

立法會 *Legislative Council*

LC Paper No. CB(1)1456/16-17(08)

Ref: CB1/BC/7/16

Bills Committee on Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 and Companies (Amendment) Bill 2017

Background brief

Purpose

This paper provides background information on the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 ("AMLO Amendment Bill") and the Companies (Amendment) Bill 2017 ("CO Amendment Bill"). It also summarizes the views and concerns expressed by members when the Panel on Financial Affairs ("FA Panel") was consulted on the legislative proposals.

Background

2. The Financial Action Task Force ("FATF") is an inter-governmental body established in 1989 that sets international standards on combating money laundering and terrorist financing. Hong Kong has been a member of FATF since 1991 and enacted the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) ("AMLO") in April 2012 requiring financial institutions ("FIs")¹ to implement customer due diligence ("CDD") and record-keeping requirements which are the main strands of the anti-money laundering and counter-terrorist financing ("AML/CFT") regulatory regime championed by FATF. The relevant CDD and record keeping

¹ According to Part 2 of Schedule 1 to the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) ("AMLO"), a financial institution refers to (a) authorized institutions under the Banking Ordinance (Cap. 155); (b) licensed corporations under the Securities and Futures Ordinance (Cap. 571); (c) authorized insurers, appointed insurance agents, and authorized insurance brokers under the Insurance Companies Ordinance (Cap. 41); (d) licensed money service operators (i.e. money changers and remittance agents); or (e) the Postmaster General.

requirements are set out in Schedule 2 to AMLO. Under the CDD measures, FIs are required to identify and verify the identity of customers and keep the relevant customer records for six years. Non-compliance with the requirements may render FIs liable to supervisory and criminal sanctions.

Consultation on proposals to enhance Hong Kong's regulatory regime for combating money laundering and terrorist financing

3. According to the Government, Hong Kong's AML/CFT regulatory regime will undergo the mutual evaluation of FATF member jurisdictions in 2018-2019. The Government has identified two major deficiencies in the Hong Kong regime vis-à-vis FATF recommendations, namely the absence of statutory CDD and record-keeping requirements for designated non-financial businesses and professions ("DNFBPs"), and the absence of statutory requirements for companies and trustees to keep beneficial ownership information of legal entities and arrangements.² To ensure that the Hong Kong regime is in line with the relevant standards set by FATF and avoid receiving adverse ratings in the upcoming FATF mutual evaluation which will result in an "enhance follow-up" process by FATF including frequent reporting and close scrutiny by member jurisdictions, the Government proposes to address the identified deficiencies by introducing:

- (a) amendments to AMLO prescribing statutory CDD and record-keeping requirements applicable to four DNFBPs (i.e. solicitors, accountants, real estate agents, and trust or company service providers ("TCSPs"))³ when they engage in specified transactions,⁴ and to introduce a licensing regime for TCSPs; and

² Under the Companies Ordinance (Cap. 622), companies incorporated in Hong Kong are only required to disclose information on legal ownership, e.g. information on members, directors, and company secretaries. There is currently no requirement for companies to provide information on beneficial ownership (i.e. the person or entity that ultimately owns or controls the company). While the AMLO requires a financial institution ("FI") to verify the identity of the ultimate beneficial owner in relation to a customer, the FI is not obliged to provide the information gathered except under a court order.

³ In the Financial Action Task Force's parlance, designated non-financial businesses and professions cover casinos, dealers in precious metals and stones, real estate agents, lawyers, notaries, accountants, and trust or company service providers ("TCSPs"). In view of Hong Kong's prevailing circumstances, the Government's legislative proposals cover solicitors, accountants, real estate agents and TCSPs only.

⁴ Specified transactions include real estate transactions; management of client money, securities or other assets; management of bank, savings or securities accounts; company formation and management; and buying and selling of business entities.

- (b) amendments to the Companies Ordinance (Cap. 622) ("CO") to require companies incorporated in Hong Kong to take reasonable steps to ascertain the individuals who (and the legal entities which) have significant control over a company, give notice to them, and obtain accurate and up-to-date information about their identities.

4. On 6 January 2017, the Government published two consultation papers to seek public views on the legislative proposals regarding AMLO and CO. The Government published the consultation conclusions on 13 April 2017. According to the Government, there was broad support for the Government to enhance the local AML/CTF regulation in fulfilment of Hong Kong's international obligations under FATF. Some respondents expressed diverse views regarding the scope, coverage and parameters of the legislative proposals. The Government has fine-tuned certain parameters of the legislative proposals as appropriate.

Major provisions in the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 and the Companies (Amendment) Bill 2017

5. The Government published in the Gazette the AMLO Amendment Bill and the CO Amendment Bill on 23 June 2017. The two Bills received their First Reading at the Legislative Council ("LegCo") meeting of 28 June 2017.

6. The major provisions in the AMLO Amendment Bill are to:

- (a) amend AMLO to apply statutory CDD and record-keeping requirements to solicitors, accountants, real estate agents, and TCSPs when these professionals engage in specified transactions (clauses 5, 7, 25 and 26);
- (b) amend the Professional Accountants Ordinance (Cap. 50) ("PAO"), the Legal Practitioners Ordinance (Cap. 159) ("LPO") and the Estate Agents Ordinance (Cap. 511) ("EAO") to enable the Hong Kong Institute of Certified Public Accountants, The Law Society of Hong Kong and the Estate Agents Authority to take disciplinary action against their respective DNFBPs for failure to comply with CDD and record-keeping requirements under AMLO, which may be dealt with by reprimands, civil penalties, suspension from practice or licence revocation (clauses 29 to 38);

- (c) introduce a licensing regime for TCSPs to require them to apply for a licence from the Registrar of Companies ("Registrar") and satisfy a "fit-and-proper" test before they can provide trust or company services as a business in Hong Kong, under which the Registrar will be empowered to investigate any non-compliance in relation to TCPS licensees and impose disciplinary sanctions (including public reprimands, remedial order, a pecuniary fine, and suspension or revocation of the licence) (clauses 7, 11, 18, 20, 22 and 25 to 27); and
- (d) make miscellaneous amendments to AMLO to ensure that the Ordinance is in line with the latest FATF requirements and to facilitate compliance by the regulatees (clauses such as 14 to 17, 19 to 22, 39 to 49).

7. The main provisions of the AMLO Amendment Bill are explained in paragraph 20 of the LegCo Brief (File Ref.: B&M/4/1/41C issued on 23 June 2017) and paragraphs 5 to 14 of the Legal Service Division Report on the Bill (LC Paper No. LS88/16-17). The AMLO Amendment Bill, if passed, will come into operation on 1 March 2018.

8. The major provisions in the CO Amendment Bill are to amend CO to require companies incorporated in Hong Kong to:

- (a) take reasonable steps to ascertain the individuals and legal persons that have significant control over the company (referred to as "significant controllers"), give notice to them, and obtain accurate and up-to-date information about their identities; and
- (b) maintain a register of significant controllers of the company (i.e. "significant controllers register" ("SCR")), containing required particulars of their identities, for inspection by law enforcement officers upon demand.

9. New requirements in the CO Amendment Bill will apply to all companies incorporated under CO in Hong Kong (i.e. applicable companies) except listed companies (as the Securities and Futures Ordinance (Cap. 571) has a more stringent regime requiring every listed corporation to keep a register of interests in shares) and companies exempted by regulations made by the Financial Secretary.

10. Clause 4 of the CO Amendment Bill adds a new Division 2A to Part 12 of CO to mainly provide for an applicable company's duties in relation to

keeping its SCR. The proposed requirements for the SCR include the registrable persons⁵ and registrable legal entities⁶ that have significant control over the company. The company has to take reasonable step to identify and ascertain its registrable persons and registrable legal entities by giving notice ("the Notice") to them. The company is not required to open its SCR for public inspection but required to allow inspection by law enforcement officers upon their demand. The Court of First Instance may, on application by a law enforcement officer, order the company to permit law enforcement officer to inspect or make a copy of the SCR.

11. It is an offence (to be liable to fines and/or imprisonment) under the CO Amendment Bill for:

- (a) an applicable company (and each of its responsible person) failing to keep a SCR;
- (b) any persons failing to comply with the Notice;
- (c) an applicable company failing to comply with the demand by a law enforcement officer to inspect the SCR; and
- (d) any person to knowingly or recklessly make a statement or provide any information that is misleading, false or deceptive in a material particular in purported compliance with the Notice.

12. Clause 6 of the CO Amendment Bill adds three new Schedules to CO, namely Schedule 5A (setting out the criteria for determining whether a person has a significant control over an applicable company), Schedule 5B (providing for the particulars to be entered in the SCR of an applicable company), and Schedule 5C (setting out the additional matters required to be entered in the SCR of an applicable company).

13. The main provisions of the CO Amendment Bill are explained in paragraph 19 of the LegCo Brief (File Ref.: B&M/4/1/43C issued on 23 June 2017) and paragraphs 4 to 13 of the Legal Service Division Report on the Bill

⁵ Under the new section 653C, "registrable person" refers to a natural person or a specified entity (defined in the new section 653A, including a government and international organization) who has significant control over an applicable company.

⁶ Under the new section 653D, "registrable legal entity" refers to a legal entity (defined in the new section 653A as a body of persons, corporate or unincorporate, that is a legal person under the law that governs it, but does not include a specified entity) who is a member of an applicable company and who has significant control over it.

(LC Paper No. LS89/16-17). The CO Amendment Bill, if passed, will come into operation on 1 March 2018.

Members' views and concerns

14. FA Panel was briefed on the Government's plan to conduct public consultation on the legislative proposals regarding AMLO and CO at the meeting on 3 January 2017. The views and concerns expressed by Panel members are summarized in the ensuing paragraphs.

Proposed amendments to the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance

15. While non-compliance by FIs with the statutory CDD and record-keeping requirements of AMLO was a criminal offence, members noted that no criminal sanctions would be introduced to the four DNFBPs for their non-compliance under the proposed amendments to AMLO. Some members queried the different treatment for FIs and the four DNFBPs and enquired whether the proposals were in line with relevant requirements of FATF. Enquires were also raised on the Government's plans to amend LPO, PAO and EAO to specifically provide for sanctions against non-compliance by solicitors, accountants and real estate agents with CDD and record-keeping requirements of AMLO.

16. The Government advised that FATF did not oblige member jurisdictions to impose criminal sanctions for non-compliance by DNFBPs. It was noted that the risks that might be faced by the four DNFBP sectors in respect of transactions relating to the handling of clients' money should not be as high as those faced by FIs. Having regard to the inherent risks concerning the four DNFBPs vis-à-vis FIs, the Government did not intend to propose criminal sanctions for non-compliances by the four sectors. The Government advised that it would leverage on the existing regulatory regimes under the respective ordinances to enforce the statutory CDD and record-keeping requirements for solicitors, accountants and estate agents. Non-compliance with the AMLO requirements would be handled in accordance with the prevailing investigation, disciplinary and appeal mechanisms under LPO, PAO and EAO, which had already stipulated a set of appropriate disciplinary sanctions with sufficient deterrent effect. The disciplinary mechanisms of the three sectors were also on a par with those of other member jurisdictions of FATF. In respect of TCSP, having regard to the risk of the sector and the need to maintain some degree of consistency among the other three DNFBP sectors, the Government also did not intend to introduce criminal offences for non-compliance by TCSP.

Proposed amendments to the Companies Ordinance

17. Panel members expressed concerns about how the proposed amendments to CO could address the problem of misuse of companies, particularly those under complex ownership and control structures, as a way to conceal the interests of the underlying beneficial owners or the ultimate controllers. Some members considered that information on the ultimate beneficial owner or the controlled legal person of a company should be disclosed to the public.

18. The Government explained that under the proposed amendments to CO, companies incorporated in Hong Kong would be required to obtain and keep up-to-date information on its beneficial ownership, and provide the information for public inspection upon request. For companies controlled by a beneficial owner through a chain of successive layers of companies, apart from disclosing the ultimate beneficial owner who was an individual, these companies would be required to identify and register the immediate holding company (irrespective of whether it was incorporated locally or overseas) as a relevant legal entity with significant control over the company. If the legal entity was an offshore company, the information of the ultimate beneficial owner who had control over the offshore company would also be required to be disclosed.

19. Noting that the proposed penalty for non-compliance with the requirement of keeping a SCR only included imposition of fines but not imprisonment, some Panel members were concerned about the deterrent effect of the proposed penalty. While concurring that a heavier penalty for the offence would produce greater deterrence, the Government pointed out that the proposed level of fines for the offence was comparable to that currently applicable to failure to keep registers of members, directors and company secretaries under CO.

Council questions

20. During the Fifth LegCo, Members raised three questions relating to AMLO at the LegCo meetings of 31 October 2012, 9 April 2015 and 27 April 2016. Issues covered in the questions include measures adopted by the real property sector to combat money laundering activities, effectiveness of the existing mechanism and legislation in combating banks' activities assisting their clients in money laundering activities, and measures to strengthen regulation of intermediaries in assisting their clients in money laundering activities. The questions and the Government's responses are hyperlinked in the **Appendix**.

Latest development

21. At the House Committee meeting on 7 July 2017, Members agreed to form a Bills Committee to study the AMLO Amendment Bill and the CO Amendment Bill.

Relevant papers

22. A list of relevant papers is in the **Appendix**.

Council Business Division 1
Legislative Council Secretariat
9 October 2017

List of relevant papers

Date	Event	Papers/Minutes of meeting
31 October 2012	Written question raised by Hon Kenneth LEUNG on "Anti-money laundering measures concerning Designated Non-Financial Business and Professions"	Hansard (pages 100-103)
29 April 2015	Written question raised by Hon Frederick FUNG on "Controls and measures against money laundering and tax evasion"	Hansard (pages 42-43)
27 April 2016	Oral question raised by Hon Kenneth LEUNG on "Handling of suspicious transaction reports"	Hansard (pages 18-21)
3 January 2017	The Panel on Financial Affairs was briefed by the Government on the latter's plan to conduct public consultation exercises on the legislative proposals regarding the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) and the Companies Ordinance (Cap. 622)	Administration's paper LC Paper No. CB(1)363/16-17(05) Minutes LC Paper No. CB(1)755/16-17
6 January 2017	The Government launched two consultations on legislative proposals to enhance Hong Kong's regulatory regime for combating money laundering and terrorist financing	Press release Consultation papers 1 and 2

Date	Event	Papers/Minutes of meeting
13 April 2017	The Government released the consultation conclusions on the consultations launched on 6 January 2017	Press release Consultation conclusions
28 June 2017	The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 and the Companies (Amendment) Bill 2017 were introduced into the Legislative Council	<i>The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017:</i> The Bill Legislative Council Brief (File Ref: B&M/4/1/41C) Legal Service Division Report (LC Paper No. LS88/16-17) <i>The Companies (Amendment) Bill 2017:</i> The Bill Legislative Council Brief (File Ref: B&M/4/1/43C) Legal Service Division Report (LC Paper No. LS89/16-17)