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SFC consultation conclusions on proposed anti-money laundering and counter-terrorist financing guidelines

On 30 September 2011, the Hong Kong Securities and Futures Commission (SFC) issued a consultation paper, launching a seven-week consultation, on proposed guidelines regarding anti-money laundering and counter-terrorist financing (the Consultation Paper). The guidelines were drafted to implement the new Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (AMLO), which will come into effect on 1 April 2012. Please refer to our previous briefing on the Consultation Paper (31 October 2011).

Introduction

On 27 January 2012, the SFC issued its consultation conclusions on the proposed guidelines (the Conclusions), the final form of the Guideline on Anti-Money Laundering and Counter-Terrorist Financing (the Guideline), as well as the related Prevention of Money Laundering and Terrorist Financing Guideline for Associated Entities, both of which will come into effect at the same time as the AMLO. The majority of the proposals contained in the Consultation Paper have been adopted in the Guideline. However, there are some helpful modifications and amendments which take into account responses received during the consultation process. In particular, the SFC has stressed that the Guideline follows a principles-based approach, and has removed some of the more prescriptive provisions.

Persons purporting to act on behalf of a customer

Under section 2(1)(d) of Schedule 2 to the AMLO, financial institutions (FIs) are required to identify all persons purporting to act on behalf of customers, and take reasonable measures to verify their identity and verify their authority to act on behalf of the customers.

The SFC has accepted that it will be burdensome for FIs to fulfil this requirement especially for customers with a long list of authorised signatories or overseas customers. The Guideline has been revised to allow FIs to adopt a more streamlined approach based on a risk-based determination. For instance, in lower risk situations, the provision of a long signatory list, recording the names of the account signatories, whose identities and authority to act have been confirmed by a department or person within that customer which is independent of the persons whose identities are being verified, may be sufficient to demonstrate compliance.

Key issues

- Persons purporting to act on behalf of a customer
- Company search and certificate of incumbency
- Accounts opened by fund distributors, managers or custodians
- CDD on investment vehicles
- Identification and verification of directors
- Identification information for natural persons
- Periodic review
- Compliance officer and money laundering reporting officer
- Record keeping

Company search and certificate of incumbency

It was proposed in the Consultation Paper that FIs be required to perform a company registry search and obtain a company search report as part of the customer due diligence (CDD) process for (i) all non-listed companies incorporated in Hong Kong; and (ii) all companies incorporated in a jurisdiction that has a public company registry. For companies incorporated in a jurisdiction that does not have a public company registry or has only a partially public registry, FIs would have been required to obtain a certificate of incumbency or equivalent issued by the company's registered agent in the place of incorporation.

Most respondents objected to a mandatory requirement to perform a company search for all companies. Concerns were raised that the compliance costs might outweigh the benefits any search would provide; and certificates of incumbency issued by a registered agent might not be available in some jurisdictions or for some newly established companies.

The SFC has decided to relax this requirement for overseas companies, although the performance of a company search will be mandatory for companies incorporated in Hong Kong. For companies incorporated overseas, the Guideline has been amended to allow FIs to either:

(a) perform a similar search enquiry of the registry in the place of incorporation and obtain a company search report;

(b) obtain a certificate of incumbency or equivalent issued by the company's registered agent in the place of incorporation; or

(c) obtain a similar or comparable document to a company search report or a certificate of incumbency certified by a professional third party in the relevant jurisdiction.

To further ameliorate cost concerns, the Guideline has been revised to allow FIs to accept:

(a) a certified true copy of the company search report certified by a company registry or professional third party; or

(b) a certified true copy of a certificate of incumbency certified by a professional third party,

provided that the company search report or certificate of incumbency has been issued within the last six months.

The Guideline has also been revised to make it clear that the company search requirement does not apply in respect of a customer eligible for simplified customer due diligence (SDD), and that an FI is not required to obtain from the customer any information that it has already obtained through the company search.

Accounts opened by fund distributors, managers and custodians

To cater for the particular circumstances of the fund distribution business, the Consultation Paper provided that an FI may treat a fund distributor that opens an account in the name of a nominee company for holding fund units as the customer of that FI, rather than treating the nominee company as customer.

Following comments received, the SFC has extended this principle to business relationships where a service provider to an investment vehicle (such as a manager or custodian) opens an account with an FI in the name of the investment vehicle, and the underlying investors have no control over the management of the investment vehicles assets. The Guideline now makes clear that in this case the service provider, not the investment vehicle, would be regarded as the customer of that other FI.

CDD on investment vehicles

As proposed in the Consultation Paper, FIs may apply SDD to a customer that is an investment vehicle if the person responsible for carrying out CDD measures in relation to all the investors of the investment vehicle falls within any of the categories of institution set out in section 4(3)(d) of Schedule 2 to the AMLO, e.g. institutions established in Hong Kong or an equivalent jurisdiction that have measures to ensure compliance with CDD requirements similar to the CDD requirements under the AMLO.

A specific query was raised during the consultation process as to whether FIs could apply SDD to investment vehicles in the scenario where the investment vehicles were under a legal obligation to carry out CDD measures but had delegated the performance of such measures to fund administrators which did not fall within any of the categories of institution set out in section 4(3)(d) of Schedule 2 to the AMLO.

A footnote has been added in the final Guideline to make it clear that if the

investment vehicle is required by the relevant governing law or enforceable regulatory requirements to implement CDD measures, then the investment vehicle itself can be regarded as the responsible party for carrying out the CDD measures for the purposes of section 4(3)(d) of Schedule 2 to the AMLO where the investment vehicle meets the requirements, as permitted by law, by delegating or outsourcing the CDD to an appointed institution.

This means that in many cases, Hong Kong-based fund managers or investment advisors will only be required to conduct SDD in respect of the investment vehicles they service, and do not have to ascertain the identity of the beneficial owners of the investment vehicles, i.e. the fund investors.

Identification and verification of directors

It was proposed in the Consultation Paper that FIs should identify and record the identity of all directors and verify the identity of at least one director.

The SFC has accepted that it is not practical to comply with this requirement. FIs are now only required to record the names of all directors of a corporate customer, and to verify the identity of directors only if a risk-based approach so requires.

Identification information for natural persons

Under paragraph 4.8.1 of the draft Guideline, FIs would have been required to collect identification information (e.g. name, residential address, date of birth, nationality, identity document type and number) in respect of personal customers and other natural persons, including connected parties of a legal person, who needed to be identified. "Connected parties" was defined to include any director, shareholder, beneficial owner, signatory, etc.

Many respondents raised concerns that the requirement had significant practical impact given the considerable number of natural persons caught and the feasibility of obtaining all identification information for all types of connected parties.

In view of the concerns raised, the Guideline has been revised so that identification information generally only needs to be obtained in respect of the personal customers themselves. However, information on connected parties of legal persons may have to be obtained as part of the identification of beneficial owners, or in high-risk situations, for example.

Periodic review

In various instances, the Guideline contains references to the requirement to undertake periodic reviews of the AML assessment conducted.

Although requested by some respondents, the SFC declined to specify a minimum review cycle, except where the customer is a high risk customer, where an annual review cycle is required as a minimum. For other customers, FIs should determine the appropriate period of review based on risk factors that are defined in their policies and procedures.

Compliance officer and money laundering reporting officer

Each FI must appoint a Compliance Officer and a Money Laundering Reporting Officer. The function of the Compliance Officer is to act as the focal point within an FI for the oversight of all activities relating to the prevention and detection of money laundering or terrorist finance and providing support and guidance to the senior management to ensure that such risks are adequately managed. The Money Laundering Reporting Officer's task is to act as liaison for the reporting of suspicious transactions to the Joint Financial Intelligence Unit (JFIU), conduct reviews of internal disclosures and exception reports to determine whether a JFIU report needs to be made, and provide guidance to staff to avoid "tipping off" a customer in case a report is made. Both the Compliance Officer and the Money Laundering Reporting Officer should normally be based in Hong Kong, but the functions can be carried out by the same person.

Record keeping

FIs must keep records relating to customer identity and transactions throughout the business relationship with the customer and for a period of six years after the end of the business relationship.

Records demonstrating staff training given must be kept for a minimum of three years.

Contacts

Martin Rogers

T: +852 2826 2437

E: martin.rogers@cliffordchance.com

Mark Shipman

T: +852 2825 8992

E: mark.shipman@cliffordchance.com

James Wadham

T: +852 2825 8837

E: james.wadham@cliffordchance.com

Paget Dare-Bryan

T: +852 2826 2459

E: paget.darebryan@cliffordchance.com

Donna Wacker

T: +852 2826 3478

E: donna.wacker@cliffordchance.com

Lisa Chen

T: +852 2826 2438

E: lisa.chen@cliffordchance.com

Matt Feldmann

T: +852 2825 8859

E: matthias.feldmann@cliffordchance.com

Clifford Chance, 28th Floor, Jardine House, One Connaught Place, Hong Kong

www.cliffordchance.com