



Hong Kong Law

July 2017

The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017

Introduction

In view of Hong Kong's international obligations under the Financial Action Task Force (**FATF**) recommendations, the Financial Services and the Treasury Bureau (**FSTB**) of Hong Kong proposed amendments to the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (**AMLO**) (Cap. 615). Following the consultation proposals published in January and the subsequent responses from the relevant stakeholders that were published in April, the Government published the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 (**the Bill**) in the gazette on 23 June. The Bill was introduced into the Legislative Council on 28 June and, subject to the passage of the Bill, will come into effect on 1 March 2018.

The amendments mainly relate to requiring designated non-financial businesses and professions (**DNFBPs**) to observe statutory customer due diligence (**CDD**) and record-keeping requirements. The Bill reflects the original consultation proposals, and consultation responses, which showed broad support for the Government's enhancement of anti-money laundering and counter-terrorist financing (**AML**) / (**CTF**) regulation in Hong Kong.

Enhancement of Anti-Money Laundering Regulation of Designated Non-Financial Businesses and Professions

Scope of Coverage

The Bill will extend Schedule 2 to the AMLO to cover solicitors, accounting professionals, real estate agents and trust and company service providers (**TCSPs**), such that these DNFBP sectors will be subject to the statutory CDD and record-keeping requirements when engaging in specified transactions. With the application of Schedule 2, CDD measures for DNFBPs will include identifying and verifying the identity of customers when establishing business relationships, carrying out occasional transactions above a threshold of HK\$120,000 when there are suspicions of money laundering and/or terrorist financing, or when there are doubts on veracity or adequacy on previously obtained customer identification data. DNFBPs will be defined to cover:¹

1. Real estate agents – when they are involved in transactions for their clients concerning the buying and selling of real estate in Hong Kong;
2. Solicitors and accountants – when they prepare

1. Anti-Money Laundering and Counter-Terrorist Financing Bill 2017, Part 2, Clause 25

for or carry out transactions for their clients concerning-

- (a) The buying or selling of real estate;
- (b) The managing of client money, securities or other assets;
- (c) Management of bank, savings or securities accounts;
- (d) Organisation of contributions for the creation, operation or management of companies;
- (e) Creation, operation or management of legal persons or arrangements; and
- (f) The buying or selling of business entities;

3. TCSPs – when they prepare for or carry out transactions for a client concerning-

- (a) The forming of companies or other legal persons;
- (b) Acting, or arranging for another person to act, as a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;
- (c) Providing a registered office, business address, correspondence or administrative address or other related services for a company, a partnership or any other legal person or arrangement; and
- (d) Acting, or arranging for another person to act, as a trustee of an express trust or similar legal arrangement, or a nominee shareholder for a person other than a company whose securities are listed on a recognized stock market.

The AMLO will be renamed the Anti-Money Laundering and Counter-Terrorist Financing Ordinance² to reflect the expanded scope.

The coverage of “solicitors” will not cover “in-house” solicitors who provide legal advice to their employers in the capacity of employees, as the

FATF’s defined scope of lawyers covers sole practitioners, partners or employed professionals within professional firms. It is not meant to refer to “in-house” professionals that are employees of other types of businesses, nor to professionals working for government agencies who may already be subject to AML/CTF measures.

Dealers in precious metals and stones will not come under regulation under the AMLO, since the Hong Kong Police Force’s post-assessment concluded that the sector does not pose insurmountable risks in the AML/CTF institutional framework in Hong Kong. Dealers in the wine and art trade also fall outside the FATF’s defined scope of DNFBPs. While the FATF’s definition of “casino” does not expressly cover mah-jong parlours or the Hong Kong Jockey Club, FSTB notes that they were not classified as “casinos” by the FATF in the third round of mutual evaluation for Hong Kong.

Risk-based approach for Applying CDD Measures

FSTB proposes that DNFBPs be allowed the flexibility to apply simplified CDD when dealing with specified customers or products in low-risk situations. DNFBPs are expected to undertake customary CDD measures in normal circumstances, and enhanced CDD measures when dealing with customers presenting high money laundering/terrorist financing risks.

Unless otherwise provided in the AMLO, DNFBPs should undertake the following customary CDD measures in usual circumstances –

1. Identifying the customer or any person purporting to act on behalf of the customer;
2. Verifying the customer’s identity using documents, data or information from a reliable, independent source;
3. Identifying a beneficial owner where there is one, and take reasonable measures to verify the identity of the beneficial owner;
4. Understanding the ownership and control structure of those customers who are legal per-

2. The Bill, Part 2, Clause 3 & Clause 4

sons or trusts (or other similar arrangements); and

5. Obtaining information for the purpose and intended nature of the business relationship.

DNFBPs should also undertake ongoing due diligence measures to scrutinise transactions to ensure that they are in line with their knowledge of the customers, their business and risk profile, and to ensure that identification documents or data are up-to-date.

Since DNFBPs may have varying capacity or expertise to follow the risk-sensitive approach, FSTB will include an enabling provision³ in the AMLO to allow regulatory authorities to issue sector-specific guidelines as they consider appropriate for implementation of the Schedule 2 requirements. With regards to real estate transactions, FSTB considers it reasonable for statutory CDD measures to trigger not at the property-viewing stage, but only when a transaction is actually taking place as typified in the signing of a Provisional Agreement for Sale and Purchase.

Record-keeping Requirement

The AMLO presently requires financial institutions to maintain the identification data, account files, business correspondence and records of transactions for a period of six years. DNFBPs be subject to the same requirement when they come under the regulation of the AMLO.

Designation of Regulatory Authority

FSTB proposes leveraging on the existing regulatory regimes applicable to solicitors, accountants and real estate agents under the Legal Practitioners Ordinance (**LPO**) (Cap. 159), the Professional Accountants Ordinance (**PAO**) (Cap. 50) and the Estate Agents Ordinance (**EAO**) (Cap. 511) respectively⁴ to enforce the statutory CDD and record-keeping requirements. The Law Society of Hong Kong (**LSHK**), the Hong Kong Institute of Certi-

fied Public Accountants (**HKICPA**) and the Estate Agents Authority (**EAA**) will take on statutory oversight for monitoring and ensuring compliance of their respective professions with the AMLO requirements. Non-compliance with the requirements will be handled in accordance with the prevailing mechanisms under the three Ordinances governing professional misconduct.

For TCSPs, there is currently no statutory regulatory regime for firms or body corporates providing trust or company formation services in Hong Kong. FSTB proposes introducing a licensing regime to enforce CDD and record-keeping requirements for TCSPs while entrusting the Companies Registry as the licensing authority.⁵

Supervisory Sanctions

FSTB proposes that the LSHK, the HKICPA and the EAA continue to rely on the applicable disciplinary and sanction measures to process non-compliance under the AMLO. The proposed DNFBP regulators are already empowered under their respective Ordinances to conduct investigations. FSTB also proposes that relevant authorities should be empowered to issue guidelines to DNFBPs under their respective regulations to provide clear guidance on compliance. Individual authorities will draw up their own sectoral guidelines to cover measures relevant to their respective regulated sectors. FSTB will not grant inspection and search powers to the LSHK, the HKICPA and the EAA, noting the concern or reservation of many consultation respondents about the notion of doing otherwise. FSTB does not consider it necessary to impose further criminal sanctions.

Licensing Regime for TCSPs

FSTB proposes setting up a licensing regime for TCSPs whereby any person providing trust or company services as a business will be required to obtain a licence from the Companies Registry. TCSPs will be subject to the CDD and record-keeping requirements stipulated in Schedule 2 to the AMLO. The proposed licensing regime for the TCSP will be

3. The Bill, Explanatory Memorandum, Paragraph 9

4. The Bill, Part 2, Clause 8 (11)

5. The Bill, Explanatory Memorandum, Paragraph 4

governed by the new Part A in the AMLO.

The Registrar of Companies will be empowered to grant, renew, refuse, suspend or revoke a licence, or impose or vary the conditions on a licence. The Registrar of Companies will consider the following factors in processing an application –

1. A fit-and-proper test;⁶
2. Possession of a certificate of business registration;
3. Payment of a licence/renewal fee; and
4. Other relevant factors related to the risk of money laundering or terrorist financing of TCSPs.

The Registrar of Companies will have the powers to appoint an authorised person to enter premises of TCSPs for conducting investigation and seizure with a warrant issued by a magistrate.⁷ The Registrar will be able to make statutory regulations to prescribe the manner in which an application for licence should be made. The granting or renewal of TCSP licences will be subject to a specified fee. The Companies Registrar will be required to maintain a publicly available register of licensees for TCSP.⁸

Coverage, exemptions and definitions

FSTB proposes to exempt authorised institutions and licensed corporations that provide TCSP service as an ancillary to their principal business (e.g. as an in-house service for clients within the same institutions) from the licensing requirements. Such authorised institutions and licensed corporations are already subject to CDD and record-keeping regulation under the AMLO by the Hong Kong Monetary Authority and the Securities and Futures Commission, respectively.

Regarding solicitors and accountants who engage in the TCSP business, FSTB proposes consider-

ing their cases on the same principle of avoiding regulatory overlap. For accountants and solicitors providing TCSP services, insofar as they are covered by the regulatory remit of the HKICPA and the LSHK, FSTB does not see the need for them to obtain a licence. If accountants and solicitors are operating TCSP business with persons not being accountants or solicitors, they will need to obtain a TCSP licence from the Companies Registry. In these circumstances, the non-accountant or non-solicitor directors/partners/ultimate owners of the TCSP entities will be subject to the fit-and-proper test as well as disciplinary proceedings administered by the Companies Registry. Their accountant/solicitor counterparts will continue to be subject to the conduct and disciplinary proceedings of the HKICPA or the LSHK.

FSTB will reserve a rule-making power in the legislation for the Secretary for Financial Services and the Treasury to grant further exemption for a certain class of TCSP operators.

Fit-and-proper test

The fit-and-proper test includes considering the criminal and bankruptcy records of the applicant (for natural persons), any ultimate owners, or the partners/directors/shareholders (in cases of partnership/legal persons). Where the applicant is a corporation, the test will also consider whether it is in liquidation or receivership, and any failure to comply with the requirements under the AMLO and guidelines to be issued by the Registrar.⁹ The Companies Registry will be entitled to revoke or suspend a licence if the applicant or its ultimate owner no longer satisfies the “fit and proper” test.

Transitional Period

FSTB will include a deeming provision in the legislation to the effect that an applicant for a TCSP licence will be deemed to be operating with a licence from the day it files an application with the Companies Registry. Given the deeming provision, the length of the transition period will not have much bearing on existing TCSP operators other than that

6. The Bill, Part 2, Clause 18, 53H

7. The Bill, Part 2, Clause 18, 53ZF

8. The Bill, Part 2, Clause 18, 53D

9. The Bill, Part 2, Clause 18, 53I

they will have to make an application within the period. But the FSTB will extend the transition period from 90 days to 120 days¹⁰, starting on the commencement date of Part 5A, to facilitate existing TCSP operators' migration to the licensing regime. The licensee may renew the licence by applying to the Companies Registry at least 60 days before the licence expires, as stated in section 53K of the Bill.

Validity of TCSP Licence

A TCSP licence will be valid for three years and will be renewable on application.¹¹

Sanctions on TCSPs

Non-compliance by licensed TCSPs with the statutory CDD and record-keeping requirements will be disciplined. Those TCSPs will be subject to a range of supervisory sanctions, including public reprimand, remedial order and a pecuniary penalty not exceeding HK\$500,000. This is in line with the maximum level of civil sanction that may be triggered against solicitors and accountants. FSTB does not intend to introduce criminal offences for any non-compliance by a TCSP with a statutory CDD and record-keeping provision. Not possessing a valid licence would constitute a criminal offence under section 53F of the Bill. On conviction of an offence, a person may be liable to a fine at level 6 (a maximum of HK\$100,000) and to imprisonment for six months. A person commits an offence if the person in connection with an application for the grant or renewal of a licence makes a false or misleading statement in a material particular. The person will be liable on conviction to a fine at level 5 (HK\$50,000) and to imprisonment for six months.¹²

Statutory Appeal – Review Tribunal

FSTB proposes amending Part 6 of the AMLO to expand the scope of reviewable decisions of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Review Tribunal to cover ap-

peals against future decisions made by the Registrar of Companies in implementing the licensing and disciplinary regime for TCSPs.¹³ The Tribunal will be renamed as the Anti-Money Laundering and Counter-Terrorist Financing Review Tribunal to reflect the expanded scope.

Threshold of Beneficial Ownership

When the AMLO was enacted in 2012, the threshold for defining “beneficial owner” was set at “not less than 10%”. The latest FATF requirement and the prevailing practice of other jurisdictions dictate a threshold of “more than 25%” for defining beneficial ownership. The bill will remove the 10% threshold for high-risk situations and adopt a threshold of over 25% across the board.¹⁴

Other proposals

Section 18 in Schedule 2 of the AMLO is amended to permit a foreign financial institution in the same parent group of a financial institution to work as an intermediary to conduct the “AML/CTF Requirements” for a financial institution.

The Bill also proposes to remove the “sunset clause” in the AMLO. After the implementation of the Bill, financial institutions will be able to rely on solicitors, accountants, TCSP licensees and other financial institutions as intermediaries to conduct the “AML/CTF Requirements”.

10. The Bill, Part 2, Clause 18, 53ZQ (5)

11. The Bill, Part 2, Clause 18, 53O (1)

12. The Bill, Part 2, Clause 6 (16)

13. The Bill, Part 2, Clause 20

14. The Bill, Part 2, Clause 14

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