

Legislative Council Panel on Financial Affairs

Proposed New Anti-Money Laundering Legislation
For Financial Institutions- Detailed Legislative Proposals

Written submission prepared by
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For discussion on 24 May, 2010

To maintain Hong Kong as an international finance centre, we have to comply with the international standards in anti-money laundering and terrorist financing. The Association generally acknowledges the need of the proposed legislation. Our concerns mainly lie on the wording and execution of it.

It is apparent that RAMCs should conduct customer due diligence (CDD) when establishing business relationship with our clients. In the detailed legislative proposal, Obligations (item 3 to 19 of Annex A to the consultative document, it clearly defines our obligations to conduct CDD. We shall undertake the specific types of CDD, namely SDD, ODD and EDD according to the risk profile of the customer. With regards to the extent of CDD, are we required to perform the CDD of our customer's customer? If the answer is affirmative, CDD would become a never ending exercise because the definition of customer's customer would be an enormous number. Before the introduction of this legislation, both the banking sectors and the RAMCs are not quite sure to what extent of CDD is sufficient for not breaching the statutory requirements. We keep on working in some sorts of "white terror" situation. Thus, the clarification of this is of paramount importance for all the interested parties.

According to the list of proposed definitions, "Originator" means the account holder or when there is no account, the person (natural or legal) that places the order with the FI to perform the wire transfer. It is a common practice during business operation that we may receive incoming funds or perform wire transfer locally or internationally under the instruction of the "originator". However, in the chain of transfer, the

actual remitter to our banking accounts may not be the same as the originator. Are we required to conduct CDD of this particular remitter? In case of out-going funds, upon instruction from the originator, we may need to pay out to a third party beneficiary locally or outside of Hong Kong. Are we required to conduct CDD on the third party beneficiary? At the same time, the instruction to remit to a third party is sometimes given by an individual who is not necessarily the owner of the funds. For example, Money Courier can pose as remitter and provide all the necessary documentation for record keeping. Can RAMC proceed with the money transfer after performing the CDD on the individual who claims to be the remitter and owner of funds. Certainly, we will keep track of the transfer and maintain the records for 6 years. It would be quite difficult if not impossible for RAMCs to verify the identity of the beneficiary or his relationship with the originator.

Sanctions (item 32 to item 37 Annex A to the consultative document)

The proposed legislation introduces a single category of personal criminal liability with a clearly-defined mental threshold, such that only those who contravene the statutory obligations with knowledge or intent to defraud commit an offence and shall be liable to criminal fines and/or imprisonment upon summary conviction or indictment. Our concern is that who should bear the onus of proof, the prosecution or the defending party? With regards to item 22 of Annex A to the consultative document, there are three tiers of criminal offences. Will a person be prosecuted if he has contravened only one tier of criminal offences mentioned in item 22?

Furthermore, during the execution of the legislation, we will definitely encounter some situations that require further elaboration from the regulatory regime that is Customs and Excise Department. For example, should a licensed RAMC apply a license for each and every branches trading in his name? Will C & E D set up a special unit or hotline to answer these types of enquiry? In the past, there may be some court cases which involve RAMCs breaching the money-laundering ordinance. The only source of information comes from television and news papers. Will C & E D use these cases as training materials to enhance our understanding of the legislation?

RAMC is a traditional industry with a long history. The predecessor of some commercial banks such as Hang Seng Bank and Wing Lung Bank is actually RAMC too. Obviously, RAMCs without proper banking accounts would not be able to function properly. Due to the deficiency of legislation, the quality and standard may vary a lot. It follows that some Banks adopt a brush board policy of closing the bank accounts of RAMC. It goes without saying that the legitimate business would be forced to go underground. Then, it would be a nightmare or disaster for the regulator to keep track of the auditory trails of money transfer. With the introduction of this proposed legislation, the standard of operation of RAMC would be guaranteed to a certain extent. Though the Government cannot order the commercial banks to establish account relationship with RAMCs, it will definitely alleviate the concern of the banking sector in dealing with our industry. We sincerely hope that the Government can convey this message to the Banking Sector.

To ensure a smooth execution of the proposed legislation, mutual cooperation between the regulatory authority and the industry is indispensable. The Government should encourage the establishment of self regulated association which pays heed to her executive orders. The association will formulate code of practice generic from the regulatory guidelines. It is already proven that executive order is more effective. And the objective can be achieved in a short time.

Apart from CDD and record keeping, suspicious transaction report (STR) is one of the important elements in anti-money laundering. RAMCs are obliged to report to the regulatory regime if they observe any suspicious transactions in the course of business operation. If the STR warrants further investigation, follow up action will then be taken. It may serve as a point of defence that RAMCs have no intent to defraud in future court proceedings as well. However, in the consultative document dated July 2009 and December 2009, the mechanism of STR has not been touched on. We wish to ensure that this mechanism remains in force and the reporting method is simplified for smooth reporting without complications as per the present STREAMS.

The aforementioned is a brief summary of our concerns and opinions. We are looking forward to have deeper exchange of ideas with the regulatory regime in the future.

ARAMC
10 May, 2010