HONG KONG EYES INTERNATIONAL BEST PRACTICES WITH 2018 AMENDMENT TO AML ORDINANCE

Amendments to Hong Kong's Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap 615) (AMLO) and the Companies Ordinance (Cap 622) will come into effect on 1 March 2018 to bring Hong Kong's anti-money laundering and counter-terrorist financing (AML/CTF) regime closer to international standards promulgated by the Financial Action Task Force (FATF), an international AML standard setting body.

BACKGROUND

Later this year, FATF will undertake a long-awaited Mutual Evaluation of Hong Kong's AML/CTF regime. The HKSAR Government has implemented numerous statutory and regulatory changes since the previous FATF Mutual Evaluation, in 2008, and follow-up report, in 2012, both of which cited numerous deficiencies against FATF's international standards. The HKSAR's remedial efforts have included the implementation of the AMLO and more vigorous oversight by regulators such as the Hong Kong Monetary Authority (HKMA) and Securities and Futures Commission (SFC).

According to Legislative Council background briefings, the HKSAR Government identified several areas of legislative deficiencies in anticipation of the upcoming Mutual Evaluation. First, Hong Kong law did not establish customer due diligence (CDD) and record-keeping requirements for designated non-financial businesses and professions (DNFBPs). Second, trustees and companies in Hong Kong were not required to gather and maintain beneficial ownership information of legal entities. Finally, Hong Kong's company registration scheme failed to provide sufficient transparency and access to law enforcement of beneficial ownership information.

The Legislative Council has addressed these deficiencies through the adoption of amendments to the AMLO and Companies Ordinance, both of which take effect on 1 March 2018.

BENEFICIAL OWNERSHIP

The amended Companies Ordinance requires Hong Kong-incorporated companies to obtain and maintain specified information on their beneficial owners in a Significant Controllers Registry (SCR) in English or Chinese that is open to inspection by Hong Kong law enforcement.

Key issues

- Hong Kong-incorporated companies will need to keep a Significant Controllers Register of beneficial owners that will be subject to inspection by Hong Kong law enforcement.
- Legal professionals and other designated non-financial businesses and professions will face new customer due diligence and record keeping requirements similar to those of financial institutions beginning in March 2018.
- Trust or company service providers operating in Hong Kong will require a licence from the Registrar of Companies after satisfaction of a "fit and proper" test, with exemptions for authorized institutions.

A "significant controller" is defined to include:

- a person holding, directly or indirectly, more than 25 percent of a company's issued shares or having rights to more than 25 percent of a company's capital or profits;
- a person holding, directly or indirectly, more than 25 percent of the voting rights of a company;
- a person having the right to appoint or remove a majority of a company's board of directors;
- a person having the right to exercise, or who actually exercises, significant influence or control over a company; or
- a person having the right to exercise, or who actually exercises, significant influence or control over a trust or a firm that is not a legal person, but whose trustees or members satisfy any of the first four conditions in relation to the company.

Each company's SCR must hold the particulars of significant controllers as specified in the new Schedule 5B of the Companies Ordinance. These include, for example, name, address, and identity card number or registration number. Failing to ascertain and maintain an SCR in accordance with the amended Companies Ordinance may result in a fine against the company and each of its responsible persons. (For further information on the changes to the Companies Ordinance, please see our client briefing *Hong Kong Companies Ordinance: The Significant Controllers Register Regime*).

DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS

The amended AMLO introduces AML/CTF compliance requirements for the first time for lawyers, accountants, real estate agents, and trust or company service providers (TCSPs) in Hong Kong, when they are engaged in specified transactions for clients. These requirements apply regardless of whether the subject matter of a transaction is located in Hong Kong or elsewhere.

For lawyers and accountants, these transactions include preparing for or carrying out for a client:

- buying or selling of real estate;
- managing client money, securities, or other assets;
- managing bank, savings, or securities accounts;
- organizing contributions for the creation, operation, or management of corporations,
- creating, operating, or managing legal persons or legal arrangements;
- buying or selling business entities; and
- engaging in trust or company service, as defined in the AMLO.

For estate agents, these transactions include the buying or selling of real estate for a client, as defined in section 2(1) of the Estate Agents Ordinance (Cap 511). For TCSPs, these transactions include preparing for or carrying out a client transaction concerning a trust or company service, as defined in the AMLO.

Under the amended Schedule 2 to the AMLO, the AML/CTF compliance requirements for DNFBPs will include, but are not limited to, conducting due diligence before establishing a business relationship or carrying out occasional transactions valued at HK$120,000 or more, continuously monitoring business relationships for unusual activity, and maintaining records related to transactions and business relationships. The record retention requirement for transactions is for a period of six years beginning on the date on which a transaction is completed. For business relationships, it is a period of six years beginning on the date on which a business relationship ends. The amendment does not alter a DNFBP's existing duty to report suspicious transactions under the Organised and Serious Crimes Ordinance (Cap 455).

With respect to lawyers, the Hong Kong Law Society is given responsibility for enforcing lawyers' compliance with the AMLO and providing guidance for legal professionals. The Law Society announced it will review its existing Practice Direction P in accordance with the amended AMLO.

TRUST OR COMPANY SERVICE PROVIDERS

In addition to requiring TCSPs to adhere to the due diligence and record-keeping requirements of Schedule 2 of the AMLO, the amended AMLO creates a new licensing regime for TCSPs under the direction of the Registrar of Companies. TCSPs will be required to satisfy a "fit and proper" test taking into account factors such as an applicant's criminal and bankruptcy history as well as that of each of the applicant's owners, directors, or partners.

The Registrar of Companies may grant, renew, suspend, or revoke a licence or impose conditions on an applicant and must approve the addition of any new ultimate owner, partner, or director of a licensed TCSP. Licences will be valid for a period of three years or a shorter period where considered appropriate by the Registrar.

The amended AMLO also gives the Registrar of Companies the power to discipline licensees for failing to comply with Schedule 2 of the AMLO through a public reprimand, an order to take remedial actions, or the imposition of a monetary penalty of up to HK$500,000.

The amended AMLO provides exemptions from the TCSP requirements for: (i) the HKSAR Government, (ii) authorized institutions, (iii) licensed corporations that operate a trust or company service business that is ancillary to the corporations' principal business, (iv) accounting professionals, and (v) legal professionals. Additionally, the Secretary for Financial Services and the Treasury may exclude others from the TCSP requirements by regulation.

LOOKING FORWARD

The amendments to the AMLO and the Companies Ordinance are designed to improve Hong Kong's standing with regard to FATF's recommendations and international best practices for combating money laundering and terrorist financing. The success of these initiatives will depend, in part, on regulators' willingness to undertake robust enforcement actions to discourage non-compliance with the new requirements. The amendments come as the SFC highlights money-laundering internal control failures as one of its key enforcement priorities for 2018.

Hong Kong companies that are DNFBPs or TCSPs are recommended to review their current AML/CTF compliance programs and to monitor for guidance or enforcement actions clarifying regulators' expectations in light of the amended AMLO.

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