

Financial

Highlights of the Second Draft of the PRC Anti-Money Laundering Law

Following the submission in April 2024 of the Anti-Money Laundering Law of the People's Republic of China (Revised Draft) ("First Draft") to the Standing Committee of the 14th National People's Congress for initial review, on September 13, 2024, the 11th Session of the Standing Committee of the 14th National People's Congress conducted a second review of the Anti-Money Laundering Law (Revised Draft for Review) (the "Second Draft"). It will solicit public comment until October 12, 2024. The proposed amendments in the Second Draft have the following notable highlights: it emphasizes the principles of proportion, accuracy and precision of anti-money laundering measures to strike a balance between financial institutions' management of money laundering risks and the optimization of their financial services, aiming to minimize the impact on legitimate financial activities, and emphasizes the need to respect and protect individual privacy.

Below is a brief analysis of the proposed revisions.

1. The Principle of Proportion in Anti-Money Laundering Measures

The Second Draft attaches greater importance to the principle of proportion in anti-money laundering measures. This means that the strength and scope of anti-money laundering measures shall be commensurate with the risk brought about by monitored financial activities.

With this approach, the Second Draft aims to strike a balance between the need to combat financial crime and the protection of legitimate financial activities and individual privacy.

To achieve this balance, the Second Draft introduces several new provisions aimed at improving the accuracy and precision of anti-money laundering measures. For example, financial institutions are required to conduct client due diligence (CDD) and enhance due diligence (EDD) based on risk. This means that financial institutions shall assess the risk characteristics of their clients and adjust their anti-money laundering measures accordingly. The Second Draft also requires financial institutions to establish and maintain comprehensive AML procedures, including policies, procedures and control measures aimed at detecting and preventing money laundering.

2. Defining Regulatory Authority and Protecting Normal Business Operations and Individual Privacy

The Second Draft clearly defines the regulatory authority regarding anti-money laundering and emphasizes the protection of normal business operations and privacy, which is a praiseworthy highlight.

(1) A new Article 4 has been added to avoid the

interference of AML work with normal and legitimate business operations as much as possible. It stipulates that anti-money laundering work shall be carried out according to the law to ensure that anti-money laundering measures correspond to money laundering risks, ensure the normal flow of funds and financial services, and safeguard the legitimate rights and interests of entities and individuals. In our view, such provisions reflect the difficulties in the current legal practice of anti-money laundering work in clearly defining the authority of the relevant regulatory authorities to avoid the abuse of administrative power. The proposed revisions can also be seen in Articles 15 and 30.

- (2) The Second Draft proposes changes to Article 8 to restrict the use of AML information and defines the limits of the authority of the administrative and judicial departments. Article 8 requires the competent AML authority and the other departments with AML supervision and administration duties under the law to only use customers' identity information and transaction information obtained in the performance of their AML duties for AML supervision, administration and administrative investigations. The customers' identity and transaction information obtained by judicial authorities in accordance with this Law, is only for AML criminal proceedings.
- (3) One of the important changes in the Second Draft is the enhancement of the protection of individual privacy. Realizing the sensitivity of personal data and the feasibility of its potential misuse, the Second Draft takes strict measures to protect individuals' privacy. Firstly, it is clearly stated that the relevant state organs shall protect individual privacy in accordance with the law when using AML information. Secondly, unauthorized disclosure of personal information obtained in AML investigations is expressly prohibited,

and strict penalties are set for any violation thereof. Thirdly, it requires financial institutions and other relevant entities to obtain explicit consent from individuals before sharing their personal information with any third party, so as to prevent the unauthorized disclosure of personal information and ensure that individuals have a right to control the use and sharing of their personal information. Finally, financial institutions are required to implement strict data security measures to protect personal information from unauthorized access, use or disclosure. This includes the use of encryption, access controls and regular security audits to ensure the integrity and confidentiality of personal information. The Second Draft also addresses issues of data retention and disposition. It requires financial institutions and other relevant entities to retain personal information only for as long as necessary for AML purposes and to securely dispose of such information when it is no longer needed. This provision is intended to prevent the unnecessary accumulation of personal data and to limit the risk of data breaches and misuse.

3. Obligations of Specific Non-financial Institutions

The current AML Law includes specific non-financial institutions in the subject of AML obligations, but the scope of "specific non-financial institutions" is not specified at the statutory level. In the Circular on Strengthening the Anti-Money Laundering Supervision of Specific Non-Financial Institutions released and implemented by the General Office of the People's Bank of China on July 26, 2018, the scope of "specific non-financial institutions" was specified for the first time in an enumerative way, while Article 60 of the First Draft redefined the scope of "specific non-financial institutions" in an enumerative and catch-all manner. The definition of "specific non-financial institutions" in Article 64 of the Second Draft is

consistent with that in the First Draft, which includes: 1) real estate development companies or real estate intermediaries providing house sale services or brokerage services for the purchase and sale of houses; 2) accounting firms, law firms and notary agencies entrusted to deal with the purchase and sale of real estate for clients, manage funds, securities or other assets on a commission basis, manage bank accounts and securities accounts on a commission basis, raise funds for the establishment and operation of enterprises, or act as agents for the purchase and sale of operating entities; 3) dealers conducting physical transactions of precious metals and gemstones; and 4) other institutions required to perform AML obligations determined by the AML administrative authority jointly with the relevant departments of the State Council according to their money laundering risks.

The current Second Draft requires the above-mentioned specific non-financial institutions, when engaging in specific businesses, to perform their AML obligations in light of industry characteristics, business scale, and their AML risks by referring to the relevant provisions regarding the performance of AML obligations by financial institutions, and it authorizes the competent departments to formulate specific measures. This helps to change the situation in which specific non-financial institutions have no law and no appropriate way to fulfil their AML obligations, and it has significance in guiding specific non-financial institutions on how to fulfil their AML obligations.

4. Litigation on the Legitimacy of Anti-Money Laundering Measures

The revision of the last paragraph of Article 39 of the Second Draft allows entities or individuals to directly initiate judicial proceedings without going through the procedures of administrative objection or reconsideration. This revision adheres to the principles of preventing the abuse of administrative power and protecting the legitimate interest of the relevant entities or individuals.

There have been few domestic judicial cases regarding the legitimacy of anti-money laundering measures. It is noteworthy that the Intermediate People's Court of Hangzhou City, Zhejiang Province in the Judgment of (2020) Zhe 01 Min Zhong No. 696 set forth opinions on how financial institutions and related enterprises could perform their AML obligations, but since the court that ruled the case was neither a high court nor the supreme court, it is not a guiding case for similar cases. We therefore expect that the judiciary will publicize more cases to guide the judicial practice in the future.

5. International Cooperation

Another notable feature of the Second Draft is the emphasis on international cooperation to combat financial crime. It recognizes that financial crimes tend to have a transnational nature and that effective anti-money laundering measures require close cooperation between countries. As such, the Second Draft establishes a framework for national and international cooperation, including mutual legal assistance, extradition, and the sharing of intelligence and information. This provision is expected to enhance the effectiveness of the AML system in China by utilizing the expertise and resources of other countries.

Article 50 has retained the draft provisions regarding information requests from foreign countries or organizations. If a foreign country or organization requires an onshore financial institution to provide summary compliance information, operating information or other information based on the needs of compliance supervision, the onshore financial institution shall report to the relevant financial regulatory authority under the State Council and the relevant authorities of the state before it can provide such information. They must cooperate and comply with the relevant provisions of the State regarding data security and personal information protection.

The Second Draft only made minor adjustments to

Article 37. Financial institutions that have established branches or hold shares in other financial institutions in or outside of the PRC, and financial holding companies, are no longer required to establish uniform rules and regulations, but to make overall arrangements for the AML work at the headquarter or group level, and the sharing of necessary AML information at home and abroad within the group is permitted, provided that the mechanisms and procedures for information sharing are specified, and it has been ensured that the relevant information will not be used for purposes other than AML and counter-terrorism financing purposes.

6. Other relevant amendments

Other important amendments in the Second Draft include:

- (1) The definition of AML is expanded to include “other crimes” in addition to the original seven upstream crimes, leaving space for the corresponding amendments to the crime of AML in the Criminal Law.
- (2) Several new provisions designed to increase the efficiency and effectiveness of AML investigations have been introduced. For example, the use of advanced techniques such as artificial intelligence and machine learning for the detection of suspicious

transactions and behavioral patterns is permitted. This provision is expected to increase the accuracy and speed of AML investigations, thus enabling the authorities to respond rapidly to potential threats. The Second Draft also considers the impact of cybercrime on AML efforts. As cybercrime poses a major threat to the integrity and stability of the global financial system, it proposes that effective AML measures must consider the unique challenges posed by it.

- (3) Article 19 stipulates that the competent AML administrative authority of the State Council shall, jointly with the relevant departments of the State Council, establish a system for the inter-department management of information of the beneficial owners of legal persons and unincorporated organizations. In association with the newly issued Measures on the Management of Information on Beneficial Owners and its ancillary measures, this provision ensures functional convergence and the unification of action among different government regulatory authorities.

We will monitor the progress of the anti-money laundering law closely and keep our clients apprised of any important developments.

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