香港信託人公會
Hong Kong Trustees' Association

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

By email: aml_consultation@fstb.gov.hk

From: The Hong Kong Trustees' Association

Subject: **FSTB's Consultation on Proposal to Amend the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) and Consultation on Companies Ordinance (Beneficial Ownership)**

The Hong Kong Trustees' Association (HKTA) welcomes the FSTB's consultation on the subject matter in an effort to meet prevailing international standards to combat money laundering and terrorist financing.

As an organization that represents the trustees in Hong Kong, we wish to provide the following response:

Key Scope of Coverage/ Consultation Questions	HKTA Comments
	1. To seek exemption for MPF and ORSO schemes due to MPF's "non refusal" requirement and also the very low risk nature for both MPF and ORSO. If required, HKTA can submit further information for seeking the exemption. **2.** To seek clarification of "Client" for each product where trust company is appointed as Trustee or providing

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	other administrative service which are not regulated activities eg registrar, transfer agent, fund administration etc: **a.** Pension: MPF/ORSO (if registration is applicable) (i) For ORSO, Employer is the client of Trustee (ii) For MPF/Pooling retirement arrangement, the Sponsor is the client of the Trustee The Sponsor who markets such pension product to the employers/members directly, is responsible to perform CDD on such employers/members pursuant to its licensing regime (iii) Where special voluntary contribution is made directly by the member and the payment is not deducted from his/her income, the member concerned shall also be considered as "Client" for due diligence purpose. *(The above is in line with the description of "Client" of the Trustee under the HKTA AML Guidelines for Pension trustees)* **b.** Unit trusts/Fund The fund manager is the client of the trustee. (i) Investors/unit holders of the Fund are clients of the Fund Manager who has primary responsibility to perform CDD on their clients (ie investors/unit holders) pursuant to its licensing regime. (ii) Where a distributor is engaged by the Fund Manager to market the Fund, the Fund Manager should ensure the Distributor perform CDD on the investor/unit holders pursuant to the Distributor's licensing regime. *(The above is consistent with the CRS Guidelines in respect of Collective Investment Schemes "CIS" issued by IRD.)* **c.** Other types of corporate trust The new law should clarify whether the "trust" itself or the "settlor of the trust" is the "customer" of the

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	trustee in performing it's trusteeship function. **3.** To seek treatment on financial institutions which provide trustee services but already have a statutory obligation to comply with the AMLO.
Scope of Coverage *(Paragraphs 3.1 – 3.37)* ➢ Circumstances Requiring the Conduct of CDD *(3.3-3.4)* ➢ Risk-based Approach for CDD measures *(3.5-3.12)* **Q 4.1** Do you agree with the application of a risk-sensitive approach, whereby the CDD measures to be undertaken by DNFBPs should be commensurate with the risk profiles of customers? **Q 4.2** Do you agree that DNFBPs should be subject to enhanced CDD measures when dealing with customers presenting a high risk of money laundering or terrorist financing? **Q 4.3** Do you think DNFBPs should be allowed the flexibility to undertake simplified CDD measures on low-risk	**4.** When carrying out potential CDD measures as a TCSP, we suggest that there are potential operational considerations such as how to carry out KYC measures to pre-existing clients and maintain ongoing monitoring on clients, etc. The new law should also clarify whether it has retrospective effect and if so, how it deals with pre-existing clients. **5.** To seek clarification on the requirements for the transitional period with regards to pre-existing customers of the trustee **6.** Agree on Risk-based approach. **7.** **a.** Trust companies should be allowed the flexibility to undertake simplified CDD measures on low-risk cases [e.g. MPF/ORSO (if registration is applicable)] **b.** Suggest Simplified CDD to employer's identity can be verified to their BR or CI documents ONLY without need to verify to their shareholders / beneficial owners' identity. (if registration is applicable) **c.** Suggest for members of MPF and ORSO with mandatory and regular voluntary contribution, copy of HKID Only as required document.(if registration is applicable) **d.** Where employers make contributions via its parent co / subsidiary co / affiliates, suggest to waive the need to verify such third party contribution from affiliates under employment related circumstances, in on-going transaction monitoring. (if registration is applicable)

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cases, with reference to the list of eligible customers and products as specified in the AMLO? **Q 4.4** Do you think there are other justified addition to the specified list of customers and products eligible for simplified CDD treatment under the AMLO by DNFBPs? If so, what are they; and what are the justifications (please support with statistics where applicable)?	**8.** In relation to the proposed extension of the scope of Schedule 2 of AMLO to cover DNFBP sectors, we suggest that the definition of "regulated activity" (e.g. trusteeship) and "customers" should be clearly defined for clarity purposes. **9.** In the case of a trust structure it may be difficult to identify who the underlying "customer" in order to conduct CDD it is suggested that additional terms to the AMLO (for example, "before engaging a service provider in the case of a trust) such that the scope of the CDD requirement is extended to cover trustee. **10.** Referring to Chapter 3.4(c)(iv) of the Paper, it'd be good to clarify if "an express trust or similar legal arrangement" apply to all types of funds including MPF funds (schemes, CF & APIFs), SFC authorized funds, private funds and offshore funds?
➢ Supervisory Sanctions *(3.17-3.20)* **Q 4.8** Do you consider it necessary to introduce new criminal sanctions for non-compliance with the statutory CDD and record-keeping requirements under the AMLO by DNFBPs? **Q 4.9** Do you think that the Law Society, the HKICPA and the EAA should be given inspection and search powers similar to those available to AML regulatory authorities for financial institutions under Part 3 of the AMLO?	**11.** Disagree that criminal sanctions be imposed for non-compliance with CDD and record keeping requirements under the new AMLO for TCSPs.

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➢ Licensing Regime for TCSPs *(3.21-3.24)* **Q 4.10** Do you agree with the provision of a 90-day transitional period for existing TCSP operators to migrate to the new licensing regime?	**12.** Given that there are uncertainties surrounding the licensing requirements and application process, such as the criteria to satisfy the "fit and proper" test is still not clear at the moment. It is pre-mature to agree with the suggested 90-day transitional period. However, it is not practicable to apply the AMLO requirements to all the existing clients within 90 days. It would be helpful to clarify that the 90-day requirement does not apply to the application of the AMLO to the existing clients of TCSP operators. Suggest to have at least 1 year transitional period for TCSP to migrate to the new licensing regime. **13.** To clarify if the licensing regime will apply to all trust companies that operate in HK regardless they are incorporated in HK or outside HK where the overseas trust companies may already be governed by regulations in the jurisdictions in which they are domiciled?!
➢ Power of Licensing Authority *(3.25-3.28)* **Q 4.11** Do you think the criteria for determining the fitness and properness of TCSPs appropriate? If not, what criteria should be included or excluded? **Q 4.12** Do you agree with the three-year validity of a TCSP license (renewable on application)? If not, what should be the validity period?	**14.** Referring to Chapter 3.25(a) of the Paper, "*…any failure to comply with the requirements under AMLO and guidelines to be issued by the Registrar*", since it's proposed to obtain the licence under 90-day transitional period, does it require trustees to complete the CDD on "Clients" (i.e. Managers) as per the customary/simplified/enhanced CDD requirements so as to comply with the AMLO when or before applying for a licence? Besides, would be good to remind the Company of Registrar to seek our comments when they have the draft guidelines. **15.** Referring to Chapter 3.25(d) of the Paper, would like to understand more what are the "Other relevant factors".

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➢ Supervisory and Criminal Sanctions *(3.29-3.32)* **Q 4.13** Do you agree that any persons operating TCSP business without a valid licence should be liable to criminal sanctions (including a fine at level 6 and/or imprisonment of up to six months)? **Q 4.14** Do you agree with the proposed supervisory sanctions for TCSPs in respect of non-compliance with statutory CDD and record-keeping requirements?	**16.** Disagree with any new criminal sanctions imposed for non-compliance with the statutory CDD and record-keeping requirement under the AMLO due to the low risk involved in the business of TCSPs

Additional Comments of Private Trustees

1. We support the proposal for Schedule 2 of AMLO to extend to trustees as DNFBPs,

a. We recommend for the AMLO to recognize the fact that the CDD and record keeping maybe done by another party to the trust arrangement and not always by the TCSP personally. Under Section 18 of the AMLO, financial institutions are currently allowed to rely on certain specific intermediaries. Currently, the list does not take into account the types of intermediaries that are commonly used by trust companies (e.g. the manager of a fund). Hence, we would like to recommend for section 18 to be modified to avoid duplication of efforts, and recognize that other parties in a trust structure may also have CDD obligations under the SFC Code.

b. We support the proposal to adopt a threshold of 25% for defining beneficial ownership in relation to corporation. We ask the government to consider also amending the definition for beneficial ownership in relation to a trust in section 1 of Schedule 2, to refer to vested interest in not less than 25% of the capital of the trust

2. We support the proposal to have the Registrar of Companies as the regulatory body responsible for TCSPs.

3. We do not consider it necessary to introduce criminal sanctions for non-compliance with the CDD and record keeping requirements.

Licensing regime

4. We understand that "all operators carrying out TCSP services as a business" will be required to be licensed (para 3.22). We propose that the term 'carrying out TCSP services as a business' be clearly defined. In particular:

a. There should be a jurisdictional limit to refer to carrying on the business in Hong Kong.

b. It would be helpful if the definition explicitly excludes Private Trustee Companies, meaning companies that are set up to act as trustee for a single trust, or a small number of trusts that are related to a family group.

c. We understand the FATF reference to trust business extends to the business of "arranging for someone to act as trustee". If this definition is adopted in the AMLO or supporting guidelines, it would be helpful to make clear that this does not include arranging by professional advisers, or where the person acting as trustee is itself a licensed TCSP.

Reference may be made to the approach taken in Singapore (see Trust Companies (Exemption) Regulations: http://www.mas.gov.sg/Regulations-and-Financial-Stability/Regulations-Guidance-and-Licensing/Trust-Companies/Regulations/2006/Trust-Companies-Exemption-Regulations-2005.aspx). (Please note that the Singapore regime is seeking to regulate the activities of a trust business, and is therefore more extensive than the proposal in Hong Kong.)

5. We understand that a 'fit and proper test' will be introduced for the directors of licensed trustees. We would like to clarify how such test will be applied where the director is not a natural person but itself another corporation that is not a TCSP.

Consultation on Companies Ordinance (Beneficial Ownership)

1. We are supportive of the proposal to introduce a register of beneficial owners for Hong Kong companies. Specifically in relation to the matters set out in the Consultation papers, our comments are set out below. However we would seek clarification as to how this is to be applied. In particular is it the intention that ONLY the individual UBO's be recorded rather than recording the BO's at each level which might be companies and ultimately an individual.

Public Inspection of PSC Register

2. We strongly object to the proposal in para 3.14 to make the PSC register available for inspection by the public, due to privacy concerns. The purpose of introducing the PSC register is to target money laundering and terrorist financing. Once the information is collated in the form of the PSC register, there are existing legal framework for the law enforcement agencies to request this information, and indeed the Companies Registry itself can request it. Further, individual private organisations that need such information for CDD/ KYC purposes (e.g. the financial institutions or counter-parties in commercial transactions) can create a contractual obligation for their customer/ counterparty to produce this Register as part of the corporate documents required for KYC. Hence, from an anti-money laundering perspective, there are already sufficient safeguards in place. It is noted that in all jurisdictions except the UK, the register is not open to the public in general. The government of Hong Kong needs to recognise that people have a right to personal privacy, and most individuals wish for their information to be kept confidential for safety, security and privacy reasons, and not because they are involved in potentially illegal activities.

3. The nature of information proposed to be included in the register of PSC also needs to be carefully considered (e.g. the residential address of the PSC would be very useful information for a law enforcement agency, but is very dangerous information to be left in the public domain.) This is particularly the case if the final decision is indeed to make the register of the PSC public. The right to privacy is a human right protected by the Hong Kong Bill of Rights Ordinance and should not be subject to arbitrary interference.

4. In addition, we object to the proposal that the TCSPs be charged with the responsibility to each maintain a register which could be viewed by the public. We believe the information should only be held in a central file with the Companies Registry and, in line with our comments earlier, should not be open to the public. The role of an 'authorised person' is to facilitate the compliance by the companies, but the responsibilities (and sanctions for non-compliance) must rest with the companies and their officers, and not that TCSPs as service providers to the companies.

5. If your final decision is to require TCSPs to each maintain a register of UBOs, we strongly recommend that this information not be open to the public. If your concern is that a law enforcement agency's inspection of the register of UBOs may alert the UBO to the investigation – there are existing laws that prevent TCSPs from "tipping off" the UBO, so public disclosure of the register of UBOs is not necessary and is not a valid reason to enable law enforcement agencies to inspect such registers without alerting the UBOs.

Sanctions for non-compliance

6. Para 3.18 of the Consultation proposes criminal sanctions for any person who knowingly or recklessly makes misleading/ false/ deceptive statements in the PSC register. This seems to be excessive when compared against the CDD requirements under the AMLO which only attract civil sanctions. Ultimately, the proposal is asking companies to start to collect information that it otherwise would not be privy to, information that is perhaps quite difficult for the companies to access and indeed to verify. The framework as proposed does not create any duties or obligations on the registrable person/ registrable legal entity; this should be considered. On the other hand, the framework should not be criminalizing the companies who are effectively merely the record collector and keeper. Indeed, if the criminal sanction was to be introduced, it should only extend to the Company and its responsible officers, and not the Authorized Person of the company.

7. Para 3.19 of the Consultation proposes to impose a statutory obligation on a 'notice addressee' who can be fined for failing to comply with the notice to confirm BO information. The scope of parties who may be covered is worrying. This can be someone whom the company 'has reasonable cause to believe' to be someone who knows the identity of someone likely to have the knowledge about BO. It is far-fetched. There needs to be a carve out for the notice addressee having 'reasonable excuse' not to comply (e.g. duty of confidentiality). Ultimately, there needs to be a balance between enabling the companies to gather the information about beneficial ownership, against a realistic appreciation of the limitations they are under and to not create a burden for the public at large. We propose that this statutory obligation should only apply to the legal owner of the company's shares and the beneficial owner/ registrable person/ registrable legal entity. There should also be a legal requirement on the beneficial owner/ registrable person/ registrable legal entity to notify the TCSPs of their interests, and of changes in circumstances. We caution that it would be undesirable for the sanctions to extend to the whole community and all service providers (banks, lawyers) who can become potential "notice addressees".

8. Para 3.21 of the Consultation proposes to allow companies to curtail dividends or voting rights for shareholders who do not respond to the notice for disclosure. Our view is that this is likely to be of limited use as it will only impact the direct legal shareholder of the companies (i.e. only the

legal shareholders vote/ receives dividends from the company, not the ultimate beneficial owners). We envisage one is more likely to have problems with beneficial owners of the indirect shareholders rather than direct shareholders.

9. For the consultation paper on "Enhancing Transparency of Beneficial Ownership of Hong Kong Companies", we would like to clarify if it refers to private funds only under Chapter 3.4 of the paper?

If the FSTB wishes to discuss the submission with the HKTA, we are more than happy to meet. Any questions, please contact Mr Michael Shue (email: Michael.Shue@vistra.com) or Ms Ka Shi Lau (email: lau.kashi@bcthk.com).

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