



By email (bc\_07\_16@legco.gov.hk) and by hand

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Hon Wong Ting-kwong,  
Chairman, Bills Committee on Anti-Money Laundering and Counter-Terrorist Financing  
(Financial Institutions) (Amendment) Bill 2017 and Companies (Amendment) Bill 2017  
Legislative Council Complex,  
1 Legislative Council Road,  
Central, Hong Kong

Dear Mr. Wong,

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

Thank you for inviting the views of the Hong Kong Institute of Certified Public Accountants ("the Institute") on the above bills. Our views on them are as set out below.

***Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions)  
(Amendment) Bill 2017 ("AML(A) Bill")***

As an international financial and commercial centre that prides itself on having well regulated markets, good corporate governance and a deeply-entrenched rule of law, Hong Kong has to play its part in minimising the risk of abuse of the financial system for the purposes of money laundering or terrorist financing. Therefore, we generally support the introduction of legislation on customer due diligence ("CDD") and record keeping ("RK") for the business sectors referred to as "designated non-financial business and professions (DNFBPs)" by the Financial Action Task Force ("FATF"), the international standard setter on anti-money laundering/combating the financing of terrorism ("AML"). These sectors include accountants, lawyers, trust or company service providers ("TCSPs") and estate agents.

The FATF standards ("the Recommendations") expect FATF members, including Hong Kong, to codify in law the basic requirements on CDD and RK (in addition to requirements on suspicious transaction reporting) in relation to financial institutions ("FIs") and DNFBPs. Legislation introducing CDD and RK requirements for FIs, in the form of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap.615)("AMLO"), was passed in 2012. As Hong Kong is scheduled to undergo an FATF mutual evaluation in 2018, the introduction of similar legislation covering DNFBPs is timely.

We consider that it would be preferable to have dedicated legislation that is more tailored towards the needs of DNFBPs, given that AMLO was drafted with FIs in mind and is couched in terms of FIs, with e.g., numerous references to (financial) transactions. However, we recognise that a similar problem is inherent in the language used in the Recommendations themselves, the original focus of which was also banks and other FIs. When the Recommendations were later extended to



DNFBPs, it seems that no review was conducted of the language or concepts embedded in them to better accommodate DNFBPs. Nevertheless, it remains the case that in implementing key parts of the Recommendations in domestic legislation, every effort should be made to be clear and precise, avoiding ambiguities and uncertainties wherever possible.

While the current approach cannot be said to be ideal, therefore, it should be workable if sufficient clarity is provided in terms of how the legislation will be implemented and what is expected of DNFBPs and their regulatory bodies.

Against the above background, the Institute has already drawn up draft AML guidelines as envisaged by the proposed amended section 7 of AMLO, and has consulted members on them. The consultation period has ended and, as at this time, we have received no objection to them. The guidelines are intended to assist members in complying with the requirements of the AMLO, as amended, and with other relevant requirements of the Recommendations, and they will be enforceable. They will be part of the Code of Ethics for Professional Accountants and non-compliance with them may result in disciplinary proceedings against the relevant members and/or CPA practices. The guidelines will be finalised once the detailed provisions and wording of the AML(A) Bill have been settled.

### **Part A - Specific issues in the AML(A) Bill**

#### **1. Scope of the Institute's regulatory authority**

Members of the Bills Committee may wish to note that the Institute is the licensing body for CPAs in Hong Kong ("CPAs") under the Professional Accountants Ordinance (Cap. 50)("PAO") and is responsible for regulating the conduct of CPAs. As part of its regulatory function, the Institute addresses complaints concerning the ethical and professional conduct of CPAs, CPA practices and registered students.

Compliance with the Institute's professional standards is a requirement of membership. The compliance and disciplinary processes are key mechanisms by which the Institute regulates the conduct of its members, with sanctions being imposed for serious breaches of professional standards.

It is a requirement that auditors who sign audited financial statements in Hong Kong must be practising CPAs (i.e., members who hold a practising certificate issued by the Institute). However, there is no requirement to be a member of the Institute in order to offer other services commonly offered by accountants (e.g., accounting, advisory, company secretarial and tax). This also applies to the services specified in relation to "accounting professionals", under the proposed new section 5A(3) to be introduced into AMLO (items (a) to (f) of which are basically the same as the services specified for accountants in the Recommendations). These are:

- (a) the buying or selling of real estate;
- (b) the managing of client money, securities or other assets;
- (c) the management of bank, saving or securities accounts;
- (d) the organisation of contributions for the creation, operation or management of companies;
- (e) the creation, operation or management of -

- (i) legal persons or
- (ii) legal arrangements;
- (f) the buying or selling of business entities; and
- (g) a service specified in the definition of trust or company service (under the AML(A) Bill)

The term "accounting professional" under the AML(A) Bill is defined to mean a member of the Institute and covers a CPA, CPA (practising), corporate practice and a firm of CPAs (practising) as defined in the PAO.

In this regard, overseas qualified accountants working in Hong Kong, unless they wish to undertake auditing, are under no obligation to join, and are not regulated by, the Institute. It appears, therefore, that they may not be regulated by anyone in Hong Kong for AML purposes when they conduct any of above services. This could create an expectation gap.

As indicated above, the Institute has authority over the general conduct of individual CPAs. Accordingly, if a complaint is lodged against a CPA, the Institute has the authority to handle the complaint according to its statutory complaint procedures. Section 34 of the PAO sets out the complaint procedure and grounds for complaints against CPAs and corporate CPA practices, and section 35 sets out the possible sanctions that may be imposed by a disciplinary committee if a complaint is upheld. In addition, various criminal offences are prescribed in section 42, including offences relating to falsely holding oneself out to be a CPA or a CPA (practising).

Section 34 of the PAO will be amended by the AML(A) Bill to make a failure by a CPA or a corporate CPA practice to comply with an AML requirement (i.e., primarily the CDD and RK requirements) grounds to initiate a formal complaint procedure against the relevant member(s) or practice; similarly action will be able to be taken where a CPA who is a director of a corporate CPA practice or of a TCSP licensee causes or allows a breach of an AML requirement, or fails to take reasonable steps to prevent such a breach.

#### *The practice review regime*

Members of the Institute will be expected to follow our guidelines and the Institute will investigate complaints of breaches against members and/or CPA practices to whom the guidelines apply. While the PAO empowers the Institute to conduct practice reviews in relation to the application of professional standards, this is limited to reviews of CPA practices, and primarily in relation to auditing standards. As regards non-auditing services, on the other hand, monitoring of compliance of these services is not currently within the scope of the practice review regime. It is also quite common for members to set up separate legal entities outside of the CPA practice to conduct these activities. In any event, we understand from our discussions with the government that there is no specific obligation to actively monitor compliance by CPA practices with the AML requirements, and that being able to respond to complaints should be sufficient. Looking ahead, we will be in a better position to understand the FATF's expectations after the mutual evaluation has been carried out.

## 2. The regulation of TCSPs

Under the proposed new Part 5A to be added into AMLO, a person who carries on a trust or company service business without a licence from the Registrar of Companies ("R of C") commits an offence. "Trust or company service business" is defined under the proposed amendments to section 1 of Part 1 of Schedule 1 of AMLO, to mean the business of providing a trust or company service. These services, which are in line with the FATF-specified services for TCSPs, are:

- (a) forming corporations or other legal persons;
- (b) acting, or arranging for another person to act —
  - (i) as a director or a secretary of a corporation;
  - (ii) as a partner of a partnership; or
  - (iii) in a similar position in relation to other legal persons;
- (c) providing a registered office, business address, correspondence or administrative address for a corporation, a partnership or any other legal person or legal arrangement;
- (d) acting, or arranging for another person to act —
  - (i) as a trustee of an express trust or a similar legal arrangement; or
  - (ii) as a nominee shareholder for a person other than a corporation whose securities are listed on a recognised stock market

An AML requirement applies to a DNFBP who is a TCSP when, by way of business, the TCSP, prepares for or carries out for a client a transaction concerning one or more of the above specified services.

Under the proposed new section 53B, Part 5A does not apply to, amongst others, an accounting professional or a legal professional. We understand that the purpose of this exemption is to avoid regulatory overlaps and possible confusion. Although members of the Institute may be involved in the provision of TCSP services, they are already subject to the Institute's "fit and proper" requirements and investigatory and disciplinary processes.

Although the proposed Part 5A will not apply to accounting professionals, from our discussions with the Administration, it appears that, in practice, a shared regulatory regime is envisaged. While individual CPAs who are directors or partners of TCSP entities will be subject to regulation by the Institute, corporate TCSP entities, including those where all the directors and/or beneficial owners are CPAs, and TCSPs in the form of partnerships, where there is a mix of CPA and non-CPA partners, will need to obtain a licence from R of C and may be subject to regulatory action by R of C. Based on our previous discussions, if a TCSP entity fails to comply with various statutory requirements under the AMLO as amended and the persons involved are accounting professionals, R of C will refer the case, insofar as it relates to the individuals, to the Institute to handle. While the Institute is willing to assist in it whatever way it can, so far we have not been made aware of the details of the referral mechanism (e.g., whether R of C will conduct initial investigations before referring cases to the Institute or whether cases will be referred without further investigation, if there is prima facie case of non-compliance).

These shared regulatory arrangements are not specifically provided for in the AML(A) Bill and, therefore, an understanding will need to be reached separately. We believe that it is essential to have a clear statement and, we would suggest, a

formal agreement, such as a memorandum of understanding, on how TCSPs will be regulated, and by whom, particularly where persons are involved to whom Part 5A will not apply. What, for example, will be respective liabilities of directors and partners of a TCSP entity where some of them are subject to Part 5A and others are not, such as when TCSP is found to be operating without a valid licence? Which guidelines, issued pursuant to section 7 of AMLO as amended, will apply to different parties?

There is also a difference in the range of powers available to R of C under the AML(A) Bill and those available to the Institute. As indicated above, the Institute has no authority to actively monitor TCSP entities run by CPAs, whereas R of C, as the licence issuer under the proposed section 53J "may impose any condition that the Registrar considers appropriate" and, under section 53ZF, with a magistrate's warrant, may enter and search premises and take documents. While we welcome the inclusion of the proposed section 53ZK, which allows R of C to share information with the Institute, amongst others, there will inevitably be some differences in R of C's ability to obtain information and the Institute's ability to do so in similar circumstances. This could, in turn, result in some disparity in outcomes and in the pace of progress of investigations and disciplinary action.

While we do not believe the above issues would undermine the proposals, the regime should be kept under review once it is in operation and may need to be looked at again in the period following the FATF mutual evaluation. It will be important to avoid expectation gaps from emerging and some businesses that should be regulated for AML slipping through cracks in the regulatory framework.

### 3. Politically exposed persons ("PEPs")

"PEP" is defined in section 1 Part 1 of Schedule 2 of AMLO as follows:

- (a) an individual who is or has been entrusted with a prominent public function in a place outside the People's Republic of China and—
  - (i) includes a head of state, head of government, senior politician, senior government, judicial or military official, senior executive of a state-owned corporation and an important political party official; but
  - (ii) does not include a middle-ranking or more junior official of any of the categories mentioned in subparagraph (i);
- (b) a spouse, a partner, a child or a parent of an individual falling within paragraph (a), or a spouse or a partner of a child of such an individual; or
- (c) a close associate of an individual falling within paragraph (a);

However, it should be noted that the Recommendations do not limit the concept of PEPs to foreign PEPs but also to make reference to domestic PEPs. Recommendation 12 states:

*"Politically exposed persons*

Financial institutions should be required, in relation to foreign politically exposed persons (PEPs) (whether as customer or beneficial owner), in addition to performing normal customer due diligence measures, to:

- (a) have appropriate risk-management systems to determine whether the customer or the beneficial owner is a politically exposed person;

- (b) obtain senior management approval for establishing (or continuing, for existing customers) such business relationships;
- (c) take reasonable measures to establish the source of wealth and source of funds; and
- (d) conduct enhanced ongoing monitoring of the business relationship."

Financial institutions should be required to take reasonable measures to determine whether a customer or beneficial owner is a domestic PEP or a person who is or has been entrusted with a prominent function by an international organisation. In cases of a higher risk business relationship with such persons, financial institutions should be required to apply the measures referred to in paragraphs (b), (c) and (d).

The requirements for all types of PEP should also apply to family members or close associates of such PEPs." [Underlining added].

The FATF defines PEP as follows:

*"Foreign PEPs* are individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.

*Domestic PEPs* are individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.

*Persons who are or have been entrusted with a prominent function by an international organisation* refers to members of senior management, i.e. directors, deputy directors and members of the board or equivalent functions.

The definition of PEPs is not intended to cover middle ranking or more junior individuals in the foregoing categories."

The AML guidelines issued by the regulatory authorities for FIs and the Institute's draft AML guidelines include reference to the concept of a domestic PEP, in line with the Recommendations. However, these references are not given any statutory support by AMLO. We would suggest, therefore, that the opportunity of the AML(A) Bill be taken to expand the statutory definition of PEP to include domestic PEPs, although, in line with Recommendation 12, domestic PEPs should not automatically be regarded as higher risk persons.

#### 4. Meaning of "prepares for... a transaction"

Under the proposed new section 5A(3) to be added into AMLO, the AML requirements apply to an accounting or legal professional when such a professional, by way of a business, "prepares for or carries out for a client a transaction" concerning one or more of the services specified in that section. The relevant services are those referred to under item 1 above.

We understand that the intention of this paragraph is to impose CDD and RK obligations on an accounting or legal professional who performs any of the specified services. However, there is no further elaboration of what is meant by "prepares for a transaction". Using the "buying or selling of business entities", which is one of the specified services, as an example, it is not uncommon for accounting professionals to assist their clients by performing a financial due diligence engagement in relation to the buying or selling of a business entity. Ultimately, it could transpire that no transaction to buy/ sell a business entity is entered into, particularly if major issues are identified in the course of conducting financial due diligence. Conducting financial due diligence is not by itself a specified service, but does it constitute "preparing for" a transaction concerning "buying or selling of business entities" and, if so, is this the case even where, ultimately, no transaction takes place? While the proposed section 5A(3) may adopt similar language to the Recommendations, as indicated above, the onus is on the government and the legislature to ensure that domestic legislation is as clear and certain as possible.

#### 5. RK requirements

There is no indication in sections 20 and 21 of Schedule 2 of AMLO, which deal with RK requirements, as to where records are to be kept. The AML(A) Bill is also silent on this point. Logically, hard copies of material should be required to be kept in Hong Kong, but information on a computer databases could conceivably be maintained on a server overseas.

#### 6. Simplified due diligence procedures

It is proposed that, under section 4 of Schedule 2 of AMLO, a DNFBP may conduct simplified CDD in certain circumstances, which are circumstances perceived as being of lower risk. The specified list of customers and products eligible for simplified CDD treatment was drawn up with FIs in mind, and for accountants, who do not usually handle clients' money, the considerations may be different. That said, to the extent that the list is relevant to accounting professionals, it is reasonable that simplified CDD may be applied to the persons and products on the list; but, we would suggest that, in addition to the existing list of clients to whom simplified CDD may be applied (which the AML(A) Bill does not amend), should be added, other DNFBPs in Hong Kong and those overseas that are adequately supervised for AML compliance, i.e., when a client of a DNFBP is another regulated DNFBP.

#### 7. Carrying out CDD measures by means of intermediaries

The existing section 18 of Schedule 2 of AMLO provides for FIs to carry out CDD by means of an intermediary. Specified intermediaries include solicitors and CPAs practising in Hong Kong, and their equivalents and other professionals practising in an equivalent jurisdiction overseas, who are adequately supervised for AML compliance. The AML(A) Bill refines these provisions and, amongst other things, includes an accounting professional, a legal professional and a TCSP licensee as specified intermediaries for FIs.

However, there is no provision in the AML(A) Bill for DNFBPs themselves to be able to make use of intermediaries to carry out CDD. It could be the case, for

example, that a client of an overseas network firm of an accounting professional plans to invest in Hong Kong and is referred to the Hong Kong accounting professional for assistance. If the network firm is supervised for AML compliance by an equivalent regulatory body to the Institute and has already performed CDD on the client, it would seem reasonable that the Hong Kong accounting professional should be permitted to make use of this CDD if the accounting professional so chooses.

### ***Part B – Specific issues related in the Companies (Amendment) Bill 2017 ("CO(A) Bill")***

We believe that enhancing the transparency of company ownership and control will assist Hong Kong in complying with its FATF obligations, including, from the profession's point of view, facilitating the process of conducting adequate CDD. Our members have the knowledge and competence to be able to help companies comply with their obligations under the current proposals.

Greater corporate transparency should also help Hong Kong to challenge any lingering perceptions that it should be regarded as a tax haven. Such perceptions, however unwarranted they may be, still emerge from time to time, and Hong Kong continues to appear on some lists of tax havens (e.g., the European Union blacklist issued in 2015).

Our views on the details of the CO(A) Bill are set out below.

#### 1. Definition of persons who must be registered (Schedule 5A, Part 1 section 1)

We note that the definition of a person who has significant control over company differs in some respects from the definition of "beneficial ownership" under the AMLO Bill, although the quantitative elements of the criteria are the same, i.e., holding/ controlling directly or indirectly more than 25% of the issued shares/ share capital, or holding/ being entitled to exercise, directly or indirectly, more than 25% of the voting rights. Aside from these quantitative thresholds, the definition in the AML(A) Bill refers to exercising "ultimate control over the management of the company" (or other entity), whereas the CO(A) Bill definition refers to "the right to appoint or remove a majority of the board" or having "the right to exercise or actually exercising significant influence or control."

We should like to understand why these definitions are not more closely aligned with one another, given that they are supposed to be aimed at serving a similar objective and both have been triggered by the provisions in the Recommendations relating to the disclosure of beneficial ownership.

#### 2. Keeping of register (section 653H)

It needs to be clarified what precisely a relevant company has to maintain on day one after the amending legislation commences, under the proposed section 653H. Before a company has sent out notices under the proposed section 653P and has received back the requisite information, which may take up to one month, according to the timeframes provided for under the CO(A) Bill, a company may have no information to enter into the significant controllers register ("register"). Is



this intended to be covered by section 5 (case 4) in Part 2 of the proposed of Schedule 5C, such that companies without the necessary information, which could be many companies, will simply state that they have not yet completed taking reasonable steps to ascertain whether they have a significant controller?

3. Entering of particulars in the register (section 653J)

Under the proposed section 653(4), it is not clear what evidence will be required to establish that a particular of a registrable person or entity, provided or confirmed by a third person, has been provided or confirmed with the registrable person's or entity's knowledge.

4. Place at which register must be kept (section 653M)

To facilitate access, we believe that, in the long run, consideration should be given to having a centralised database in addition to, or instead of, registers kept by individual companies. This could also help to ensure the accuracy of the information.

5. Register to be available for inspection (section 653X)

In our response to the consultation on enhancing the transparency of beneficial ownership of Hong Kong companies, conducted earlier in the year, we proposed that, for public interest and professional reasons, access to the register should be available to CPA practices and other relevant DNFBPs, to facilitate them in complying with their proposed CDD obligations under AMLO. This would also be consistent with Recommendations 24 and 25, which state: "Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22" (i.e., those relating to CDD for FIs and DNFBPs). While we understand the rationale for restricting access to law enforcement officers or officers of the Companies Registry, at this stage, we would suggest that, in the future, consideration be given to extending access to DNFBPs regulated for AML, to facilitate them in discharging their CDD obligations.

6. Company's duty to investigate and obtain information (section 653P)

We would suggest that a notice given under the proposed section 653P(2) or (3) should include the definition of "registrable person"/ "registrable legal entity"/ "significant controller", as appropriate, or indicate clearly where the definitions may be found, bearing in mind that the recipients may be living overseas and be unfamiliar with the applicable laws of Hong Kong.

7. Power of Court to order rectification of register (section 653ZD)

Pursuant to section 653ZD, a person may apply to the Court to rectify the register of a company if -

- (a) the person's name is wrongly entered in or omitted from the register; or
- (b) there is default or unnecessary delay in entering in the register the fact that a person has ceased to be a significant controller of the company



While the proposed section 653W gives the right to inspect the register to a person whose name is entered in the register, it is unclear how a person would come to know that his/her name has been wrongly entered into the register. On the other hand, a person whose name has been wrongly omitted for the register, prima facie, would not have the right under this section to inspect the register. So how is it envisaged that this provision will work in practice? In addition, should the right to inspect the register also be given to persons who were previously significant controllers, or will it be confirmed to a registrable person that the person's name has been removed from the register when that person ceases to be a registrable person?

8. Transitional provisions for section 653S (section 653ZX)

It is not clear why information known to be correct, which has been provided to a company before the commencement date of the legislation, cannot be relied upon by the company. Consequently, it would seem that the same information will have to be sought again.

Should you have any questions on the submission, please do not hesitate to contact me at the Institute.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Peter Tisman', written in a cursive style.

Peter Tisman  
Director, Advocacy & Practice Development

PMT/EKC/pk