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**Paper for the House Committee**

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

**Purpose**

This paper reports on the deliberations of the Bills Committee on Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 and Companies (Amendment) Bill 2017 ("the Bills Committee").

**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. The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) ("AMLO") was enacted in July 2011 and came into full operation in April 2012 to require financial institutions ("FIs")<sup>1</sup> 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/CTF") regulatory regime championed by FATF. The relevant CDD and record keeping requirements are set out in Schedule 2 to AMLO. Under the CDD measures, FIs are required to identify

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<sup>1</sup> 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 ("FI") refers to (a) an authorized institution under the Banking Ordinance (Cap. 155); (b) a licensed corporation under the Securities and Futures Ordinance (Cap. 571); (c) an authorized insurer, an appointed insurance agent, or an authorized insurance broker under the Insurance Ordinance (Cap. 41); (d) a licensed money service operator (i.e. money changer and remittance agent); (e) the Postmaster General; and (f) a stored value facilities licensee.

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 disciplinary and criminal sanctions.

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

3. Hong Kong's AML/CTF 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 to keep beneficial ownership information.<sup>2</sup> To ensure that the Hong Kong regime is in line with the relevant standards set by FATF, the Government has proposed to address the identified deficiencies by introducing amendments to AMLO and the Companies Ordinance (Cap. 622) ("CO").

4. The Government conducted a two-month stakeholder consultation from January to March 2017 on the legislative proposal regarding AMLO and a public consultation on the legislative proposal regarding CO during the same period. The consultation conclusions for the two consultation exercises were published in April 2017. As suggested in the consultation conclusions, there was broad support for the Government to enhance the AML/CTF regulation in order to fulfill Hong Kong's international obligations under FATF.

### **The Bills**

5. To take forward the legislative proposals in the two consultation exercises, the Government published the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 ("the AML Bill") and the Companies (Amendment) Bill 2017 ("the CO Bill") in the Gazette on 23 June 2017. The two Bills received their First Reading at the Legislative Council ("LegCo") meeting of 28 June 2017.

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<sup>2</sup> Under the Companies Ordinance (Cap. 622) ("CO"), 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 AMLO requires an FI to verify the identity of the beneficial owner in relation to a customer, the FI is not obliged to provide the information gathered to law enforcement agencies except under a court order.

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

6. The AML Bill seeks to expand the scope of AMLO by extending the CDD and record-keeping requirements under Schedule 2 to four sectors of DNFBPs (i.e. legal professionals (covering solicitors and foreign lawyers), accounting professionals, estate agents, and trust or company service providers ("TCSPs")) when they engage in specified transactions,<sup>3</sup> introduce a licensing regime for TCSPs, make certain improvements to AMLO to ensure that it is in line with the latest FATF requirements and to facilitate compliance by the regulatees, and make related amendments to various enactments. The AML Bill, if passed, would come into operation on 1 March 2018 (clause 1(2)).

7. The main provisions of the AML Bill are set out as follows:

- (a) Clause 7 seeks to add a new section 5A to AMLO to provide that the AML/CTF requirements in Parts 2, 3 and 4 of Schedule 2 apply to DNFBPs;
- (b) Clause 8 seeks to amend section 7 of AMLO to allow the Registrar of Companies ("the Registrar") and the regulatory bodies (i.e. The Law Society of Hong Kong ("LSHK"), the Hong Kong Institute of Certified Public Accountants ("HKICPA") and the Estate Agents Authority ("EAA")) to issue guidelines for the purposes of Schedule 2 and to add a new subsection (5A) to provide that section 7 does not prevent LSHK or any other body that has the function of considering whether a legal professional has contravened an AML/CTF requirement from having regard to any practice directions that give guidance about those requirements;
- (c) Clauses 9 to 13 propose to amend sections 9 to 13 of AMLO to extend to TCSP licensees the provisions relating to –
  - (i) entry into business premises for routine inspections;
  - (ii) offences relating to those inspections; and
  - (iii) appointment of investigators, their powers and offences for non-compliance with requirements made by investigators;

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<sup>3</sup> Specified transactions include the buying or selling of real estate management of client money, securities or other assets; management of bank, savings or securities accounts; company formation and management; management of legal persons or arrangements and buying and selling of business entities.

- (d) Clauses 14 to 17 seek to amend sections 24, 30(4) and 43 of AMLO and to add a new section 39A with respect to money service operators ("MSO") to –
- (i) amend the definition of "ultimate owner" by increasing the prevailing minimum percentages for shareholdings and voting rights of controlling persons from not less than 10% to more than 25% to reflect the prevailing FATF standard and international practice;
  - (ii) include all offences under the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) as part of the fit-and-proper test; and
  - (iii) require a licensed MSO to display the licence at the licensed premises and to make non-compliance an offence as well as a ground for disciplinary action;
- (e) Clause 18 seeks to add a new Part 5A to AMLO to provide for the regulation of TCSPs. The main new sections proposed in that Part are as follows –
- (i) section 53B states to whom the Part does not apply;
  - (ii) section 53D requires the Registrar to maintain a register of TCSP licensees, which should be made available for public inspection;
  - (iii) section 53F makes it an offence for a person to carry on a trust or company service business without a licence;
  - (iv) section 53G empowers the Registrar to grant licences and states how to make an application for a licence;
  - (v) section 53H makes the grant of a licence subject to the applicant satisfying the fit-and-proper test and section 53I sets out the elements of the fit-and-proper test;
  - (vi) section 53K provides for the renewal of a licence;
  - (vii) section 53Q empowers the Registrar to revoke or suspend a licence in certain situations and section 53R specifies the procedure for revocation or suspension;

- (viii) sections 53S, 53T and 53U provide that the Registrar's approval is required to hold certain positions in a TCSP licensee after the licence is granted and that it is an offence to do so without that approval, and section 53V states how to apply for approval;
  - (ix) sections 53Z to 53ZD relate to the Registrar's disciplinary powers, including the procedural requirements for exercising disciplinary powers and the Registrar's duty to publish guidelines about the power to impose a pecuniary penalty;
  - (x) sections 53ZE to 53ZF concern entry by authorized officers under a magistrate's warrant to search premises on which there is reason to suspect a trust or company service ("TCS") business is being or has been carried on without a licence;
  - (xi) section 53ZL empowers the Registrar to amend Schedule 3A (which contains the fees payable under Part 5A) and section 53ZM empowers the Registrar to make regulations for the purposes of Part 5A;
  - (xii) section 53ZN creates an offence for giving false or misleading information for various purposes under Part 5A and section 53ZO provides for the time limit for prosecuting a summary offence under Part 5A; and
  - (xiii) section 53ZQ contains transitional provisions applicable to TCSPs who are carrying on business when the licensing requirement in section 53F comes into effect;
- (f) Clauses 19, 20(5), 21 and 22 contain proposed amendments to change the name of the review tribunal established under section 55;
  - (g) Clause 25 seeks to amend Schedule 1 (which contains definitions applicable to AMLO) to add new definitions relevant to the application of the AML/CTF requirements to DNFBPs;
  - (h) Clause 26 proposes to amend Schedule 2, which contains requirements relating to CDD and record-keeping. Most of the proposed amendments are for the purpose of extending those requirements to DNFBPs. The other amendments include –

- (i) amending the definition of beneficial owner in section 1(1) to increase the minimum shareholding from not less than 10% to more than 25% to reflect international standards;
  - (ii) defining who a "pre-existing customer" is in relation to a DNFBP;
  - (iii) adding a definition of "customer" as including a client as it is more common to use the term "client" in relation to DNFBPs;
  - (iv) setting out the means of customer identification and verification for DNFBPs who are accounting professionals, estate agents or legal professionals;
  - (v) amending section 9(b) to reflect technological developments in the methods used by financial institutions for obtaining information relating to customers;
  - (vi) amending section 12 to reflect the current requirements relating to wire transfers in the FATF recommendations;
  - (vii) amending the description of a specified intermediary in section 18(3)(a) to substitute references to three types of DNFBPs; and
  - (viii) amending section 18 to add a related foreign financial institution of an FI to the type of intermediaries through whom an FI can carry out CDD measures;
- (i) Clause 27 seeks to add a new Schedule 3A, setting out fees payable for various matters under Part 5A; and
  - (j) Clauses 29 to 39 contain consequential and technical amendments to other relevant ordinances including the Professional Accountants Ordinance (Cap. 50) ("PAO"), the Legal Practitioners Ordinance (Cap. 159) ("LPO"), and the Estate Agents Ordinance (Cap. 511) ("EAO").

### Companies (Amendment) Bill 2017

8. The CO Bill seeks to amend CO to implement the FATF recommendations on enhancing the transparency of beneficial ownership of companies by requiring companies incorporated in Hong Kong to ascertain the individuals who (and the legal entities which) have significant control over the

companies, and to keep registers of these individuals and legal entities. The CO Bill, if passed, would come into operation on 1 March 2018 (clause 1(2)). The main provisions of the CO Bill are set out as follows:

- (a) Clause 4 seeks to add a new Division 2A to Part 12 of CO to provide for an applicable company's duties to keep a significant controllers register ("SCR"). The following is a brief description of the provisions in the new Division 2A—
  - (i) sections 653A to 653D and sections 653F and 653G provide definitions for certain expressions used in the new Division, such as "applicable company", "law enforcement officer", "registrable person", "registrable legal entity", "significant controller" and "significant controllers register";
  - (ii) section 653E provides for the circumstances under which a person is regarded as having significant control over an applicable company;
  - (iii) section 653H requires an applicable company to keep a SCR and section 653I provides for the contents of SCR;
  - (iv) sections 653J and 653K provide for the entering of certain particulars of a significant controller of the company in the company's SCR. Section 653L provides that in the specified circumstances, certain entries in the SCR may be destroyed after a specified period of time ;
  - (v) sections 653M and section 653N provide for the place at which a SCR may be kept and the giving of a notice to the Registrar in respect of the place for keeping the SCR or any change in the place;
  - (vi) sections 653P, 653Q and 653R set out the requirements for the company to take reasonable steps to ascertain whether there is a significant controller of the company and to issue notices to relevant parties as well as the requirements for such notices;
  - (vii) section 653T imposes a duty on the company to keep the information in its SCR up to date and section 653U sets out the requirements for a notice to be given under section 653T;

- (viii) section 653W provides for the right of a person whose name is entered in the company's SCR to inspect the register and request a copy of it;
  - (ix) section 653X requires an applicable company to make its SCR available for inspection by a law enforcement officer and to permit the officer to make a copy of it. Sections 653Y and 653Z empower the Court of First Instance of the High Court ("Court") to make orders relating to the inspection and making copies of the SCR by a law enforcement officer;
  - (x) section 653ZA imposes a duty on the addressee of a notice given under the new Division 2A to comply with a requirement of the notice made under section 653Q, 653R or 653U;
  - (xi) section 653ZB is a provision on legal professional privilege;
  - (xii) section 653ZC requires an applicable company to designate at least one person to provide assistance relating to the company's SCR to a law enforcement officer;
  - (xiii) section 653ZD empowers the Court to rectify the SCR of an applicable company;
  - (xiv) section 653ZE creates an offence for making any statement or providing any information that is misleading, false or deceptive in a material particular; and
  - (xv) section 653ZG empowers the Financial Secretary ("FS") to make regulations.
- (b) Clause 6 seeks to add three new schedules to CO –
- (i) Schedule 5A sets out the criteria for determining whether a person has significant control over an applicable company;
  - (ii) Schedule 5B provides for certain particulars of a significant controller of an applicable company to be entered in the SCR of the company; and
  - (iii) Schedule 5C sets out the additional matters required to be entered in the SCR of an applicable company.



## **The Bills Committee**

9. At the House Committee meeting on 7 July 2017, Members agreed to form a Bills Committee to study the two Bills. The membership list of the Bills Committee is in **Appendix I**. Under the chairmanship of Mr WONG Ting-kwong, the Bills Committee has held eight meetings to study the two Bills including one meeting to receive views from 21 deputations/individuals. The Bills Committee has also received a total of 25 written submissions. The list of deputations/individuals which have provided views to the Bills Committee is in **Appendix II**.

## **Deliberations of the Bills Committee**

10. The Bills Committee supports the policy objectives of the two Bills and their proposals in general which would align Hong Kong's AML/CTF regulatory regime with international standards as promulgated by FATF and reduce the risk of money laundering and terrorist financing so as to safeguard the integrity of Hong Kong as an international financial centre. The major deliberations of the Bills Committee are summarized in the ensuing paragraphs.

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

- (a) Adoption of a risk-based approach in implementing the statutory CDD and record-keeping requirements on DNFBPs (paragraphs 13 – 15);
- (b) Approach in applying the statutory CDD and record-keeping requirements to legal professionals (paragraphs 16 – 20);
- (c) Scope of DNFBPs under the AML Bill (paragraphs 21 – 22);
- (d) Transactions of DNFBPs that are covered by the requirements in Schedule 2 to AMLO (paragraphs 23 – 25);
- (e) Reliance by DNFBPs on third parties to carry out CDD measures on their behalf (paragraphs 26 – 27);
- (f) The period of record-keeping requirement under AMLO (paragraphs 28 – 29);
- (g) Professional development of TCSPs (paragraphs 30 – 31);

- (h) Persons required to obtain TCSP licences (paragraphs 32 – 35);
- (i) Transitional arrangements for existing TCSPs (paragraphs 36 – 37);
- (j) Cessation of business of licensed TCSPs (paragraphs 38 – 39);
- (k) Pecuniary penalty ordered by the Registrar (paragraphs 40 – 41);
- (l) Permitted disclosure by the Registrar (paragraph 42);
- (m) Approval by the Registrar relating to ultimate owner, partner, or director of a TCSP licensee (paragraph 43)
- (n) Time limit for prosecution of offences on the regulation of TCSPs (paragraphs 44 – 45)
- (o) Threshold for prosecution in offence provisions in the AML Bill (paragraphs 46 – 47)
- (p) Preparation of the Companies Registry ("CR") for implementation of the TCSP licensing regime (paragraphs 48 – 49); and

#### Companies (Amendment) Bill 2017

- (q) Exemptions from the SCR regime (paragraphs 52 – 53);
- (r) Preparation of a SCR (paragraphs 54 – 56); and
- (s) Access to SCRs (paragraphs 57 – 59).

#### Issues relating to Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017

11. Under the AML Bill, CDD and record-keeping requirements specified in Schedule 2 to AMLO now applicable to FIs are extended to legal professionals (consisting of solicitors and foreign lawyers), accounting professionals, estate agents and TCSP licensees when they engage in specified transactions. LPO, PAO, and EAO are amended to enable LSHK, HKICPA and EAA to take disciplinary action under existing regulatory mechanisms against their respective DNFBPs for failure to comply with the CDD and record-keeping requirements. The relevant sanctions include reprimands, civil penalties, suspension from practice or licence revocation.

12. As for the TCSP sector, there is currently no authority in Hong Kong with statutory power to regulate or oversee the business of TCSPs or to assess their suitability for carrying out that business. The AML Bill proposes to establish a licensing regime for TCSPs under the CR. Under the TCSP licensing regime, a TCSP must apply to the Registrar for a licence to carry on a TCS business. 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 new sections 53F and 53G of AMLO). A licence would be granted only if the Registrar is satisfied that the applicant is a "fit and proper" person (proposed section 53H).

*Adoption of a risk-based approach in implementing the statutory customer due diligence and record-keeping requirements on designated non-financial businesses and professions*

13. Some members of the Bills Committee have expressed concern that the AML Bill has not adopted a risk-based approach in applying the statutory CDD and record-keeping requirements to DNFBPs and has not taken into account the different risks and operational needs of DNFBPs. There is concern that the AML Bill may adversely affect the normal operation of DNFBPs and increase their compliance costs.

14. The Government has explained that AMLO is intended to be an overarching, enabling piece of legislation prescribing the general CDD and record-keeping requirements applicable to FIs and DNFBPs in accordance with FATF standards. Following a risk-based approach, Schedule 2 to AMLO sets out CDD requirements applicable in different risk situations. Taking into account the higher risks of FIs as compared to DNFBPs, the AML Bill has not extended to DNFBPs the more stringent sanction mechanism (with both civil and criminal sanctions available for non-compliance with CDD and record keeping requirements) now applicable to FIs under AMLO.<sup>4</sup> Instead, accounting professionals, legal professionals and estate agents would only be subject to the regulatory oversight of their respective regulatory bodies. In the event of non-compliance with CDD and record keeping requirements, they would be subject to the prevailing investigation and disciplinary mechanisms under the respective Ordinances for the professional bodies. Non-compliances with the requirements by DNFBPs would only result in disciplinary sanctions ranging from reprimands, orders for remedial actions, civil fine, and suspension from practice or revocation of licence (as the case may be) instead of criminal

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<sup>4</sup> At present, the maximum criminal sanctions for non-compliances by an FI of the Schedule 2 requirements are a fine of \$1 million and imprisonment of seven years under section 5 of AMLO. Alternative to the criminal route, AMLO empowers relevant authorities of FIs to take a range of disciplinary actions, including public reprimand, remedial orders, a civil penalty not exceeding \$10 million or three times the amount of profit gained or costs avoided as a result of the contravention (whichever is higher) (section 21 of AMLO).

sanctions under AMLO as in the case of non-compliances by FIs. The same risk-based approach would also be adopted for TCSPs. The Registrar would have regulatory oversight of TCSPs and be empowered to investigate any non-compliance with Schedule 2 requirements in relation to TCSP licensees and impose disciplinary sanctions (including public reprimand, remedial order, a pecuniary fine and suspension or revocation of the licence), in line with the maximum level of civil sanction for legal and accounting professionals. Any non-compliance with CDD and record-keeping requirements by TCSP licensees would not attract criminal sanctions under AMLO.

15. The Government has also advised that to facilitate regulatory bodies of DNFBPs in the discharge of their regulatory functions under AMLO, section 7 of AMLO would be amended to enable them to publish sector-specific guidelines to provide guidance in relation to the operation of the requirements in Schedule 2 to AMLO. The Registrar would also have power to issue guidelines to facilitate TCSP licensees in implementing CDD and record-keeping requirements. This would enable the DNFBP sectors to take into account industry-specific considerations when implementing AMLO requirements, and ensure the conduct of CDD measures in a risk-sensitive manner.

*Approach in applying statutory customer due diligence and record-keeping requirements to the legal professionals*

16. Some members of the Bills Committee including Hon James TO, Hon Dennis KWOK, Hon Holden CHOW and Dr Hon Junius HO have pointed out that LSHK has issued Practice Direction P ("PDP") setting out requirements relating to anti-money laundering for all law firms, solicitors and foreign lawyers practising in Hong Kong. Given that PDP has been operating smoothly, these members consider that the legal professionals should be required to follow the requirements in PDP instead of those in Schedule 2 to AMLO. Hon Dennis KWOK and Hon James TO have requested the Government to consider: (a) making amendments to PDP by LSHK so that the requirements therein would fully align with the requirements in Schedule 2 to AMLO or those requirements promulgated by FATF; and (b) introducing amendments to LPO empowering LSHK to enforce the compliance of the legal professionals with the amended PDP.

17. The Government has provided a comparison between Schedule 2 to AMLO and PDP and pointed out that a number of requirements stipulated in Schedule 2 are absent from PDP. While CDD principles and concepts are generally covered in PDP, they fall short of the AMLO requirements in terms of specificity and depth. FATF has required that the principle for FIs and DNFBPs to conduct CDD and maintain records on transactions and information obtained

through the CDD measures must be set out in law.<sup>5</sup> PDP does not have the force of law, and CDD and record-keeping requirements under PDP do not amount to statutory requirements. Specifically, paragraph 11 of PDP specifies that "these guidelines do not have the force of law and should not be interpreted as such". The promulgation of and amendment to PDP are also not subject to the scrutiny of LegCo. Even if amendments were to be made to PDP to align it with the requirements stipulated in Schedule 2 to AMLO or requirements promulgated by FATF, PDP would still not have the force of law. Overseas experience has shown that the absence from the statute of the core FATF principles that legal professionals should observe CDD and record-keeping requirements when they engage in specified transactions has resulted in some jurisdictions failing their FATF mutual assessments. If Hong Kong does not prescribe CDD and record-keeping requirements for legal professionals in the law, it is very likely that Hong Kong will fail the upcoming FATF mutual evaluation scheduled for 2018-2019 which will result in an "enhanced follow-up" process by FATF including frequent reporting and heightened scrutiny by member jurisdictions.

18. The Bills Committee has sought details on the implementation of FATF requirements by DNFBPs in other jurisdictions. The Government has advised that when Singapore was under the FATF mutual evaluation in 2015-2016, its lawyers were subject to statutory CDD and record-keeping requirements,<sup>6</sup> whereas its estate agents and accountants were only subject to administrative guidelines issued by the respective self-regulatory bodies. Singapore received unfavourable ratings in the mutual evaluation for its DNFBP regime. FATF assessors specifically pointed out that, for estate agents and accountants, CDD requirements were only set out in circular or code of ethics but not in law as required by FATF recommendations. After the mutual evaluation, Singapore has taken remedies to improve its regulatory regime. The United States also failed the FATF test due to the absence of statutory CDD requirements for DNFBPs. The United Kingdom ("UK"), which will undergo the FATF mutual evaluation in 2018, already sets out statutory CDD requirements under the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* for independent legal professionals (among other DNFBPs and FIs) to observe when they engage in specified transactions.

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<sup>5</sup> Financial Action Task Force ("FATF") allows specific customer due diligence and record keeping requirements to be set out in enforceable means. In FATF parlance, "enforceable means" refers to regulations, guidelines, instructions or other documents or mechanisms that set out enforceable anti-money laundering and counter-terrorist financing requirements in mandatory language with sanctions for non-compliance, and which are issued or approved by a competent authority. A self-regulatory body that represents a profession and which is made up of members from the profession is not to be regarded as a competent authority according to FATF.

<sup>6</sup> Legal Profession (Prevention of Money Laundering and Financing of Terrorism) Rules 2015.

19. The Government has re-iterated that having regard to the principle of professional self-regulation, the AML Bill has leveraged on the existing regulatory regimes applicable to DNFBPs to enforce the statutory CDD and record-keeping requirements. In the case of legal professionals, LSHK would take on statutory oversight for monitoring and ensuring their compliance with AMLO requirements. Non-compliance with the requirements would be handled in accordance with the prevailing investigation and disciplinary mechanism under LPO governing professional misconduct. To facilitate LSHK in their discharge of regulatory functions in relation to statutory CDD and record-keeping requirements that are applicable to legal professionals, enabling provisions have been built in the AML Bill (proposed amendments to section 7(1) and the proposed new section 7(5A) of AMLO) to the effect that LSHK, as the sole authority for enforcing AMLO requirements for legal professionals, would have the discretion to promulgate guidelines as they consider appropriate in relation to the operation of AMLO Schedule 2 requirements. Moreover, LSHK may have regard to or take into account any practice direction that it issues in providing guidance on the statutory AML/CTF requirements. As for HKICPA and EAA, the Government notes that they are in the process of preparing AML/CTF guidelines on the basis of the requirements in Schedule 2 to AMLO. Given that HKICPA and EAA would be the regulatory bodies and issuing authorities for guidelines under the AML Bill, it is believed that they would ensure consistency between their guidelines and the AML/CTF requirements as set out in AMLO. The Government will continue to liaise with HKICPA and EAA closely to follow through the issue of guidelines.

20. Having considered the views of the Bills Committee and LSHK's submissions on its PDP and regulatory mechanism under LPO, the Government has agreed to introduce Committee Stage amendments ("CSAs") to amend the proposed new section 7(5A) of AMLO to clarify beyond doubt that LSHK has the sole discretion to determine the content of PDP as defined under LPO in providing guidance to legal professionals in relation to the operation of requirements in Schedule 2 to AMLO. CSAs will also be introduced to make consequential amendments to the proposed new section 9A(1AA) and (1AAC) of LPO to clarify that the Council of LSHK must take into account PDP and has the discretion in determining whether a conduct: (a) involves an alleged breach of AML/CTF requirements; and (b) should be inquired into or investigated, before it can be referred to the Solicitors Disciplinary Tribunal Panel for inquiry or investigation.

*Scope of designated non-financial businesses and professions under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017*

21. In FATF's parlance, DNFBPs include casinos, dealers in precious metals and stones ("DPMS"), real estate agents, lawyers, notaries, accountants, and TCSPs. The Bills Committee notes that the AML Bill only covers legal professionals, accounting professionals, estate agents and TCSPs, and has enquired why casinos, DPMS and notaries are not covered. There is a concern that the exclusion may result in regulatory loopholes.

22. The Government has explained that there are no casinos in Hong Kong, and notaries in Hong Kong do not engage in transactions as specified by FATF. As such, these two sectors are not relevant in the present legislative exercise. As regards DPMS, the sector is not covered because cash transactions are no longer common among dealers in Hong Kong as in the old days. According to the Hong Kong Police Force, no dealer had been found linked to or convicted for money laundering offences over the five years between 2010 and 2015. Thus, the sector does not pose insurmountable risks in the overall AML/CTF institutional framework in Hong Kong requiring immediate mitigation. Moreover, currently there is no authority with statutory power to regulate or oversee the business of DPMS. While it takes time to prepare DPMS for undertaking statutory AML/CTF responsibilities, the Government has proposed to cover those DNFBPs sectors that are more ready in the current legislative exercise. This will be a more proportionate and pragmatic response in light of the risk-based approach advocated by FATF. Notwithstanding, the Government has been stepping up education in the DPMS sector to raise the AML/CTF awareness through capacity-building seminars and the issuance of guidelines. The Government will keep in view international development and review the need to subject DPMS to regulation under AMLO in future.

*Transactions of designated non-financial businesses and professions that are covered by the requirements in Schedule 2 to the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance*

23. The proposed new section 5A(3), (4) and (5) of AMLO requires a DNFBP, "in Hong Kong", to prepare for, carry out or be involved in a specified transaction in order for an AML/CTF requirement set out in Schedule 2 to apply to that DNFBP/transaction. The Bills Committee has sought clarification as to whether the provisions would cover DNFBPs' transactions with clients which involve subject matters located overseas. In this regard, Hon James TO has sought clarification on whether the requirement on estate agents to comply with the AML requirements in Schedule 2 to AMLO would have the effect of expanding EAA's power over estate agents to cover agents' transactions with clients concerning the buying or selling of real estate overseas. For instance, an

estate agent may prepare a transaction for a Hong Kong client for buying/selling an overseas property.

24. The Government has pointed out that in relation to a specified transaction set out in the proposed section 5A(3), (4) and (5) of AMLO, "in Hong Kong" qualifies "*prepares for or carries out*" and "*is involved*". As long as the italicised acts take place in Hong Kong, the geographical location of the subject matter of the transaction is immaterial. In the case of estate agents in Hong Kong, they are only required to comply with the AML/CTF requirements in Schedule 2 to AMLO when they are involved in transactions concerning the buying or selling of real estate which take place in Hong Kong. The geographical location of the real estate is immaterial. The Government has added that the definition of "land" under section 2(1) of EAO extends to land outside Hong Kong. The AML Bill seeks to empower EAA to ensure compliance with the AMLO requirements by licensed estate agents and licensed salespersons. The AML Bill requires estate agents to observe statutory CDD and record-keeping requirements when they engage in specified transactions; it does not govern the location of the subject matter of the transactions.

25. Noting the Government's policy intent for the proposed new sections 5A(3), (4) and (5) of AMLO, the Bills Committee has requested the Government to refine the provisions. The Government has agreed to move CSAs to add section 5A(5A) to clarify beyond doubt that it is immaterial whether the subject matter of a transaction under section 5A(3), (4) or (5) is in Hong Kong or elsewhere.

*Reliance by designated non-financial businesses and professions on third parties to carry out customer due diligence measures on their behalf*

26. Clause 26(102) of the AML Bill proposes to remove the sunset clause in section 18(5) of Schedule 2 to AMLO so that FIs can rely on legal professionals, accounting professionals, licensed TCSPs as well as other FIs (including a foreign FI in the same parent group) as intermediaries to carry out CDD measures. The Bills Committee notes that while DNFBPs in some other jurisdictions such as Singapore and the UK are allowed to rely on other qualified DNFBPs as intermediaries to carry out CDD measures on their behalf, there are no similar arrangements in the AML Bill. Some members of the Bills Committee have suggested that similar arrangements be included in the AML Bill. Hon James TO further considers that such intermediaries should include both qualified professionals in Hong Kong and overseas.

27. The Government has advised that it is not common for DNFBPs to rely on other DNFBPs as intermediaries to carry out CDD measures on their behalf. Nonetheless, having regard to the views raised by the Bills Committee, the Government will move CSAs to amend the proposed section 18 in Schedule 2 to



AMLO to allow DNFBPs to rely on intermediaries to carry out CDD measures. The Bills Committee notes that under the proposed CSAs, "specified intermediaries" include qualified professionals both in Hong Kong and in an equivalent jurisdiction.<sup>7</sup> The Bills Committee further notes that despite the provision allowing the conduct of CDD by means of intermediaries, the liability rests with the FIs or DNFBPs concerned. The FIs or DNFBPs concerned have to be satisfied that the intermediaries have adequate procedures in place to prevent money laundering and terrorist financing. For overseas intermediaries, they have to be suitably regulated under the relevant law of their respective jurisdictions.

*The period of record-keeping requirement under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance*

28. The Bills Committee has stressed that Hong Kong should not implement AML/CTF requirements that are beyond FATF recommendations so as to minimize the compliance costs of FIs and DNFBPs and to maintain their competitiveness. Noting that the record-keeping period under AMLO is six years while the corresponding FATF recommendation is at least five years, Hon James TO has urged the Government to reduce the current six-year requirement in AMLO to align with the FATF recommendation.

29. The Government has advised that in respect of the record-keeping requirement, FATF recommends that FIs and DNFBPs should maintain records on customer identification and transactions for "at least five years". In other words, jurisdictions have the discretion to consider the appropriate length of record-keeping in accordance with the risk-based approach provided that the threshold is met. The six-year record-keeping requirement now applicable to FIs under AMLO has been drawn up having regard to FATF recommendations, relevant requirements in other Ordinances as well as views received during public consultations, and has been working smoothly for FIs since the commencement of AMLO in 2012. As AMLO is intended to be an overarching piece of enabling legislation, and its Schedule 2 provides a ready basis for extension to DNFBPs, it is proposed that DNFBPs will be subject to the same record-keeping requirement as FIs. This legislative approach has received general support during the stakeholder consultation. Notwithstanding the above, having regard to the views of the Bills Committee, the Government will introduce CSAs to amend section 20(2) and (3) of Schedule 2 to AMLO to revise the record-keeping requirement from six years to at least five years.

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<sup>7</sup> A jurisdiction other than Hong Kong that is a member of FATF or a jurisdiction that imposes requirements similar to those imposed under Schedule 2 to AMLO.

*Professional development of trust or company service providers*

30. The Bills Committee has enquired why the Government has not considered the suggestion of some deputations to set up a self-regulatory body for TCSPs in lieu of introducing the proposed TCSP licensing regime. Hon CHAN Chun-ying has asked whether, apart from ensuring that TCSP licensees must meet the fit-and-proper test, consideration will be given to including professional registration and prudential requirements on TCSPs such as qualifications, experience, and competency under the TCSP licensing regime so as to enhance the professional development of the TCSP sector in the long run.

31. The Government has explained that the proposed licensing regime for TCSPs is introduced for the purpose of meeting FATF's relevant requirements on AML/CTF and not as a professional registration system for individual practitioners. CR, being a government agency, is better placed to administer the licensing and regulatory regime for TCSPs. Against the above, and in order to minimize the compliance costs of TCSPs, the regime has not included any professional registration requirements. While there is no plan to introduce professional registration or prudential requirements for the TCSP sector in the current legislative exercise, the Government will continue the dialogue with relevant stakeholders on the long-term professional development of the TCSP sector and keep in view implementation of the licensing regime to see if any refinement is required in future.

*Persons required to obtain trust or company service provider licences*

32. The Bills Committee notes that the proposed definition of "trust or company service" in Part 1 of Schedule 1 to AMLO (clause 25(3)) includes the provision in Hong Kong by a person, by way of business, of the service of acting as a trustee of an express trust or a similar legal arrangement. Members of the Bills Committee have sought clarification as to what would constitute providing a TCSP service "by way of business", and whether a person has to obtain a TCSP licence when he acts as the trustee/executor of a trust set up by a relative/friend under a will and contains a charging clause enabling the person to charge for his services.

33. The Government has pointed out that the term "business" according to dictionary meaning is a person's official or professional duties as a whole; one's regular, habitual, or stated profession, trade or occupation; a trade and all activities relating to it, especially considered in terms of volume or profitability, commercial transactions, engagements, and undertakings regarded collectively (Oxford English Dictionary). Similar concepts of "carrying on a business" are adopted in various other Ordinances such as the Banking Ordinance (Cap. 155), the Securities and Futures Ordinance (Cap. 571) ("SFO") and the Business

Registration Ordinance (Cap. 310). According to case law,<sup>8</sup> the question of whether something amounts to the carrying on of a business is a question of fact and degree to be answered upon a consideration of all the circumstances. In considering whether a person is carrying out a TCS by way of business, it is relevant to take into account whether the person:

- (a) undertakes one or more of the activities of a TCSP;
- (b) advertises or publicizes his business activity or receives referrals from other businesses;
- (c) aims to make a profit when he carries out the activity; and
- (d) carries out the activity with reasonable or recognizable continuity.

Therefore, if a person acts as the trustee for a trust, charges for the service, publicizes the service and carries on the activity continuously, it is clear that the person is carrying on a business and needs to obtain a licence. On the contrary, a licence is unlikely to be required if a person accepts a one-off appointment by a friend or relative to act as a trustee of a trust in a personal capacity and with no commercial gain.

34. The Bills Committee also notes that the proposed definition of "trust or company service" covers services of providing a registered office, business address, correspondence or administrative address for a corporation, etc. (paragraph (c) of the definition). Hon James TO is concerned that the definition may cover the provision of post box service to corporations. Thus, providers of such post box service would be required to obtain TCSP licences. Moreover, some non-commercial organizations may also provide post box service to their associated bodies/societies. The requirement for such non-commercial organizations to obtain TCSP licences may be onerous. The Government should consider excluding the provision of post box service from the proposed definition of "trust or company service" unless it is a requirement promulgated by FATF.

35. The Government has pointed out that proposed definition of "trust or company service" in the AML Bill has closely followed the FATF recommendations. Given FATF's requirement relating to paragraph (c) of the definition, anyone who carries on a business in Hong Kong which amounts to the provision of 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 would be required to apply for a TCSP licence from the Registrar in future. No objection from existing operators on

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<sup>8</sup> Lee Yee Shing v CIR [2008] 3 HKLRD 51; SFC v C.L. Management Services Ltd & Another [2016] HKCU 1314.

the proposal was received during the stakeholder consultation. CR would strengthen publicity on the TCSP licensing regime. As a TCSP licence would only be required for providing a TCS "by way of business", the provision of post box service by non-commercial organizations to their associated bodies/societies for non-profit making purpose would not be covered by the definition.

*Transitional arrangements for existing trust or company service providers*

36. The Bills Committee has sought details on the proposed transitional arrangements for existing TCSPs to migrate to the new licensing regime. Hon James TO has suggested allowing existing TCSPs to continue carrying on their businesses until their appeal against the Registrar's decision to refuse granting the TCSP licence has been determined.

37. The Government has explained that under the proposed new section 53ZQ of AMLO, an existing service provider carrying on a TCS business and holding a valid business registration certification is deemed to have been granted a licence ("a deemed licensee") when the AML Bill commences. A service provider who wishes to continue with the business is required to apply for a TCSP licence within 120 days from the commencement of the Bill. The transitional period of 120 days has been extended from the originally proposed 90 days taking into account views received during the consultation in order to further facilitate migration of the existing TCSPs to the licensing regime. As regards cessation of business of a deemed licensee, the Government has clarified that pursuant to the proposed new section 53ZQ(4), if the deemed licensee applies for a licence during the transitional period, the application is not granted and there is an application to review the decision, the deemed licence would continue to have effect until the decision not to grant the licence is confirmed or otherwise varied by the Review Tribunal, or when the application for review is withdrawn (section 75(1)(c) of AMLO).

*Cessation of business of licensed trust or company service providers*

38. Under the proposed new section 53X of AMLO, a TCSP licensee has to notify the Registrar of the cessation of business before the intended date of cessation. The Bills Committee has enquired about the policy objective of the provision. In order to provide certainty to TCSP licensees, the Government should consider specifying the required notification period for the TCSP licensee to inform the Registrar of the intended cessation of business. The Bills Committee has also requested the Government to consider the need of imposing: (a) requirement on TCSP licensees to inform their clients before cessation of business, and (b) restriction(s) on the licensees' business after they have notified the Registrar of the intention to cease business.

39. The Government has explained that the proposed new section 53X is modelled on section 41 of AMLO relating to MSOs. As the Registrar needs to update the Register of TCSP licensees which is available for public inspection and requires the information for administering the licensing regime, TCSP licensees are required to notify the Registrar of the cessation of business before the intended date of cessation. Similar requirement is also found in section 135(1) of SFO relating to a licensed person. Taking into account that the circumstances and reasons for cessation of business will vary from case to case and may not be foreseen beforehand as well as the need to reduce compliance burden, it would be inappropriate to specify a notification period for the cessation of business. As regards restriction of a TCSP licensee's business after the notification of cessation of business, the Government considers that the relationship between the licensee and its clients is commercial and contractual in nature. It is inappropriate to regulate such relationship under AMLO. After receiving the notification of cessation of business, the Registrar will cancel the licence with effect from the intended date of cessation (the proposed new section 53X(2)). A person who carries on a TCS business without a licence commits an offence (the proposed new section 53F). CR will carry out site inspections to ensure compliance with the relevant requirements.

*Pecuniary penalty ordered by the Registrar of Companies*

40. Under section 17A of the Public Finance Ordinance (Cap. 2), any fine or penalty imposed by or under the authority of any Ordinance must be paid into the general revenue ("GR"). However, the Bills Committee notes that a pecuniary penalty received by the Registrar under the proposed new section 53Z(3)(c) and (4) of AMLO would be paid into the Companies Registry Trading Fund ("CR Trading Fund") instead of GR. Some members of the Bills Committee are concerned that under the proposed arrangement, the Registrar's decisions on imposing pecuniary penalty may be influenced by the financial position of CR.

41. The Government has pointed out that section 5 of the Trading Funds Ordinance (Cap. 430) provides that "Notwithstanding any provision of another Ordinance, the income received for the provision of a government service in respect of which a trading fund is established under section 3 is to be paid into the trading fund." It is therefore a matter of policy that, unless otherwise stipulated in legislation, income received for the provision of a government service under a trading fund concerned is to be credited into the trading fund. As the administration and enforcement of the provisions of AMLO regarding TCSP licensees is proposed to be included as services provided by the CR Trading Fund, the related income, including pecuniary penalty, received under the TCSP regime should be paid into the CR Trading Fund for consistency sake. Regarding the Registrar's decisions on imposing pecuniary penalty, pursuant to the proposed new section 53ZB(3) of AMLO, in exercising the disciplinary

power to impose a pecuniary penalty, the Registrar must have regard to the guidelines published by the Registrar, which set out the relevant factors to be considered. The Government has assured the Bills Committee that the financial position of CR would not be a relevant factor and the Registrar's decisions on imposing pecuniary penalty cannot and will not be influenced by the financial position of the CR.

*Permitted disclosure by the Registrar of Companies*

42. The proposed new section 53ZK(1)(d) of AMLO sets out persons to whom information relating to TCSP licensees may be disclosed by the Registrar. Taking on board the views of the Bills Committee, the Government will introduce CSAs to include EAA among such persons because a TCSP and an estate agent may both be implicated in a real estate transaction involving a TCS (e.g. the formation of a company or trust to hold the subject property) and the information gathered by the Registrar about the TCSP may therefore be relevant to EAA's investigations into the transaction under EAO.

*Approval by the Registrar of Companies relating to ultimate owner, partner, or director of a TCSP licensee*

43. The Bills Committee notes that the proposed new sections 53S, 53T and 53U of AMLO seek to make it a criminal offence for a person to become an ultimate owner, partner or director of a TCSP licensee without the Registrar's written approval. There is a concern that the provisions may not prohibit a person from acting (or purporting to act) as an ultimate owner, partner or director of a licensee without the Registrar's written approval. Upon enquiry by the Legal Adviser to the Bills Committee, the Government has clarified that whether a person is an ultimate owner, partner or director is a matter of fact and may not depend on formal appointment. Depending on the circumstances, the prohibited acts under the proposed sections 53S, 53T and 53U could include occupying the position of, or otherwise acting as, a licensee's ultimate owner, partner or director without the Registrar's written approval. The Government has further advised that a TCSP licensee who, without reasonable excuse, allows another person to become its ultimate owner, partner or director without the Registrars' approval may also be liable as a secondary party.

*Time limit for prosecution of offences relating to regulation of trust or company service providers*

44. The proposed new section 53ZO of AMLO provides that, except for an indictable offence, proceedings may be instituted for an offence under Part 5A within 12 months after the offence is discovered by, or comes to the notice of, the Registrar. Hon James TO has enquired why the time limit for prosecution has not been specified as "after the commission of the offence" which is a common

formulation adopted in some ordinances. He considers that the present formulation of the provision uncertain and has requested the Government to refine the provision.

45. The Government has responded that the proposed new section 53ZO is the equivalent provision of existing section 53 which applies to MSOs. There are a number of other legislation (for example, section 34A of the Marriage Ordinance (Cap. 181) and section 43B of the Mandatory Provident Fund Schemes Ordinance (Cap. 485)) in which the time limit for prosecution runs from the date of discovery, or notice, of the offence. The provision is not a new formula. While noting the Government's explanation, Hon James TO indicates that he may consider moving CSAs to state a time limit for prosecution adopting the formulation of "after the commission of the offence".

*Threshold for prosecution in offence provisions in the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017*

46. The Bills Committee notes that the fault element of "causes or allows" is used in provisions relating to the liability of a director of a corporation for a breach of an AML/CFT requirement committed by the corporation in the AML Bill (e.g. the proposed section 13(7) and (8) and 53ZD(1)(b)(i) of AMLO, and consequential amendment to PAO (i.e. the proposed new section 34(1)(a)(xiv)(A) and (xv)(A) of PAO)) and LPO (i.e. the proposed new section 9A(1AAB)(b)(i) of LPO)). Hon James TO has enquired why the more common formulation of "with the consent or connivance" for the liability of directors for offences of a corporation has not been adopted.

47. The Government has pointed out that the liability of a director for causing or allowing a breach by a corporation is a common feature of regulatory regimes involving corporations. Examples are section 31 of the Financial Reporting Council Ordinance (Cap. 588), section 20E of the Waste Disposal Ordinance (Cap. 354) and section 34ZZC of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) and provisions in SFO and CO. The formulation also reflects the Government's policy intent and the threshold it adopts for considering a breach.

*Preparation of the Companies Registry for implementation of the trust or company service provider licensing regime*

48. The Bills Committee has examined the preparation work of CR for implementing the proposed TCSP licensing regime. To enhance the industry's understanding of the licensing regime, in particular, the circumstances under which practitioners are required to obtain TCSP licences, the Bills Committee has urged CR to provide clear guidelines. It is also necessary for CR to develop relevant guidelines to provide guidance to licensed TCSPs in implementing the

statutory CDD and record keeping requirements.

49. CR has advised that it has been making preparation for the TCSP licensing regime including establishing a new TCSP Registry comprising a licensing division and a compliance division for vetting TCSP applications, undertaking inspections and developing the relevant guidelines. CR will leverage on the expertise and experience from the implementation of CO requirements and regulation of companies to administer the TCSP licensing regime. CR is preparing AML/CTF guidelines for practitioners in consultation with the industry and relevant stakeholders, and is prepared to provide the finalized guidelines for LegCo Members' reference.

#### Issues relating to the Companies (Amendment) Bill 2017

50. The CO Bill proposes to add a new Division 2A to Part 12 of CO to introduce a SCR and impose various requirements relating to SCR on an applicable company. An applicable company will be required to keep a SCR which must be kept in either the English or Chinese language at the company's registered office or a prescribed place in Hong Kong. The SCR must contain information on the significant controllers of an applicable company, namely registrable persons<sup>9</sup> and/or registrable legal entities<sup>10</sup> who have significant control over the company. Under the proposed new Schedule 5A to CO, a person has significant control over an applicable company if one or more of the specified conditions are met. These include holding directly or indirectly more than 25% of the issued shares in the company, holding directly or indirectly more than 25% of the voting rights in the company, and having the right to exercise or actually exercising significant influence or control over the company.

51. An applicable company has to take reasonable steps to investigate whether the company has any significant controllers and, if any, to identify each of them. If an applicable company knows or has reasonable cause to believe that a particular person is a significant controller of the company, or the company knows or has reasonable cause to believe that a particular person knows the identity of another person who is a significant controller of the company, the company must give written notice, in accordance with the new Division 2A, to the particular person within seven days. The addressee of the notice must comply with the requirements set out in the notice within one month from the

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<sup>9</sup> Under the proposed new section 653C of CO, "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.

<sup>10</sup> Under the proposed new section 653D of CO, "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) is a member of an applicable company and who has significant control over it.



date of the notice. An applicable company must also ensure that the information contained in its SCR is up-to-date. The company must give written notice, in accordance with the new Division 2A, to the person to whom the registrable change relates within seven days and the addressee of the notice must comply with the requirements set out in the notice within one month from the date of the notice.

*Exemptions from the significant controllers register regime*

52. The definition of "applicable company" under the proposed new section 653A of CO does not include listed companies. The Bills Committee has enquired about the rationale for exempting listed companies from the SCR regime and notes that some deputations have suggested providing exemption to other companies such as companies limited by guarantee.

53. The Government has advised that listed companies are exempt from the SCR regime as they are subject to different and a more stringent disclosure regime on beneficial ownership under SFO. There was no consensus among respondents to the consultation exercise on the CO Bill on providing exemption to other types of companies. There is also no strong justification for providing exemption to companies limited by guarantee. Given the unequivocal intention of FATF to catch legal persons of all forms, carving out the various types of companies will undermine the effectiveness of the disclosure regime and run the risk of subjecting these companies to possible abuse. That said, under the proposed new section 653ZG(1)(a) of CO, FS is empowered to make regulation providing for exemption of a particular type of company, or class of companies, from the new Division 2A should such need arise in future. The Government will exercise this power prudently. Such regulations will be made by subsidiary legislation subject to the negative vetting procedure of LegCo.

*Preparation of a significant controllers register*

54. The Bills Committee has enquired about the reasons for including the proposed new sections 653Q(2)(b) and 653R(1)(b) of CO ("the proposed notice requirements") to require the addressee of the notice issued by a company to provide information on other persons who is a significant controller of the company, and whether the addressee would be provided with immunity from suits when acting in compliance with the proposed notice requirements as such compliance may be in breach of a confidentiality agreement entered into between the addressee and another person/entity.

55. The Government has explained that there are situations where a company may have no idea who the beneficial owners are without making enquiries with third parties and it would be reasonable for a company to find out the identities of possible beneficial owners through third parties in such cases.

Under the proposed new sections 653Q(2)(b) and 653R(1)(b) of CO, if the addressee of the notice knows the identity of another person who is a significant controller of the company, the addressee is only required to provide the specified particulars of such person that are known to the addressee, and state whether or not the particulars are provided with that person's knowledge. In relation to the information on a registrable person that is supplied by a notice addressee without the knowledge of the registrable person, the company must not enter the registrable person's particulars in its SCR until all the required particulars have been provided or confirmed by the registrable person under the proposed new section 653J. On confidentiality, the proposed new section 653ZB provides that in complying with a notice given under the new Division 2A, a person is not required to provide any information to the company that the person would on grounds of legal professional privilege be entitled to refuse to give or provide in legal proceedings. Other than that, an addressee would be required to comply with the proposed notice requirements even if compliance may be allegedly in breach of, for example, a confidentiality agreement.

56. The Bills Committee has enquired about the "reasonable steps" to be taken by applicable companies in identifying their significant controllers and assistance to companies in minimizing their compliance costs. The Government has responded that reasonable steps may include examination of relevant documents kept by an applicable company like its Articles of Association and register of members. In order to assist applicable companies in complying with the various requirements relating to SCR, CR will provide guidelines regarding the keeping of SCR and develop specified forms for use by companies. CR will also launch publicity campaigns and set up an enquiry hotline on the new requirements to enhance the understanding of the public and companies on the new beneficial ownership regime.

#### *Access to the significant controllers registers*

57. Under the proposed new section 653X of CO, an applicable company is required to make available its SCR for inspection upon demand by law enforcement officers. The proposed new section 653B(1) sets out the list of law enforcement officers permitted to inspect SCRs. The Bills Committee notes that while some deputations support allowing inspection of SCRs by law enforcement officers only, some deputations consider that information on the beneficial ownership of companies should be kept in CR's public register and be available for public inspection. These deputations note that it was the Government's original proposal during the consultation on the CO Bill to allow public inspection of SCRs. Some deputations have further suggested that the Government should set up a centralized database on information relating to companies' beneficial ownership to facilitate access by relevant parties in the long run. As regards the list of law enforcement officers under the proposed new section 653B(1) of CO, with a view to facilitating the discharge of functions

relating to companies, Hon Kenneth LEUNG has proposed adding officers of the Labour Department and the Mandatory Provident Fund Schemes Authority to the list.

58. The Government has responded that the majority of the respondents to the consultation exercise supported the proposals of requiring a company to keep the SCR at the company's registered office or a prescribed place in Hong Kong and allowing only competent authorities to access the SCR. The Government is also mindful of the potential compliance burden on companies especially the small and medium enterprises if they have to file regular returns on beneficial ownership information to CR. Having regard to privacy concern, international practices and FATF recommendations, the Government considers it appropriate to restrict access to SCR by law enforcement officers only. On the proposal of pursuing a central database for beneficial ownership information, the Government will keep in view international development and consider the matter further should the need arise in future.

59. As regards the list of law enforcement officers under the proposed new section 653B(1) of CO, the Government has explained that the current list has been carefully crafted to include only officers of CR and those officers who perform functions under the law of Hong Kong that are related to the prevention, detection or investigation of money laundering or terrorist financing matters. To cater for future needs, the proposed new section 653ZG(1)(b) of CO provides that FS may make regulation to specify any other department or agency of the Government, or any other statutory body for the purposes of section 653B(1)(j). The effect will be that an officer of the department, agency or body so specified by FS will also be a law enforcement officer under the proposed new section 653B(1)(j). Such regulation will be subsidiary legislation subject to the scrutiny of LegCo under the negative vetting procedure. The Government will keep in view implementation of the new regime and review the specified list under the proposed new section 653(B)(1) whenever necessary to ensure that it is in keeping with law enforcement needs.

### **Committee Stage amendments to be moved by the Government**

60. Apart from the CSAs explained in paragraphs 20, 25, 27, 29 and 42 above, the Government will move CSAs to introduce minor technical amendments to the AML Bill. The Bills Committee has examined the CSAs to be moved by the Government on the AML Bill and raised no objection. The full set of the draft CSAs is in **Appendix III**. The Legal Adviser to the Bills Committee in relation to the AML Bill has studied the proposed CSAs and confirms that no legal or drafting difficulties have been identified.

61. The Bills Committee will not propose CSAs to the two Bills.

### **Resumption of Second Reading debate**

62. The Bills Committee has no objection to the resumption of the Second Reading debate on the two Bills at the LegCo meeting of 24 January 2018.

### **Advice sought**

63. The Chairman of the Bills Committee made a verbal report on the deliberations of the Bills Committee at the House Committee meeting on 12 January 2018. Members are invited to note the contents of this Report.

Council Business Division 1  
Legislative Council Secretariat  
15 January 2018

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

**Membership list\***

**Chairman** Hon WONG Ting-kwong, GBS, JP

**Members** Hon James TO Kun-sun  
Hon Jeffrey LAM Kin-fung, GBS, JP  
Hon CHAN Kin-por, GBS, JP  
Hon WU Chi-wai, MH  
Hon YIU Si-wing, BBS  
Hon Charles Peter MOK, JP  
Hon Kenneth LEUNG  
Hon Dennis KWOK Wing-hang  
Hon Christopher CHEUNG Wah-fung, SBS, JP  
Dr Hon Elizabeth QUAT, BBS, JP  
Hon CHUNG Kwok-pan  
Hon CHU Hoi-dick  
Dr Hon Junius HO Kwan-yiu, JP  
Hon Holden CHOW Ho-ding  
Hon CHAN Chun-ying

(Total : 16 members)

**Clerk** Ms Connie SZETO

**Legal Advisers** Mr Bonny LOO  
Miss Joyce CHAN

\*Change in membership is shown in Annex to Appendix I.

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

**Change in membership**

<b>Member</b>	<b>Relevant date</b>
Hon Tanya CHAN	Up to 14 December 2017

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

**List of organizations/individual from which the Bills Committee  
has received views**

1. Acota Limited
2. A-Swiss Corporate Services Limited
3. The Chinese Manufacturers' Association of Hong Kong
4. Clifford Chance
5. Ernst & Young Advisory Services Limited
6. Estate Agents Authority
7. Federation of Hong Kong Industries
8. Hatari Express Limited
9. The Hong Kong Association of Banks
10. Hong Kong Chinese Importers' and Exporter' Association
11. Hong Kong General Chamber of Commerce
12. The Hong Kong General Chamber of Small and Medium Business
13. Hong Kong Institute of Certified Public Accountants
14. The Hong Kong Institute of Chartered Secretaries
15. Hong Kong Investment Funds Association
16. Hong Kong Society of Notaries
17. Hong Kong Trustees' Association
18. The Law Society of Hong Kong
19. Oxfam
20. STEP HK Ltd
21. Thomson Reuters
22. Tricor Services Limited
23. Victon Registrations Limited
24. Mr CHIU Ling-cheong Anthony
25. Ms LAM Lau-mei
26. Mr ROGERS Anthony
27. 鄭俊鴻先生
28. A member of public

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

Committee Stage

Amendments to be moved by the Secretary for Financial Services and the Treasury

<u>Clause</u>	<u>Amendment Proposed</u>
7 <sup>1</sup>	<p>In the proposed section 5A, by adding—</p> <p>“(5A) To avoid doubt, for the purposes of this section, it is immaterial whether the subject matter of a transaction referred to in subsection (3), (4) or (5) is in Hong Kong or elsewhere.”.</p>
8 <sup>2</sup>	<p>By deleting subclause (8) and substituting—</p> <p>“(8) After section 7(5)—</p> <p><b>Add</b></p> <p>“(5A) To avoid doubt, in relation to a legal professional, the power to publish guidelines under this section does not affect the sole discretion of the Law Society to determine the content of Practice Direction P as defined by section 9A(3) of the relevant Ordinance in relation to the Law Society.”.</p>
8	<p>By deleting subclause (12).</p>
9(10) <sup>3</sup>	<p>In the proposed paragraph (i), in the English text, by deleting “TSCP” and substituting “TCSP”.</p>

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<sup>1</sup> Having regard to views raised at the last Bills Committee meeting, Clause 7 is to clarify beyond doubt that it is immaterial whether the subject matter of a transaction referred to in section 5A(3), (4) or (5) is in Hong Kong or elsewhere.

<sup>2</sup> Having regard to views raised by the Law Society of Hong Kong (“LSHK”), Clause 8 is to clarify that the LSHK may have regard to or take into account the Practice Direction P in providing guidance on anti-money laundering and counter-terrorist financing (“AML/CTF”) requirements under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (“AMLO”), and that the LSHK has the sole discretion to determine the content of Practice Direction P as defined under the Legal Practitioners Ordinance (“LPO”).

<sup>3</sup> Clause 9 is to amend a typo.



- 18<sup>4</sup> In the proposed section 53ZK(1)(d)(viii), by deleting “or”.
- 18 In the proposed section 53ZK(1)(d)(ix), by deleting “Society;” and substituting “Society; or”.
- 18 In the proposed section 53ZK(1)(d), by adding—  
“(x) the Estate Agents Authority;”.
- 26<sup>5</sup> By adding—  
“(91A) Schedule 2, section 18(1)—  
**Repeal**  
“institution may”  
**Substitute**  
“institution or a DNFBP may”.
- (91B) Schedule 2, section 18(1)(a)—  
**Repeal**  
“institution’s”  
**Substitute**  
“institution’s or the DNFBP’s”.
- (91C) Schedule 2, section 18(1)(b)—  
**Repeal**  
“institution”  
**Substitute**  
“institution or the DNFBP”.
- (91D) Schedule 2, section 18(2)—  
**Repeal**  
“institution”  
**Substitute**

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<sup>4</sup> Having regard to views raised at the last Bills Committee meeting, Clause 18 is to allow the Registrar of Companies to disclose information to the Estate Agents Authority under the proposed new section 53ZK(1) of the AMLO.

<sup>5</sup> Having regard to views raised at the Bills Committee meetings, Clause 26 is (i) to allow designated non-financial businesses and professions to rely on intermediaries to conduct customer due diligence measures; (ii) to cover qualified estate agents in comparable jurisdictions as one of the specified intermediaries for carrying out customer due diligence measures; and (iii) to amend the record-keeping requirement from six years to at least five years.

“institution or a DNFBP”.

(91E) Schedule 2, section 18(3)(a)—

**Repeal**

“institution”

**Substitute**

“institution or the DNFBP”.”.

26 By deleting subclause (92) and substituting—

“(92) Schedule 2, section 18(3)(a)—

**Repeal subparagraphs (i), (ii), (iii) and (iv)**

**Substitute**

“(i) an accounting professional;

(ii) an estate agent;

(iii) a legal professional;

(iv) a TCSP licensee;”.”.

26 By deleting subclause (93).

26 By deleting subclause (94) and substituting—

“(94) Schedule 2, section 18(3)(b)—

**Repeal**

“; or”

**Substitute a semicolon.”.**

26 By adding—

“(94A) Schedule 2, section 18(3)(c)—

**Repeal**

“business in an equivalent jurisdiction,”

**Substitute**

“business in an equivalent jurisdiction, or a person who carries on in an equivalent jurisdiction a business similar to that carried on by an estate agent,”.”.

26 By deleting subclause (96) and substituting—

“(96) Schedule 2, section 18(3)(c)(iii)—

**Repeal**

“authorities.”

**Substitute**

“authorities or the regulatory bodies (as may be applicable);  
or”.”.

26(97) In the proposed section 18(3)(d), by deleting “an institution” and substituting “in the case of a financial institution, an institution”.

26 By adding—

“(98A) Schedule 2, section 18(4)—

**Repeal**

“A financial institution”

**Substitute**

“A financial institution or a DNFBP”.

(98B) Schedule 2, section 18(4)(a)—

**Repeal**

“institution”

**Substitute**

“institution or the DNFBP”.”.

26 By adding—

“(99A) Schedule 2, section 18(4)(b)—

**Repeal**

“institution” (wherever appearing)

**Substitute**

“institution or the DNFBP”.”.

26(101) In the proposed section 18(4)(c), by deleting “if” and substituting “in the case of a financial institution, if”.

26

By adding—

“(102A) Schedule 2, section 18(6)—

**Repeal**

“institution” (wherever appearing)

**Substitute**

“institution or a DNFBP”.

“(102B) Schedule 2, section 18(6)—

**Repeal**

“its”

**Substitute**

“an”.

26(103)

In the proposed section 18(7), by deleting the definition of *intermediary financial institution* and substituting—

“*intermediary financial institution* (中介人金融機構) means a financial institution mentioned in subsection (3)(b);”.

26

By adding—

“(110A) Schedule 2, section 20(2)—

**Repeal**

“6”

**Substitute**

“at least 5”.

(110B) Schedule 2, section 20(3)—

**Repeal**

“6”

**Substitute**

“at least 5”.

34(1)<sup>6</sup>

By deleting the proposed section 9A(1AA) and substituting—

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<sup>6</sup> Having regard to views raised by the LSHK, Clause 34 is to clarify the consequential amendments to the LPO that the Council of the LSHK must take into account Practice Direction P and has the discretion in determining (i) whether

“(1AA) Without limiting subsection (1), where the Council considers that the conduct—

(a) involves an alleged breach referred to in subsection (1AAB)(a) or (b); and

(b) is conduct that should be inquired into or investigated, the Council must submit the matter to the Tribunal Convenor for the purpose of inquiring into or investigating the conduct.”.

34(1) In the proposed section 9A(1AAB), by deleting “(1AA)” and substituting “(1AA)(a)”.

34(1) By deleting the proposed section 9A(1AAC) and substituting—  
“(1AAC) The Council must take into account Practice Direction P when considering whether conduct falls within subsection (1AA) (a) or (b).”.

34(2) In the proposed section 9A(3), by adding in alphabetical order to the proposed definitions—

“***Practice Direction P*** (執業指引 P) means any practice direction issued by the Society for providing guidance in relation to the operation of AML/CTF requirements;”.

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a conduct involves an alleged breach of AML/CTF requirements; and (ii) should be inquired into or investigated before the conduct can be referred to the Solicitors Disciplinary Tribunal for follow-up.