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**Paper for the House Committee Meeting
on 7 July 2017**

**Legal Service Division Report on
Anti-Money Laundering and Counter-Terrorist Financing
(Financial Institutions) (Amendment) Bill 2017**

I. SUMMARY

1. The Bill

The Bill proposes to:

- (a) expand the scope of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) to apply the customer due diligence and record-keeping requirements relating to transactions under Schedule 2 ("Requirements") to designated non-financial businesses and professions ("DNFBPs"), namely, solicitors, foreign lawyers, accountants, estate agents, and trust or company service providers ("TCSPs"). A DNFBP who contravenes the Requirements would be subject to disciplinary sanctions such as a pecuniary penalty;
- (b) establish a licensing regime for TCSPs. Any person who carries on a trust or company service business without a licence would commit an offence and be liable to a fine at level 6 (i.e. \$100,000) and imprisonment for six months; and
- (c) make related amendments to various enactments such as those regulating the other DNFBP sectors.

2. Public Consultation The Administration consulted stakeholders from January to March 2017 on the legislative proposal. While there was broad support for the proposal, diverse views were expressed on its precise scope, coverage and parameters.

3. Consultation with LegCo Panel The Panel on Financial Affairs was consulted on the legislative proposal on 3 January 2017. Members had no objection to the proposal but raised various enquiries.

4. Conclusion Our scrutiny of the Bill is continuing. As the Bill seeks to create a new regulatory regime for TCSPs and to apply the Requirements of Cap. 615 to DNFBPs, Members may wish to form a Bills Committee to study the Bill in detail.

II. REPORT

The date of First Reading of the Bill is 28 June 2017. Members may refer to the LegCo Brief (File Ref.: B&M/4/1/41C) issued by the Financial Services and the Treasury Bureau ("FSTB") on 23 June 2017 for further details.

Object of the Bill

2. To meet Hong Kong's anti-money laundering and counter-terrorist financing ("AML/CTF") obligations imposed by the Financial Action Task Force ("FATF"), the Bill proposes to:

- (a) expand the scope of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) to apply the customer due diligence ("CDD") and record-keeping requirements relating to transactions under Schedule 2 to Cap. 615 ("Requirements") to designated non-financial businesses and professions ("DNFBPs"), namely, solicitors, foreign lawyers, accountants, estate agents, and trust or company service providers ("TCSPs");
- (b) establish a licensing regime for TCSPs; and
- (c) make miscellaneous amendments to various enactments such as those regulating the other DNFBP sectors.

Background

3. Enacted in 2011, Cap. 615 implements FATF's AML/CTF recommendations by imposing the Requirements on financial institutions ("FIs") such as banks, securities firms, insurers and money service operators to identify and verify customers, and to keep the relevant customer records for six years.

4. According to paragraphs 3 and 4 of the LegCo Brief, a key deficiency in Hong Kong's AML/CTF regime is that the Requirements do not at present apply to DNFBPs when they engage in certain specified transactions. FSTB contends that if remedial action is not taken to address the deficiency in the run-up to 2018, Hong Kong will almost certainly receive adverse ratings.

Provisions of the Bill

5. The Bill seeks to remedy this deficiency by applying the Requirements to legal and accounting professionals, estate agents and TCSPs.

Accountants, lawyers and estate agents (clauses 5, 7, 25, 26 and 29 to 38)

6. The proposed new section 5A(3) and (4) of Cap. 615 seeks to apply the Requirements, as amended by clause 26, to certified public accountants ("CPAs"),

solicitors, foreign lawyers and licensed estate agents or salespersons who engage in specified transactions such as buying or selling real estate and (for accountants and lawyers) managing client money, securities or bank accounts, creating or managing companies, or buying or selling business entities.

7. Clauses 29 to 38 propose amending the Professional Accountants Ordinance (Cap. 50), the Legal Practitioners Ordinance (Cap. 159) and the Estate Agents Ordinance (Cap. 511) to enable the Hong Kong Institute of CPAs, The Law Society of Hong Kong and the Estate Agents Authority ("Regulators") to take disciplinary action against their respective DNFBDs for failure to comply with the Requirements, which may be dealt with by reprimands, civil penalties, suspension from practice or licence revocation. Under clause 5, the Regulators would be given immunity from civil liability in the performance of their functions under Cap. 615.

TCSPs (clauses 7, 11, 18, 20, 22 and 25 to 27)

Licensing of TCSPs

8. At present, TCSPs are not regulated in Hong Kong. Clause 18 seeks to add a new Part 5A to Cap. 615 to establish a licensing regime for TCSPs:

- (a) a trust or company service ("TCS") is defined to include forming corporations or other legal persons; acting as a director, secretary or partner of, or providing a registered office or administrative address for, a corporation, partnership or other legal person; and acting as a trustee or nominee shareholder for another person (clause 25(3));
- (b) a TCSP must apply to the Registrar of Companies ("Registrar") for a licence to carry on a TCS business, and a person who carries on a TCS business without a licence would commit an offence and be liable on conviction to a fine at level 6 (i.e. \$100,000) and to imprisonment for six months (proposed sections 53F and 53G); and
- (c) a licence would be granted only if the Registrar is satisfied that the applicant is a "fit and proper" person (proposed section 53H), having regard to, among other matters, the person's conviction, if any, for any specified offence under Cap. 615, the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405), the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575), or the Organized and Serious Crimes Ordinance (Cap. 455) (proposed section 53I).

Application of the Requirements to TCSP licensees

9. Under clause 7, the proposed new section 5A(5) of Cap. 615 seeks to apply the Requirements, as amended by clause 26, to a TCSP licensee who prepares for or carries out for a client a transaction concerning a TCS. Being the relevant authority in relation to TCSP licensees (clause 25(6)), the Registrar would be

empowered under the proposed section 11 of Cap. 615 (as amended by clause 11) to appoint investigators to inquire into any possible contravention of the Requirements. Under the proposed Division 5 of Part 5A, the Registrar could publicly reprimand a TCSP licensee, order the licensee to take remedial action, and order the licensee to pay a pecuniary penalty not exceeding \$500,000 in respect of the licensee's contravention of any of the Requirements.

Review and other provisions relating to TCSPs

10. By virtue of section 54 of Cap. 615 as amended by clause 20, the Registrar's licensing and disciplinary decisions under Part 5A vis-à-vis TCSP licensees would be subject to review in accordance with Part 6 by the existing review tribunal ("Tribunal") which would be renamed as the "Anti-Money Laundering and Counter-Terrorist Financing Review Tribunal" (clause 22).

11. The proposed Part 5A also provides for a register of licensees (section 53D), the renewal, revocation or suspension of licences (sections 53K and 53Q), a magistrate's warrant to enter and search premises (section 53ZF), offences of unauthorized disclosure of confidential information (section 53ZI) and providing false or misleading information to the Registrar (section 53ZN), transitional arrangements for applying for a licence upon commencement of Part 5A (section 53ZQ), and specification of fees in the proposed Schedule 3A (clause 27).

Sanctions for contravention of the Requirements (clauses 7, 18, 26 and 29 to 38)

12. In relation to FIs, section 5(5) to (8) of Cap. 615 imposes criminal liability on anyone who knowingly or, with intent to defraud, contravenes a specified provision of Schedule 2. The maximum penalty is a fine of \$1,000,000 and imprisonment for seven years. The Bill, however, does not propose making a DNFBP's non-compliance with the Requirements a criminal offence, although the Regulators and the Registrar could take disciplinary action. According to paragraphs 13 and 18 of the LegCo Brief, the Administration considers that this proposal reflects the lesser risks concerning DNFBPs when compared with FIs.

Miscellaneous provisions (clauses 1, 3, 4, 8, 19 to 22, 26, 28 and 39 to 49)

13. Under the proposed section 7 of Cap. 615 as amended by clause 8, the Regulators and the Registrar would be empowered to publish in the Gazette appropriate guidelines for providing guidance in relation to the operation of the Requirements. These guidelines are not subsidiary legislation (section 7(6)).

14. The Bill also proposes various miscellaneous amendments such as:

- (a) textual amendments to Cap. 615 and other related Ordinances to reflect the enhanced scope of Cap. 615 and the consequential change of name of the Tribunal (clauses 3, 4, 19 to 22, 28 and 40 to 49);

- (b) amending the relevant LegCo resolution (Cap. 430B) to authorize the Companies Registry Trading Fund to administer and enforce the provisions of Cap. 615 applicable to TCSPs (clause 39); and
- (c) updating certain requirements and definitions (e.g. "beneficial owner") in Schedule 2 to Cap. 615, and repealing a sunset clause (section 18(5) of Schedule 2) to let FIs continue to conduct CDD via a lawyer, an accountant or a TCSP licensee beyond 31 March 2018 (clause 26).

15. The Bill, if passed, would come into operation on 1 March 2018 (clause 1(2)).

Public Consultation

16. According to paragraphs 25 to 27 of the LegCo Brief, FSTB consulted stakeholders from 6 January to 5 March 2017 to seek views from the affected sectors on the legislative proposal. While there was broad support for the Government to enhance AML/CTF regulation in Hong Kong, diverse views were expressed on the precise scope, coverage and parameters of the proposal. Having regard to the responses, FSTB has fine-tuned certain parameters of the legislative proposal as are reflected in the Bill.

Consultation with LegCo Panel

17. As advised by the Clerk to the Panel on Financial Affairs, the Panel was consulted on the legislative proposal on 3 January 2017. Members had no objection to the proposal but raised various enquiries including the scope of DNFBPs, why no criminal sanction was proposed for DNFBPs' non-compliance with the Requirements, and whether Cap. 50, Cap. 159 and Cap. 511 would also be amended to provide for sanctions in respect of DNFBPs' non-compliance.

Conclusion

18. Our scrutiny of the legal and drafting aspects of the Bill is continuing. As the Bill seeks to establish a new licensing regime for TCSPs, and to extend the application of the AML/CTF Requirements to DNFBPs, Members may wish to consider forming a Bills Committee to study the Bill in detail.

Prepared by

LOO Chi-pong, Bonny
Assistant Legal Adviser
Legislative Council Secretariat
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