rule 5-3(2) is to apply these policies to persons that are not the customer, which further exacerbates the compliance burden. The current drafting of this Rule creates a perverse incentive whereby

[1] Guideline on Anti-Money Laundering and Counter Financing of Terrorism (For Licensed Corporations and SFC-licensed Virtual Asset Service Providers), June 2023, p43.

2 Anti-Money Laundering and Countering Financing of Terrorism (Class Exemptions) Notice 2018, Part 19

reporting entities adopt the minimum standard of AML/CTF policies regarding the identification of customers to mitigate the burden in terms of identification of other persons.

To give effect to our recommended approach, AFMA's position is that draft Rule 5-3(2) should state:

> "For the purposes of subsection 1 above, a reporting entity must:
> (a) collect KYC information about the person that is appropriate to the ML/TF risk of the person; and
> (b) verify KYC information about the person, using reliable and independent data, as is appropriate to the ML/TF risk of the person."

***Legal or Official Documentation***

Proposed Rule 5-2(4) provides that, for a customer other than an individual, a government body or a listed public company, it is necessary for reporting entities to establish on reasonable grounds the legal or official documentation that sets out how the customer is governed. The note to the proposed Rule states:

> "Examples include the constitution of a body corporate, a partnership agreement or a trust deed."

The proposed Note limits the flexibility afforded to reporting entities to establish the matters required under proposed Rule 5-2(4). Given the intention of the Rule is to, based on paragraph 253 of the Explanatory Statement, provide the existence of the body corporate and assist with establishing beneficial owners, both of which can be done via the interrogation of a register such as the ASIC register, AFMA notes with approval the approach adopted in Hong Kong, whereby the HKMA's AML guidelines set out a list of the classes documentation that could be obtained to demonstrate how the customer is governed, such as:

- certificate of incorporation;
- record in an independent company registry;
- certificate of incumbency;
- certificate of good standing;
- record of registration;
- partnership agreement or deed;
- constitutional document; or
- other relevant documents, data or information provided by a reliable and independent source (e.g. document issued by a government body).

To that end, AFMA recommends the removal of the Note in proposed Rule 5-2(4) to allow reporting entities to determine the appropriate documentation to be obtained based on the customer and in accordance with a risk-based approach. This would allow for customers for which the required information is included in an independent company registry to have the records within that registry being used for the purposes of satisfying the requirements of proposed Rule 5-2(4).

In addition, AFMA's view is that there should be alignment between the exceptions in proposed rule 5-2(4) and 5-15. i.e. the relief is extended to:

- entities subject to oversight by a prudential, insurance or investor protection regulator;
- strata/community title corporations; and
- listed public companies that are subject to public disclosure requirements and their subsidiaries.

***Beneficial Owner Relief/Individuals with Responsibility for Decisions***

AFMA is supportive of proposed Rule 5-15, which allows for deemed compliance with respect to the identification of beneficial owners in respect of low-risk customers that are:

- government bodies;
- entities subject to prudential, insurance or investor protection regulation;
- strata/community title corporations; and
- listed public companies that are subject to public disclosure requirements.

It is noted that, through engagement with AUSTRAC following the publication of the Second Exposure Draft, AFMA has received confirmation that:

- the relief for regulated entities applies in any jurisdiction, subject to the low-risk requirement being satisfied; and
- The listed public company exemption applies also to subsidiaries of listed entities, that is, in establishing the beneficial owners of an unlisted entity, there is no requirement to "look-through" a listed entity further up the ownership chain.

The residual concern that AFMA has is that the relief under proposed Rule 5-15 is obviated by the requirements in proposed Rule 5-2(7). Broadly, this Rule requires that, for non-individual customers, it is necessary that the reporting entity identifies the individual or each member of the group of individuals with primary responsibility for the governance and executive decisions of the customer. Importantly, this obligation is only required where either the reporting entity establishes on reasonable grounds that there are no beneficial owners of the customer or the reporting entity is taken to have complied with the beneficial ownership identification requirement by virtue of proposed Rule 5-15. Accordingly, the relief in proposed Rule 5-15 is of no practical benefit.

AFMA's recommendation is that proposed Rule 5-2(7) be amended through the removal of sub-paragraph 5-2(7)(b)(ii) such that the requirement to identify specified individuals only arises where there are no beneficial owners of the customer. This is consistent with paragraph 256 of the Explanatory Statement, which only refers to the circumstance where a non-individual customer has no beneficial owner. It is also consistent with AFMA's understanding of the requirements of FATF Recommendation 10, which requires only the identification of individuals where no natural person has been identified as the beneficial owner.

Further, FATF Recommendation 10 requires the identification of the "senior managing official" in circumstances where no beneficial owner is identified. The requirement in proposed Rule 5-2(7) of identifying those with responsibility for the governance and executive decisions of the customer is, in our view, broader than senior managing official, which would routinely make executive decisions only. Accordingly, our submission is either the language in proposed Rule 5-2(7) is aligned to the FATF Recommendation or alternatively relates only to executive decisions and not governance decisions.

AFMA also requests that, in relation to the relief provided for entities subject to prudential, insurance or investor protection regulation be extended to charitable regulation, such as charities registered with the Australian Charities and Not-for-Profits Commission, thereby aligning with the current relief.

***Investment Manager***

AFMA's submission to the first Exposure Draft of the AML/CTF Rules included a submission point that a specific Rule be included that, where a reporting entity faces an investment manager (IM) who in turn is providing services for a suite of underlying funds, the reporting entity is able to treat the IM as the customer. This would assist with the significant compliance burden associated with the reporting entity needing to identify a significant number of potential customers, with the allocation of the transaction by the IM to the underlying funds potentially not known at the time of the

provision of the designated service. AFMA's proposed approach would align with the position in other jurisdictions, particularly the UK, thereby enhancing regulatory cohesion.

Noting the AUSTRAC position in the Consultation Paper that accompanied the Second Exposure Draft, AFMA maintains that there are circumstances in institutional markets where from a legal, contractual and risk perspective the counterparty is the investment manager, not the underlying fund. This is particularly in circumstances where the reporting entity does not have visibility as to the underlying fund to which the transaction was ultimately allocated to.

Given the myriad of asset classes, transaction types and legal documentation that underpins institutional markets globally, it is impractical to craft a Rule that covers all circumstances and it is imperative that the approach adopted in Australia is consistent with the approach in other key trading jurisdictions. To that end, AFMA recommends that the Rules require reporting entities to set out in their policies whether the customer is the investment manager or the underlying fund, and the basis for that conclusion, together with the risk-based measures that a reporting entity must undertake to collect and verify information to identify parties that are connected to the transaction.

Where the circumstances are such that the reporting entity's customer is the underlying fund as opposed to the investment manager, it is open to AUSTRAC to make a Rule under Section 28(6)(b), which sets out circumstances in which the reporting entity is taken to have complied with the requirements of Section 28(2) in respect of the underlying fund. These circumstances may be that the IM is itself a reporting entity providing designated services to the funds and has itself complied with the Section 28 requirements in relation to the underlying fund.

***Ongoing Due Diligence – Domestic Politically Exposed Persons***

AFMA notes the significant expansion to the definition of "domestic politically exposed person" (PEP) under proposed Rule 1-5. AFMA has two specific comments in relation to the expanded definition.

Firstly, proposed Rule 1-5(j) significantly expands the individuals who would be considered to be domestic PEPs relative to the current position by including members of local government councils. AFMA's view is that such an expansion goes beyond the FATF requirements and we are of the view that the definition should reflect the FATF language that such members are considered to be PEPs where they have been entrusted with prominent public functions. In addition, the language of proposed Rule 1-5(k) are such that it is difficult to ascertain the types of persons that are within scope, which will make operationalising the definition problematic.

Secondly, based on the expended definition, it is expected that a significant number of current customers would be considered to be domestic PEPs to the extent that they were onboarded post 31 March 2026.

Proposed Rule 5-23(1)(b)(ii) requires that a reporting entity must review and, where appropriate, update and reverify KYC information where a customer, a beneficial owner or a person on whose behalf the customer is receiving designated services becomes a domestic PEP and the ML/TF risk of the customer is high.

AFMA's view is that it should be made clear that this only applies to a change of circumstances in relation to the customer, beneficial owner or person on whose behalf the customer is receiving the designated service, and not due to a pre-existing person being caught within the expanded domestic PEP definition. This approach would permit the grandfathering of the existing classification, pending a change of circumstances in relation to the person.

***Bodies Corporate***

Proposed Rule 5-2(5) provides that, if a customer is a body corporate, the reporting entity is to establish the full name and director identification number of each eligible officer. AFMA's concern is that director identification numbers are not publicly available, which presents operational

challenges. In this regard, AFMA notes the Australian Business Registry Services website, which states "the law doesn't authorise us to disclose director IDs to the public without the director's consent," and that the only authorised disclosures are to certain Commonwealth, state and territory government bodies and to courts/tribunals.

Further, it is noted that the proposed requirement to collect and hold the personal identification information (DIN), particularly where that information serves no purpose in mitigating ML/TF risk, appears to run contrary to the Australian Government's clear stance on the handling of personal identity information and documents by private sector entities, with a strong emphasis on privacy protection and data minimisation.

***Initial Customer Due Diligence – Previous Compliance in a Foreign Country***

AFMA notes that proposed Rule 5-13 has not changed from the first Exposure Draft. In particular, there is a requirement that either the reporting entity holds the KYC information or has in place an arrangement permitting immediate access to the KYC information, together with the reliable and independent data used to verify KYC information. We reiterate our concern from the first Exposure Draft that "immediate access" is a difficult standard and that the provision adopt the "as soon as practicable" language that is used in the reliance provisions.

In addition, we are concerned about the practical application of proposed Rule 5-13(c)(ii) which requires that, in order to passport in a customer that has been onboarded by another member of the reporting group, "the reporting entity or other member established the matter in relation to the provision of the service as required by those laws." This obligation arises where the reporting entity or other member was not required to establish the matter because the risk of the provision of the customer was low. On a literal reading, this seems to appear that reporting entities will need to undertake a line-by-line assessment of the application of the customer due-diligence requirements in the offshore jurisdictions to determine which matters have been established and, if not established, whether the risk of providing the service to the customer is low. This appears contrary to our understanding of the intent of the provisions, as set out in the Explanatory Statement, which is to offer relief from undertaking initial CDD where such CDD was undertaking in a jurisdiction that has given effect to the FATF recommendations on customer due diligence and record keeping. AFMA requests that the language in 5-13(c)(ii) be modified to make it clear that there is no requirement to establish further matters where the other requirements in proposed Rule 5-13 have been met.

AFMA notes that currently there is a broad exemption that means that where a service is provided through an overseas permanent establishment, there are no additional obligations that need to be adhered to from an Australian perspective. Noting the comments regarding proposed Rule 5-13(c)(ii) above, to the extent that there are additional obligations arising on commencement (i.e. 31 March 2026), AFMA submits that services provided through offshore permanent establishments can continue to be provided to pre-commencement customers, with any additional obligations applying to initial customer due diligence only.

**Reporting Groups**

AFMA's submission to the First Exposure Draft specifically requested clarification of the application of the business group/reporting group concepts to inbound groups, particularly where a reporting entity providing designated services in Australia is not a separately-incorporated Australian entity but rather is a branch. Similarly, our submission sought clarity on the concept of a lead entity in an inbound context, particularly where there are multiple entry-points into Australia.

Accordingly, AFMA appreciates the clarity provided by AUSTRAC, both in the Second Exposure Draft (proposed Rule 1-9) and also through subsequent engagement. To summarise AFMA's understanding of the current position:

- In a global group, all entities within common control will be within the reporting group. This includes all related parties offshore as well as in Australia. This permits the sharing of AML/CTF information with all members of the reporting group and allows for customers that have been onboarded by a member of a reporting group in an offshore jurisdiction to be passported into Australia, subject to the requirements of proposed Rule 5-13 being satisfied;
- Where a reporting group includes offshore entities, there is no need for the offshore entities to enrol on the Reporting Entities Roll unless the entities provide designated services in Australia;
- AUSTRAC's regulatory reach only extends to the provision of designated services, i.e. AUSTRAC has no jurisdiction over an offshore entity that has no nexus to Australia;
- Offshore entities that are within the reporting group and do not provide designated services in Australia are able to assist with Australian AML/CTF compliance; and;
- Where designated services are provided in Australia by a branch as opposed to a separate legal entity, that branch will be able to be the lead entity under proposed Rule 1-9, although another entity may be the lead entity if agreed.

AFMA would appreciate further engagement to the extent that there is any point of divergence in relation to these points.

One point that has arisen in subsequent consultation with AFMA members is that the reporting group concept brings all entities within common control into the reporting group without any ability for entities to opt out. AFMA members have noted that there are circumstances, such as due to mergers/acquisitions, where a subset of the group may operate entirely independently and on an operationally segregated basis, with its own enrolment procedures and accountable personnel. Bringing in such entities into the reporting group will require the lead entity, however determined, to have capacity to determine the outcome of the application of AML/CTF policies for reporting entities over which it has no operational oversight.

AFMA acknowledges that the FATF standard is for AML/CTF compliance to be managed at a group level; however, we support the extension of an ineligible group under proposed Rule 1-9(4) to include entities where the lead entity has no operational oversight.

In addition, AFMA notes the specific circumstances of energy market operators and the current exemption for Market Operators, which should be replicated in the proposed Rules. To give effect to the current exemption, AFMA proposes an exemption for reporting groups where the primary business is operating as a Market Operator and that all entities within a group be treated as a Market Operator for the purpose of the exemption.

***Delayed Verification – Financial Markets Transactions***

AFMA appreciates the retention in proposed Rule 5-11 that allows for collection and verification of KYC information after the provision of the designated service where the acquisition or disposal of the security, derivative or foreign exchange contract needs to be performed rapidly due to financial market conditions relevant to the transaction.

In order to avail itself of the proposed exemption, it is necessary that a reporting entity takes reasonable steps to establish that an individual customer is who that customer claims to be, identify the ML/TF risk of the customer based on reasonably available KYC information and collect KYC information that is appropriate to the ML/TF risk of the customer. Additionally, the effect of the proposed Rule is that the reporting entity may need to collect and verify information about any beneficial owner or agent. The effect of these requirements is essentially to require a reporting entity to risk assess the customer without verifying the identity information, which is contrary to how KYC occurs in practice. To the extent that the reporting entity was to verify the information collected from the customer, this would nullify the effect of the exemption. AFMA's view is that the

requirements in proposed Rule 5-11(3) should be removed and that reporting entities should be given the discretion to determine appropriate policies to mitigate and manage the associated risks, as per Section 29(1)(e) of the Act.

Proposed Rule 5-11(4)(b) includes a number of prohibitions in respect of the provision of the designated service by the reporting entity, including:

- Accepting physical currency to fund the designated service;
- Permitting the customer to transfer proceeds of the disposal of the financial product;
- Reselling, transferring or otherwise parting with the financial product that has been acquired on behalf of the customer; and
- Allowing the customer to be recredited with or obtain a refund of the purchase price.

AFMA maintains that such prescriptive restrictions should not be included in the Rules and submits that the risk mitigation measures undertaken by the reporting entity are best determined by the reporting entity on a risk-based basis.

**Nested Service Relationships**

Proposed Rule 5-24 sets out the matters that are specified in relation to the provision of a designated service as part of a nested service relationship. AFMA notes that a nested service relationship is defined in Section 5 of the amended AML/CTF Act as relating to the provision of a designated service by (relevantly) a financial institution to a customer that is a financial institution, remitter or virtual asset service provider where the relationship is not a correspondent banking relationship.

AFMA's current position is that the following institutional scenarios do not result in a nested service relationship for the reasons set out below:

- **Broker/FI relationships:** In the scenario where a financial institution provides its payments infrastructure to a broker to facilitate the provision of services to the broker's customers, this should not be a nested service relationship where the broker is not a financial institution for the purposes of the AML/CTF Act;
- **Custodian relationships:** Where a reporting entity is providing sub-custodial services in Australia on behalf of another custodian offshore, who in turn is providing custodial services to its customers, the sub-custodian is not acting in the capacity of a financial institution.

AFMA's view is that the application of the nested service relationship requirements in proposed Rules 5-24 and 5-25 would be burdensome for these types of relationship, which are outside of what AFMA understands to be the policy intent of the nested service relationship provisions. As such, AFMA would welcome clarification of our position in respect of these relationships, either through the Rules or otherwise.

**Travel Rule**

***Required Information***

AFMA welcomes the changes to the definitions of ordering, intermediary and beneficiary institutions and the removal of the hierarchy in the Second Exposure Draft.

We note proposed Rule 7-3 sets out the obligations of the ordering institution and the information that needs to be passed on to other institutions in the value chain. The concern here is that the information to be provided needs to be verified by the ordering institution. This concern arises where the information that is to be provided at the time of the value differs from the information that was verified at the time that the customer is onboarded, and may not have been subject to additional verification, for example, change of address as payer information. While subsection (c) of the definition of payer information has a number of options, of which address is one, AFMA

understands that address is usually chosen as an identifier in terms of the payer and this may be mandatory from the payment schemes. To this end, AFMA submits that Rule 7-3 be amended to remove the requirement to verify the information where there is no requirement to verify the information otherwise.

AFMA notes that the definition of "payer information" includes at (c)(iv) "the payer's full business or residential address (not being a post box)." In this regard, FATF Recommendation 16 allows for country and town name in the absence of full residential address. To the extent that the Australian institution is either an intermediary or a beneficiary institution, the Rules should allow for receipt of country and town name to be sufficient to discharge the requirements with respect to payer information. In addition, given other jurisdictions allow PO Box information to suffice for travel rule purposes, this should similarly be available to Australian institutions.

***Application to Overseas Permanent Establishments***

AFMA is concerned that the application of proposed Rule 7-7 results in the travel rule requirements in proposed Rules 7-1 to 7-6 applying to transfers of value made through an overseas permanent establishment. Our understanding of the policy intent underpinning the changes to the value transfer provisions, as noted in the Explanatory Memorandum to the Amendment act, is to limit the application of these requirement to only domestic and cross border transfers with an Australian nexus. It is problematic for the Australian travel rule requirements to apply to non-Australian value transfers as it may result in inconsistencies with the local laws of the jurisdiction in which the permanent establishment operates and undermine the relief in proposed Rule 5-8 if there is a requirement to collect and verify information to comply with Australian travel rule requirements. Furthermore, proposed Rules 4-13, 4-14, 4-15 of the Rules regarding polices apply only to reporting entities that provide designated services at or through permanent establishments in Australia which create inconsistencies.

Accordingly, AFMA requests that there be an additional exemption in proposed Rule 7-6 that exempts overseas permanent establishments from the travel rule requirements where the transfer of value occurs entirely outside of Australia.

**TTR/SMR Information**

Proposed Rules 8-3 and 8-7 set out the information that is to be included in suspicious matter reports (Rule 8-3) and threshold transaction reports (Rule 8-7). The information that is to be provided is extensive for both report types.

Both proposed rules 8-3 and 8-7 require that the information that is to be provided is "as applicable and to the extent that the information is known." The concern that arises in this context is that, given the extensive information that is eligible for inclusion in the reports, there is a positive and unreasonable obligation on reporting entities to interrogate systems to ascertain whether the information is "known" within the reporting group. This will be time-consuming and will cause the requirement to provide the information within ten-days to be challenging. Further, given the reporting group encompasses all entities within common control globally, it is unclear as to whether the requirement to ascertain whether the information is known required interrogation of global systems. To this extent, AFMA's view that the words "and readily available" be included after "to the extent that the information is known."

Further, AFMA's view is that the items to be reported under proposed Rules 8-3 and 8-7 are limited to the classes of information required under the applicable FATF standard, as opposed to those which

may be considered to be beneficial from a regulatory perspective. This would result in the removal of fields such as "place of birth," "gender" and "tax residency." To the extent that AUSTRAC believes that certain information is of intelligence value, it has sufficient information gathering powers to request that specific information and may be able to access that information from other sources.

It is noted that proposed Rule 8-4(1)(d) requires that the reporting entity needs to disclose the information of the offence that is relevant to the matter. This requires an assessment beyond a mere suspicion and AFMA submits that law enforcement is better placed to determine the specific offence to which the suspicion relates. As such, AFMA would support the removal of this Rule.

Further, proposed Rule 8-2(1)(f) requires a reporting entity to include information in relation to previous reports in SMRs to the extent that the reporting entity considers that the report is relevant to the matter. Paragraph 460 of the Explanatory Statement states that previous reports includes SMRs, TTRs and IVTS reports. The inclusion of IVTS reports in the scope of "reports" may present operational challenges for reporting entities as the team responsible for SMR lodgement may have no line of sight as to the IVTS processes. Given the time-critical nature of SMRs and the payment-related information that needs to be included on the reports, such as completion status, reference number and transfer date, AFMA's view is that this information is sufficient and requests that IVTS reports not be reports for the purpose of Rule 8-2(f) to enhance efficiency in terms of reporting.

**Senior Manager**

AFMA notes that the Second Exposure Draft contains specific rules in relation to senior manager, including the matters that require senior manager approval. It is noted that AUSTRAC is of the view that delegation of senior manager decision making would not be in accordance with AUSTRAC's interpretation of the Act. It is unclear what the legal basis is for this interpretation. AFMA notes that a delegations framework is commonly used and gives companies flexibility, while still ensuring accountability through proper documentation and oversight and reiterate our support for such an approach in the Rules.

Noting that the term "senior manager" is defined in the AML/CTF Act in a manner consistent with the Corporations Act definition, AFMA's members will generally apply a consistent approach to determining who is a senior manager within their organisations, which is important to ensure that those who may be senior managers for AML/CTF purposes do not inadvertently become officers for Corporations Act purposes. In practice, this means that senior manager approvals for AML/CTF purposes will be done at a significantly senior level within AFMA member organisations, notwithstanding any AUSTRAC guidance that less senior personnel still may have requisite approval authority. Those personnel within reporting entities that are currently "senior managers" for Corporations Act purposes are not typically involved in operational approvals and hence having only senior managers with authority to approve risks delays due to competing strategic priorities, negatively impacting the customer experience.

AFMA recommends that the Rules be amended to replace the term "senior manager" with a more flexible designation that aligns with FATF Recommendation 12. The replacement term should not leverage off the definition applied in other legislative circumstances, such as the Corporations Act, to mitigate the risk of conflict in terms of interpretation. Operationally, conferring authority on less senior personnel that a "senior manager" would have the twin benefits of both ensuring that the decision maker is best placed to determine whether the approval should be provided and also allow access to a broader range of decision makers, thereby enhancing efficiency and removing bottlenecks within an organisation.

The other approach for consideration is to allow for more operational approvals to be undertaken by "senior officers" as opposed to "senior managers," aligning with the current approval authority for correspondent banking relationships. This would permit approvals at a less senior level while avoiding conflict with the interpretation of "senior manager" between the Corporations Act and the AML/CTF Act.

**Exemptions**

***Chapter 21***

Chapter 21 broadly provides an exemption where a person issues or sells a derivative or security to another person and the transaction occurs on a declared financial market, a specified financial market or on a foreign market in an offshore jurisdiction that uses a proprietary system such that it is not reasonably practical to conduct due diligence on the counterparty. In essence, the exemption allows the continued efficient operation of public financial markets where there is anonymity between the counterparties to the transaction.

AFMA supports the retention of the exemption and makes the following comments regarding the way in which the exemption is drafted:

- Paragraph 21.2 of the exemption states that, for the purpose of paragraph (d) of Item 35, the condition applies that the service is not "a disposal of a security or a derivative through an agent." AFMA submits that the language in the paragraph should mirror the Item 35 designated service and refer to "selling" a security or derivative as opposed to a "disposal";
- As a result of the passage of the AML/CTF Amendment Act, the definition of "security" has been amended such that it does not include an interest in a Managed Investment Scheme. This would mean that such an interest is not an Item 35 designated service and the exemption in Chapter 21 would not apply. Given that an interest in a managed investment scheme is specifically referenced in Paragraphs 21.3(2) and (3) then the interaction with the amended definition of "security" needs to be clarified;
- The exemption applies to transactions effected in Australia on either "declared" or "specified" financial markets. The term "declared financial market" aligns with the definition in the Corporations Act, while specified financial markets are ASX and FEX Global. It is unclear as to why these particular markets have been specified; however the fact that they have been specifically listed by name means that the potential for the exemption to become outdated is high as Australian financial markets evolve. AFMA's preference would be for a principles-based definition, such as "financial markets that have been licensed to operate in Australia by the Minister in accordance with Chapter 7 of the Corporations Act" which would allow for the exemption to be future-proofed. This list is available at https://www.asic.gov.au/regulatory-resources/markets/market-structure/licensed-and-exempt-markets/licensed-domestic-financial-markets-operating-in-australia/

In addition, given that the purpose of the exemption is to acknowledge circumstances where there is anonymity between the counterparties to a transaction, rendering the performance of KYC as impractical, AFMA's view is that the exemption should be extended to off-market derivatives that are cleared through a central clearing party (such as an exchange or clearing house). Currently, this issue does not arise in respect of derivatives that are issued through a permanent establishment in a foreign jurisdiction, exempting them from customer due diligence requirements. However, the amended AML/CTF Act will remove this exemption, requiring due diligence even when the

counterparty's identity is unknown and the trade is subsequently cleared through an exchange/clearing house. This should be reflected in the Chapter 21 exemption.

In re-writing Chapter 21, AFMA submits that the intended scope of Paragraph 21.2 be clarified. At a high level, the exemption should apply equally regardless of whether the security or derivative is issued/sold directly (Item 35) or via an agent (Item 33). However, the current drafting of the exemption is problematic insofar as the customer for an Item 35 designated service is the counterparty to whom the security or derivative is issued/sold while the customer for an Item 33 designated service is the person who appointed the agent. AFMA submits that the policy basis for the exemption applies equally where transacted through an agent and should apply equally to acquisitions as well as disposals.

***Chapter 22***

Chapter 22 provides an exemption for transactions in respect of over-the-counter derivatives (Item 35) where the underlying is a specified commodity or product. Further, in order for the exemption to apply, it is necessary that both the provider and the recipient of the designated service is registered under the National Electricity Rules, the Wholesale Electricity Market Rules or the National Gas Rules. In addition, it is necessary that the provider of the designated service holds an AFSL, acts through an agent that hold an AFSL or is exempt from holding an AFSL under the Electricity Industry Act (WA).

AFMA has a long history of engaging with AUSTRAC regarding both the formulation of the initial Chapter 22 exemption and amendments to the exemption as markets and transaction structures have evolved. However, the current version of the exemption reflects the most recent amendments from 2017. In the interim, environmental product markets have significantly evolved, with new underlying products being traded and the class of counterparty shifting to offshore participants who are active in Australia's energy and environmental product markets.

AFMA notes that the ML/TF risk associated with transactions in these products is low and that the policy rationale for the exemption remains sound. On this basis, AFMA suggests the following refinements to the Chapter 22 exemption to reflect market innovation since the last amendments to the exemption:

- **Class of Commodity/Product:** Ideally the class of eligible commodity or product should be drafted in a principles-based manner to facilitate future-proofing of the exemption as new commodities/products become traded. In the event that the current drafting approach is retained and the eligible commodities/products are specifically listed, AFMA would welcome the inclusion of lithium (and potentially "precious metals") and aluminium, given their prevalence in the environmental products markets. For completeness, it is AFMA's view that carbon as a class of commodity/product is captured as an "environmental product" for the purpose of paragraph 22.6(2) and would welcome AUSTRAC guidance confirming same in due course;
- **Class of Eligible Counterparty:** As noted, the types of entities that enter into over-the-counter derivatives over specified commodities/products has evolved significantly since 2017, with a number of counterparties now resident in overseas markets. Given the jurisdictionally bespoke nature of the current drafting of the exemption, it accordingly has little utility in respect of these overseas counterparties. AFMA submits that the determination of the class of eligible counterparty could leverage off the proposed drafting in Rule 5-15 to include both a listed public company (and its subsidiaries) and also entities

that are subject to oversight by a prudential, insurance or investor protector regulator through registration or licensing requirements. While this may not capture all eligible counterparties, it would assist with managing the compliance burden in relation to those counterparties where the ML/TF risk is demonstrably low;

- **Eligibility on a group wide basis:** However determined, it is important that the eligibility of the provider of and the counterparty to the derivative be determined on a group-wide basis, i.e. entities within the same reporting group as an eligible counterparty are also within scope for the exemption; and
- **Other:**
    - The Chapter 22 exemption should be extended to those that operate through a registry account as well;
    - Any Australian reference in the exemption should include all Australian markets, noting that the current exemption does not include the Western Australian gas market; and
    - Any reference to "gas" should be extended to include "renewable gases."

* * * * *

AFMA and its members value the engagement with AUSTRAC and the opportunity to consult on the Second Exposure Draft. Please contact me on (02) 9776 7996 if you have any queries about this submission.

Yours sincerely,

Rob Colquhoun
Chief Operating Officer
Head of AML