



By email (aml-consult@fstb.gov.hk)

29 January 2021

Our Ref.: C/AMLTF, M128886

Division 5, Financial Services Branch
Financial Services and the Treasury Bureau
24/F, Central Government Offices
Tim Mei Avenue, Tamar Central
Hong Kong

Dear Sirs,

[Public Consultation on Legislative Proposals to Enhance Anti-Money Laundering and Counter-Terrorist Financing Regulation in Hong Kong](#)

The Hong Kong Institute of Certified Public Accountants (“Institute”) has considered the proposals in the Public Consultation on Legislative Proposals to Enhance Anti-Money Laundering and Counter-Terrorist Financing Regulation in Hong Kong.

Broadly, we support the need to introduce regulation for virtual asset service providers (“VASPs”) and for dealers in precious metals and stones (“DPMS”) under the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615)(“AMLO”), in order to demonstrate Hong Kong’s compliance with Financial Action Task Force (“FATF”)’s Recommendations.

We also agree that a balance needs to be found between having an effective system for tackling money laundering/ terrorist financing (“ML/TF”) risks in the VASP and DPMS sectors and minimising the regulatory burden and compliance costs on the businesses. However, as you will note from our comments on specific questions in the Appendix, in some areas, we believe that the proposals emphasise regulation, including regulation that seems to go beyond the needs of anti-money laundering/ counter-terrorist financing (“AML/CTF”) requirements, over allowing greater flexibility for business to develop.

Given our general position, we do not have strong views on all of the specific questions in the consultation paper and, therefore, we have highlighted only those questions where we have comments.

As regards the miscellaneous technical amendments under AMLO, while we are broadly supportive of the changes, we suggest that the opportunity also be taken to make other changes to set out or clarify in law or guidance certain other relevant matters. These include the following:



- (a) To require that an AML/CTF risk assessment to be conducted prior to launching new products or services, in accordance with FATF Recommendation 15.
- (b) To issue guidance regarding the type and level of officials outside of Hong Kong (within central and provincial governments, state-owned enterprises, etc.) who will be caught by the new definition of “Politically Exposed Person” and those who will not.
- (c) To align the definitions of “beneficial owner” under AMLO and “significant controller” under the Companies Ordinance (Cap. 622).
- (d) To provide further information on regulatory requirements for ongoing monitoring and updating of client information, in terms of, e.g., the frequency of reviews.
- (e) To consider introducing a consequential amendment to the Limited Partnership Fund Ordinance (Cap. 637) (“LPFO”) to make it clear that, where a “responsible person” under the LPFO is from one of the designated non-financial businesses and professions sectors, the relevant regulatory body is the designated DNFBP regulator under Schedule 2 of AMLO.

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

Yours faithfully,

Peter Tisman
Director, Advocacy & Practice Development

PMT/NCL/pk
Encl.



Hong Kong Institute of
Certified Public Accountants
香港會計師公會

Response from the Hong Kong Institute of Certified Public Accountants on the Public Consultation on Legislative Proposals to Enhance Anti-Money Laundering and Counter-Terrorist Financing Regulation in Hong Kong (“CP”)

Q1 - Do you agree that Hong Kong should continue with efforts to strengthen the anti-money laundering and counter-terrorist financing (“AML/CTF”) system having regard to international standards, in keeping with our status as an international financial centre that is safe and clean for doing business?

Yes, we agree. This is necessary in order to comply with the Financial Action Task Force (“FATF”)’s Recommendations.

Q2 - Do you agree that a balanced approach should be adopted for the current legislative exercise, complementing the need to have an effective system for tackling ML/TF risks in the virtual asset service providers (“VASP”) and the dealers in precious metals and stones (“DPMS”) sectors in accordance with FATF Standards, while minimising regulatory burden and compliance costs on the businesses?

We agree an appropriate balance needs to be found.

Chapter 2 – Regulation of VASPs

Q3 - Do you agree with the proposed scope and coverage of the regulated activity of operating a VA exchange?

Q6 - Do you agree that only locally incorporated companies may apply for a VASP licence?

Other than as indicated below, generally, we do not have strong views on the specific proposals for the regulation of VASPs. However, in principle and at this stage, we do not see the need to regulate beyond what is necessary for AML/CTF purposes, and particularly not under the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615)(“AMLO”). For this reason, we do not, for example, see the need to limit VASP licensees to locally incorporated companies (paragraph 2.13 of the CP) or, with reference to paragraph 2.17 of the CP, “for licensed VASPs to be subject to a robust set of regulatory requirements to ensure that they have the capacity and know-how to operate the VA business properly, so as to mitigate the risks posed to investors arising from system failure, security breach or market manipulation.” These proposed regulatory requirements include the following:

- (a) Professional investors only: at the initial stage, a licensed VASP should only be able to offer services to professional investors;
- (b) Financial resources: a licensed VASP should have adequate financial resources, including a paid-up share capital of a specified amount and liquid assets, depending on the nature of its business;
- (c) Knowledge and experience: a licensed VASP and its associated entities should have a proper corporate governance structure staffed by personnel with the necessary knowledge and experience to enable the effective discharge of responsibility;
- (d) Soundness of the business: a licensed VASP and its associated entities (i.e., a separate corporate entity with which the licensed VASP has a controlling relationship) should operate its VA business in a prudent and sound manner, and ensure that client and public interests will not be adversely affected;

- (e) Prevention of market manipulative and abusive activities: a licensed VASP should establish and implement written policies and controls for the proper surveillance of activities on its platform(s) in order to identify, prevent and report any market manipulative or abusive trading activities;
- (f) Prevention of conflicts of interest: to avoid any conflicts of interest, a licensed VASP and its associated entities should not engage in proprietary trading or market-making activities on a proprietary basis. Suitable firewalls should also be instituted between the different functions of the corporate structure to avoid conflict of interests. The licensed VASPs and its associated entities should also have a policy to eliminate, avoid, manage, or disclose actual or potential conflicts of interests for their employees who deal with VAs.

A number of the proposed measures in relation to VASPs appear to be, primarily, investor-protection measures, rather than AML/CFT-focused measures. This is evident from the commentary accompanying some of the above requirements, as well as, e.g., paragraphs 2.26 - 2.27 of the CP. It could be confusing for the public and others stakeholders, if instead of being an ordinance aimed at implementing AML/CTF requirements, AMLO is allowed to evolve into hybrid legislation, for the purposes for AML/CFT and the general regulation of specific types of financial services.

While there may be merit in considering the introduction of a more extensive regime of prudential regulation for VASPs, as a new type of financial service, ideally there should be more focused discussion on the type of regulatory framework suitable for VASPs, independent of AMLO and the requirements relating to AML/CFT. We would contrast the current proposals with the approach adopted in the case of the new framework for the operation and regulation of limited partnership funds, under the Limited Partnership Fund Ordinance (Cap. 637) ("LPFO"), which also need to comply with AML/CFT requirements.

Q7 - Should other criteria be added to the fit-and-proper test given the nature and risks of VASPs?

In relation to the proposed fit-and-proper test, further clarification is needed on what is intended to be covered by taking into account, not only whether a relevant person has failed to observe the AML/CTF or other regulatory requirements applicable to licensed VASPs, but also whether the person "may fail" to observe such requirements. Prima facie, it would be of concern if an individual were to be declined a licence on the basis of what he/she might do, as opposed to what he/she has already done in the past.

Q10 - Do you agree with the exemption arrangement and the 180-day transitional period for application of a VASP licence?

Given the severity of the sanctions for operating an unlicensed VASP business, and in the light of the experience of introducing a licensing regime for trust and company service providers ("TCSPs") (albeit the TCSP market may be much larger, in terms of the number of participants), the government should consider carefully whether 180 days will provide a sufficient transition period. Introducing a "deemed licence" arrangement, as was done, ultimately, in the case of applicants for a TCSP licence could facilitate the transitional arrangements.

Chapter 3 – Regulation of DPMS

Q15 - Do you agree generally with the proposed scope of “regulated activities” and related definitions for DPMS, which draw reference from the FATF requirement and overseas legislation?

Other than as indicated below, generally, we do not have strong views on the specific proposals for the regulation of DPMS.

Q17 - Do you agree with the proposal to have a two-tier registration regime, such that registrants who do not engage in large cash transactions can be separated from those who do, with the former being subject to simple and mere registration requirements and the latter to standard AML/CTF requirements currently applicable to other designated non-financial businesses and professions (“DNFBPs”)?

We consider that there should be measures to ensure that the proposed threshold of HK\$120,000 is not easily circumvented, e.g., to take into account a closely connected series of transactions that amount to HK\$120,000 or above. At the same time, the legislation should not be so sweeping as to catch individuals who may occasionally sell personal items for cash.

As with the proposed fit-and-proper test for VASPs (see under “Q7”, above), further clarification is called for on what is intended to be covered by taking into account, not only whether a relevant person has failed to observe the AML/CFT or other regulatory requirements applicable licensed DPMS, but also whether that person “may fail” to observe such requirements.

Q19 - Do you agree that financial institutions which are already regulated under the AMLO should be exempted from the registration regime when carrying on a DPMS business that is ancillary to their principal business?

We agree with this proposal provided that, in practice, the regulatory authorities of financial institutions that carry on a DPMS business ancillary to their principal business clearly monitor this aspect of financial institutions’ business for AML/CTF purposes.

Q21 - Do you agree with a 180-day transitional period and the deemed registration arrangement for incumbent dealers to facilitate their migration to the registration regime?

As mentioned in relation to the proposed transitional period for VASPs (see under “Q10” above), given the experience of introducing a licensing regime for TCSPs, the government should consider carefully whether 180 days will provide a sufficient transition period, unless the intention is to introduce a “deemed licence” arrangement, as in the case of applicants for a TCSP licence.

Q22 - Do you think the proposed sanction is adequate in deterring the operation of a DPMS business without registration?

While we agree that the Registrar should be able to request production of records or documents from Category A registrants, to ensure that they do not unlawfully engage in specified transactions, we have some reservations as to whether the Registrar should be empowered to routinely enter their premises for inspection purposes, without suspicion of any wrongdoing (paragraph 3.19 of the CP). This could be seen as being out of step with the statement in paragraph 3.10 of the CP that “*the objective of establishing Category A is to enable the Registrar to maintain an up-to-date understanding of the overall landscape of the sector, without placing any undue regulatory burden on the DPMS concerned.*”

Chapter 4 – Miscellaneous Amendments

Q25 - Do you agree with the miscellaneous amendments proposed by the Government to address some technical issues identified in the Mutual Evaluation Report and other FATF contexts?

Generally, we agree with the proposed miscellaneous amendments with the additional comments set out below.

Politically Exposed Persons

Regarding Politically Exposed Persons (“PEPs”), while the Institute’s [Guidelines on Anti-Money Laundering and Counter-Terrorist Financing for Professional Accountants](#) currently require a risk assessment to be carried out for “domestic” PEPs, this proposed amendment, while necessary to comply with the FATF Recommendations, will impose a heavier regulatory burden on financial institutions and DNFBPs. Given the prevalence and size of the government and state-owned sector in the Mainland, in particular, and the extent of cross-boundary business, we would urge the government to issue more guidance regarding the type and level of officials (within the central and provincial governments, state-owned enterprises, etc.) who will be caught in the new definition and those who will not. We would also recommend that regulated entities be given sufficient lead time to modify their systems, policies and procedures.

We agree with the proposal to allow a risk-based approach to be adopted in relation to former PEPs. Clear definitions should be provided in relation to, e.g., whether this will apply to someone who ceased being a PEP several years ago in the same way as to someone who has only just retired.

Beneficial ownership of trust

In addition to aligning the definition of “beneficial owner” of a trust under the AMLO with that of “controlling person” of a trust under the Inland Revenue Ordinance (Cap.112), we suggest that the definition of “beneficial owner” generally under the AMLO and that of “significant controller” under the Companies Ordinance (Cap. 622) should be aligned with one another, for the same reason, that is, both mean to implement the same concept of beneficial ownership originating from the FATF standards.

Non-face-to-face situations

The proposal to amend section 9 of Schedule 2 to AMLO, to add the use of independent and reliable digital identification systems for customer identification and verification purposes, where a customer is not physically present, as a permissible way to satisfy the requirements under section 9, will provide more flexibility and should be welcomed by financial institutions and DNFBPs. We suggest that more information or guidance be provided in due course on what constitutes “independent and reliable digital identification systems”.

Other issues

We would suggest that while amending AMLO the opportunity should be taken to consider setting out or clarifying in law, or guidance certain other relevant matters, including the following:

- To require that an AML/CTF risk assessment be conducted prior to launching new products or services, in accordance with FATF Recommendation 15. This is regarded as a significant requirement by FATF, and is one of the specific measures highlighted in

“Immediate Outcome 4.4” in the FATF’s [*Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems*](#), i.e., effective implementation is considered to be important in order for FATF members to demonstrate full compliance with Recommendation 15.

- To provide further information on regulatory requirements or expectations for ongoing monitoring and updating of client information, in terms of, e.g., the frequency of reviews.
- To consider introducing a consequential amendment to the LPFO, which requires a limited partnership fund to appoint a “responsible person” that is a financial institution or a DNFBP regulated for AML/CFT. Section 34 of the LPFO cross-refers to AMLO, so as to apply the requirements of Schedule 2 of the AMLO to a responsible person. To make clear that the responsible person is also subject to the oversight of the appropriate regulator under the AMLO, section 34(2)(c) of LPFO indicates that a reference to a “relevant authority” in Schedule 2 of AMLO is -
 - for a responsible person that is an authorized institution—a reference to the Monetary Authority; or
 - for a responsible person that is a licensed corporation—a reference to the Securities and Futures Commission

However, there is no corresponding cross-reference to the relevant “regulatory bodies” in Schedule 2 of AMLO, to make it clear that, where a “responsible person” is from one of the DNFBP sectors, the relevant regulatory body is the designated DNFBP regulator under Schedule 2 of AMLO (see the Attachment).

Hong Kong Institute of CPAs
29 January 2021

34. Schedule 2 to Cap. 615 has effect with respect to responsible person

- (1) Schedule 2 to Cap. 615 has effect with respect to a responsible person of a limited partnership fund.
- (2) For subsection (1)—
 - (a) a reference to a financial institution in Schedule 2 to Cap. 615 is a reference to a responsible person that is—
 - (i) an authorized institution; or
 - (ii) a licensed corporation;
 - (b) a reference to a DNFBP in that Schedule is a reference to a responsible person that is—
 - (i) an accounting professional; or
 - (ii) a legal professional;
 - (c) a reference to a relevant authority in that Schedule is—
 - (i) for a responsible person that is an authorized institution—a reference to the Monetary Authority; or
 - (ii) for a responsible person that is a licensed corporation—a reference to the Securities and Futures Commission; and
 - (d) a reference to a customer in that Schedule is a reference to a customer of the fund (including a limited partner in the fund).