

New Anti-Money Laundering and Counter-Terrorist Financing regulations



Mazars Hong Kong, April 2012

BUCKLE UP AND DON'T BE A VICTIM IN THE NEW ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING REGULATIONS!

It sounds like a cliché but is somehow true that “what you don’t know can hurt you”. Players in the finance industry in Hong Kong now need to be very conscious of their roles under the new anti-money laundering (“AML”) and counter-terrorist financing (“CFT”) regulations, since failure to comply with these may lead to criminal prosecution and financial penalties.

Conformity with the Financial Action Task Force (“FATF”) FATA Standards

In July 2008, FATF issued its third mutual evaluation report on the AML/CFT regime of Hong Kong with reference to the Forty Recommendations 2003 and the Nine Special Recommendations on Terrorist Financing 2001 of the FATF. This report recognized the strengths of Hong Kong’s AML/CFT regimes but also identified areas requiring improvements, in particular, in customer due diligence and record-keeping; AML/CFT requirements on remittance agents/money changers; and also statutory criminal and supervisory sanctions in combating money laundering/terrorist financing (“ML/TF”).

Anti-Money Laundering and Counter-Terrorist Financing (Financial institutions) Ordinance (“AMLO”)

In response to the recommendations of the FATF, the Hong Kong Government has enacted the AMLO which became effective on 1 April 2012. The AMLO has codified, among others, the requirements relating to customer due diligence (“CDD”) and record-keeping for financial institutions (“FIs”). It also empowers the Hong Kong relevant authorities (“RA”) to supervise FIs. It imposes supervisory and criminal sanctions on breaches or non-compliance with the requirements. It applies to licensed corporations (“LCs”), authorized institutions, insurers, insurance agents and brokers, remittance agents and money changers in Hong Kong.

The AML/CFT Guideline 2012

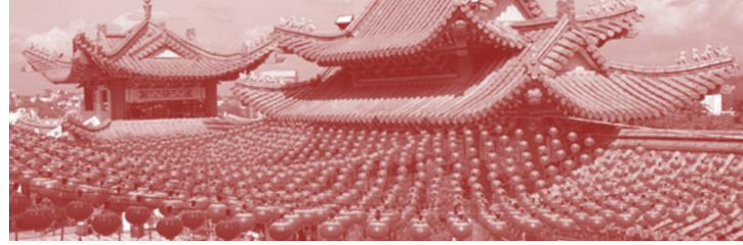
The RAs, including the Hong Kong Monetary Authority, the Securities and Futures Commission (“SFC”) and the Office of the Commissioner of Insurance, have issued relevant AML/CFT guidelines to assist their registrants to meet the new AML/CFT requirements.

For the purpose of the discussion below, I will focus on the AML/CFT Guideline 2012 (“the AML Guideline 2012”) which was issued by the SFC in January 2012, after consultation with the public. The AML Guideline 2012 also became operative on 1 April 2012, in line with the AMLO. It superseded the Prevention of Money Laundering and Terrorist Financing Guidance Note (“AMLGN”) which was issued by the SFC in 2009.

The AML Guideline 2012 does not have the force of law, but a failure to comply with any of the requirements by Licensed Corporations or their licensed representatives may reflect adversely on their fit and proper status and may be considered as misconduct.

I have made a comparison of the major differences between the AML Guideline 2012 and the AMLGN on the requirements on CDD, record keeping and staff training in Exhibit A for easy reference.

Key AML / CFT Requirements



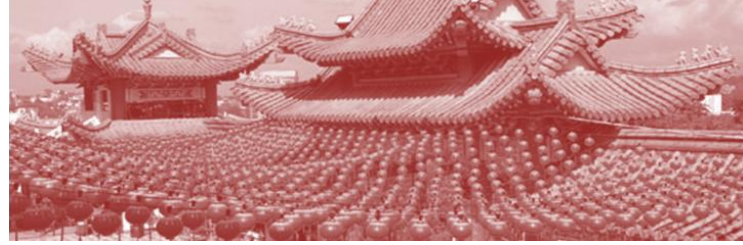
What does the implementation of the AMLO and the AML Guideline 2012 mean to senior management of an FI?

Specifically, senior management should ensure that the key AML/CFT requirements of the AML Guideline 2012, including the following are met:

- Proper AML/CFT policies and procedures have to be established and kept up-to-date
- Adequate and effective AML/CFT systems and controls have to be put in place
- CO and MLRO have to be appointed to oversee and monitor AML/CFT related matters
- Appropriate Customer Due Diligence has to be implemented
- Risk-based Approach should be adopted as appropriate
- Identification and Reporting of Suspicious Transactions should be properly implemented and monitored
- Records should be kept for 6 years
- Staff Screening, Education and Training should be strengthened

Senior management should appoint a compliance officer (CO) and a money laundering reporting officer (MLRO) to ensure that the FI's AML/CFT systems are capable of addressing the ML/TF risks of the FI. Senior management should, as far as practicable, ensure sufficient seniority, authority, competence, resources, access to all available information and independence of the CO and MLRO in order that they can discharge their responsibilities effectively.

Personal Criminal Liability for Non-Compliance



What happens if an FI and its employees fail to comply with the AMLO?

If a FI knowingly contravenes a specified provision of the AMLO, the FI commits an indictable offence and is liable on conviction to imprisonment of up to 2 years and a fine of up to HK\$1 million. If an FI with intent to defraud any RA, contravenes a specified provision, it is liable on conviction on indictment to imprisonment of up to 7 years and a fine of up to HK\$1 million.

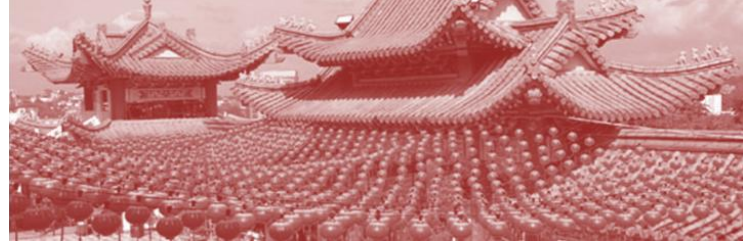
Similarly, if a person who is an employee of an FI or is employed to work or is concerned in the management of an FI knowingly causes or knowingly permits the FI to contravene a specified provision, such person commits an offence and is liable on conviction on indictment to imprisonment of 2 years and a fine of HK\$1 million. If that person does so with intent to defraud the FI or any RA, he is liable on conviction on indictment to imprisonment of 7 years and a fine of HK\$1 million.

Accordingly, personal criminal liability is imposed on FIs, senior management and also on employees of FIs to perform proper CDD and implement proper record keeping requirements.

Defence for employee: It is a defence for the employee to prove that he or she has acted in accordance with the policies and procedures established and maintained by the FI.

On top of this, the RA will no doubt take appropriate disciplinary actions including reprimand, suspension or revocation of licences against the licensed corporations and its licensed representatives.

Are You and Your Company At Risk?



Is the implementation of AMLO and the AML/CFT Guideline a benefit or a burden to you and your company?

It is important to note that inadequate AML/CFT systems will expose you and your company to immense regulatory risks. Understanding the implications of the AMLO and the AML/CFT guideline is crucial toward establishing good AML/CFT policies, procedures and controls which will certainly assist FIs to control regulatory risks. In addition, establishing proper policies and procedures can also provide your employee with a defence in case of a breach of the AMLO, if he/she can prove that policies and procedures of the FI have been followed.

In addition, it is important to learn the techniques of using appropriate monitoring tools to perform AML/CFT risk assessments so as to identify the not-so obvious ML/CF risks that may do the most damage to you and your company.

AML/CFT training is crucial to demonstrate that you have trained your staff members in “what they need to do to carry out their roles in the FI” in respect of AML/CFT. Different training requirements would be necessary for new staff/front office/back office and the MLRO. Further, AML/CFT training records should be kept for a minimum of 3 years.

To avoid becoming a victim to the AML/CFT new requirements, I encourage you and your company to take immediate actions to put in place appropriate AML/CFT systems and controls, in particular policies and procedures, customer due diligence, record keeping and AML/CFT training to meet the stringent new AML/CFT requirements without delay.



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April 2012, Hong Kong

The contents of this publication are for reference purposes only. They do not constitute legal advice.

Please contact Ms Annie Chan at annie.chan@mazars.com.hk for further information about the new AML/CFT regulatory requirements or should you need any assistance.

Appendix A



Highlights of Major Differences between the AML/CFT Guideline 2012 and the AMLGN, both issued by the SFC:

Major Differences in:	The AML Guideline 2012	AMLGN
(1) Verification of a beneficial owner to a trust or corporation	<p>Paragraph 4.3.5</p> <p>To take reasonable measures to verify the identity of any beneficial owners owning or controlling:</p> <ul style="list-style-type: none"> - 25% or more of the voting rights or shares (for normal risk situation) - 10% or more of the voting rights or shares (for high risk situation) 	<p>Paragraph 6.4.1</p> <p>To verify the identity of any beneficial owners owning or controlling:</p> <ul style="list-style-type: none"> - 10% or more of the voting rights or shares
(2) Identification and verification of a person purporting to act on behalf of the customer	<p>Paragraphs 4.4.1 to 4.4.4</p> <ul style="list-style-type: none"> - must identify and verify the identity of any person purporting to act on behalf of the customer and should obtain written authority to verify that the individual purporting to represent that customer. - may adopt a risk-based approach in determining the appropriate measures in case of encountering difficulties in identifying and verifying long lists of account signatories. 	<p>Paragraph 6.4.1(e)</p> <ul style="list-style-type: none"> - should obtain copies of identification documents of at least 2 authorized persons.
(3) Failure to complete verification of identity	<p>Paragraph 4.7.8</p> <p>Verification of identity should be concluded within a reasonable timeframe. Examples of reasonable timeframe are:</p> <ul style="list-style-type: none"> - completing verification no later than 30 working days after the establishment of business relationship; - suspending business relations if such verification remains uncompleted 30 working days after the establishment of business relationship; and - terminating business relations if such verification remains uncompleted 120 working days after the establishment of business relationship. 	<p>Paragraph 6.1.10</p> <p>Adoption a clear and appropriate policies and procedures concerning the conditions and timeframe under which a customer is permitted to establish the business relations prior to verification. The LC or associated entity should discontinue the business relationship with the customer if it is unable to perform the CDD process satisfactorily within a reasonably practicable timeframe.</p>
(4) Identification information for corporate customers	<p>Paragraph 4.9.9</p> <ul style="list-style-type: none"> - should record the names of all directors and verify the identity of directors on a risk-based approach. <p>Paragraph 4.9.11</p> <ul style="list-style-type: none"> - must obtain a company report for a Hong Kong incorporated company; or - must obtain a similar company search enquiry, a certificate of incumbency or a similar/comparable document to a company search report for an overseas incorporated company. 	<p>Paragraph 6.4.1(f)</p> <ul style="list-style-type: none"> - should obtain copies of identification documents of at least 2 directors (including the managing director). <p>Paragraph 6.4.4</p> <ul style="list-style-type: none"> - is advisable to make a company search or credit reference agency search for high risk customer.
(5) Politically exposed persons ("PEPs")	<p>Paragraphs 4.13.3 and 4.13.11</p> <p>Separate requirements for foreign and domestic PEPs:</p> <ul style="list-style-type: none"> - should apply enhanced due diligence ("EDD") to PEPs outside the People's Republic of China; and - should adopt a risk-based approach to determine whether to apply EDD for domestic PEPs. 	<p>Paragraph 6.9.1</p> <ul style="list-style-type: none"> - should apply EDD to both foreign and domestic PEPs.
(6) Record retention period	<p>Paragraphs 8.4 and 8.6</p> <ul style="list-style-type: none"> - requires to keep CDD documents and records as mentioned on paragraph 8.3 for at least 6 years after the account is closed. - requires to keep the documents/records on transactions for at least 6 years after the transaction is completed. 	<p>Paragraph 8.1</p> <ul style="list-style-type: none"> - requires to keep records on customer identification, account files and business correspondence for at least 5 years after the account is closed. - requires to keep all necessary records on transactions, both domestic and international, for at least 7 years.
(7) Staff training	<p>Paragraphs 9.1 to 9.9</p> <ul style="list-style-type: none"> - should train staff members in what they need to do to carry out their roles in the FI with respect to AML/CFT. - should monitor and maintain staff training records for a minimum of 3 years. 	<p>Paragraphs 11.3 to 11.6</p> <ul style="list-style-type: none"> - must provide proper AML/CFT training to their local and overseas staff members. Staff members should be aware of their own personal obligations under the DTROP, the OSCO and the UNATMO. - should have educational programmes in place for training all new employees.

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