



Hong Kong Trustees' Association Ltd
香港信託人公會

c/o Deacons 的近律師行
6/F Alexandra House
16-20 Chater Road
Central, Hong Kong
香港中環遮打道十六至二十號
歷山大廈六樓

Tel 電話 : 2559 7144 Fax 傳真 : 2559 7249
E-mail 電郵 : queries@hktrustees.com
Website 網址 : www.hktrustees.com

October 8, 2009

PRIVATE & CONFIDENTIAL

Secretary for Financial Services & the Treasury
18th Floor
Admiralty Centre, Tower One
18 Harcourt Road
Hong Kong

Attention: Ms. Angelina Kwan

Dear Ms. Kwan

Legislative Proposal to Enhance the Anti-Money Laundering ("AML") Regime

The Hong Kong Trustees' Association ("HKTA") welcomes the opportunity to comment on the conceptual framework of the legislative proposal to enhance the AML regulatory regime in Hong Kong. In response to the consultation questions, the HKTA's position is set out below:-

Q2.1 Do you agree to the proposed designation of AML regulators for the banking/deposit-taking, securities, insurance and RAMC sectors as set out in paragraph 2.2?

Save for MPF Trustees, there is no one regulator in Hong Kong currently responsible for regulating and monitoring the activities of trustees and trust companies where such entities are not otherwise regulated by the HKMA or the SFC. It would be preferable, from the perspective of the trust industry, to have one central regulator exercise regulatory oversight in a consistent manner. In the absence of such a universal regulator for trustees, we agree with the proposed designation of AML regulators for the various industries.

Q2.2 Do you think that there are other important principles in addition to those set out in paragraph 2.4 that the Administration should adopt in working out the detailed legislative AML regime on CDD and record-keeping requirements?

Since the proposal is a response to the FATF Evaluation Report on Hong Kong's AML regime, we suggest that the new AML measures and regulatory regime to be implemented be a proportionate response to the FATF requirements and not be excessive to the extent of inadvertently inhibiting Hong Kong's competitive status as an international financial centre.

- Q3.1 Do you agree that the CDD measures that should be undertaken by financial institutions should be subject to the risk profiles of the customers and that enhanced CDD measures should apply to higher-risk customers as set out in paragraph 3.4(e)?*

Yes. In addition, mechanisms should be put in place to ensure that any change in such risk profiles may be effectively monitored and assessed on an on-going basis.

- Q3.2 Apart from the enhanced training to be provided to facilitate financial institutions' compliance with the statutory obligations as mentioned in paragraph 3.7, do you think that the Government, relevant regulators and concerned trade or professional bodies should also provide other assistance to facilitate compliance by the financial institutions? If so, what types of assistance should be provided?*

The guidelines currently issued by regulators such as the SFC and HKMA, as well as the training provided by the financial regulators and the Police are helpful and should be adequate provided that they are revised and improved from time to time to take account of market developments and having regard to any specific requests from the financial community from time to time for further guidelines or training in specific areas.

- Q3.3 What should be the appropriate length of the transitional period, if any, to be allowed for individual financial sectors concerned to get fully prepared before commencement of the new legislation?*

We propose a transition period of 6-12 months.

- Q4.1 Do you think that the proposed inspection, supervisory and enforcement powers which are similar to SFC's existing powers in supervising the securities business, are appropriate for supervising the financial institutions' compliance with the statutory CDD and record-keeping requirements in paragraphs 4.4 and 4.6?*

Yes.

- Q4.2 Do you consider that the establishment of an independent appeals tribunal to hear appeals against the regulators' decisions on supervisory sanctions and matters relating to the licensing of RAMCs is an appropriate check and balance arrangement (paragraph 4.5?)*

Yes.

- Q5.1 Do you think it is appropriate to stipulate in the new legislation that an offence would be committed only if any of the circumstances set out in paragraph 5.4 (in underlined text) arises?*

The proposal to have the criminal courts impose sanctions on non-compliance of AML obligations should, certainly, be an effective deterrent but we question whether such a proposal is an excessive response to the FAFT Evaluation Report on Hong Kong.

Paragraph 5.4(a) of the proposal appears to be drafted as a "strict liability" offence, and the proposal at paragraph 5.4(b) refers to "recklessness" which is a concept requiring a subjective assessment as to whether or not one has been reckless. Criminal activity

requires "mens rea", i.e. if there are to be any criminal sanctions imposed, they should be limited to situations where there has clearly been wilful misconduct.

On a broader note, we would suggest that regulatory, rather than criminal, sanction, similar to the regime currently implemented by the SFC, would suffice to ensure appropriate compliance with AML obligations.

Q5.2 Do you agree that the new legislation should provide for supervisory fines and other supervisory sanctions, in addition to criminal sanctions, to deal with breaches of the statutory requirements (i.e., the imposition of criminal sanctions on any breach of the statutory requirements should not preclude the imposition of supervisory sanctions by the concerned regulatory authority and vice versa) on the basis that any such sanctions should be effective, proportionate and dissuasive in accordance with FATF's requirement?

Yes, although we propose that they be in place of, rather than in addition to, criminal sanction.

The supervisory and regulatory regime currently implemented by the SFC, which is subject to appeal to the Securities and Futures Appeals Tribunal, is effective and would be a good example to follow.

Q5.3 Do you think that the other supervisory sanctions (i.e. other than fines) should include public reprimand, partial/full suspension or revocation of licence, and issue of directions for remedial actions? Yes. Do you have views on other types of supervisory sanctions that the authorities should be empowered to impose under the new legislation?

Similar to the regime currently implemented by the SFC, we also suggest public reprimand, letters of censure, monetary settlement.

Q5.4 Do you agree that the maximum level of supervisory fines to be prescribed in the new legislation should be determined having regard to the maximum level of supervisory fines that may be imposed by SFC under S. 194 of SFO as mentioned in paragraph 5.6?

Yes.

Q6.1 Do you agree that all RAMCs currently covered by the registration system under OSCO should be required to obtain licences from C&ED and subject to the CDD and record-keeping requirements under the proposed legislation?

Yes.

Q6.2 Do you agree that the criteria for determining "fitness and properness" as proposed under 6.5(e)(i) are appropriate?

Generally, yes.

Q6.3 Do you agree that any persons who operate RAMCs business without a valid licence should be liable to criminal sanctions (including a fine and/or imprisonment)?

We note that this question relates to a separate issue to AML and the proposed measures to address AML compliance in Hong Kong.

Q6.4 Do you agree that the licence/renewal fee should be determined on the basis of the cost recovery principle?

We do not offer an opinion on this question as it relates to the RAMCs, which is a sector in Hong Kong distinct from the trust industry whose trustees we represent.

Q6.5 What is your view on the need or otherwise for transitional arrangements before RAMC licensing system is implemented? If so, what specific arrangements should be made?

We do not see a need for any significant transitional arrangements.

We welcome the opportunity to further discuss our submissions in greater detail with the FSTB.

Yours faithfully

A handwritten signature in black ink, appearing to read 'HK Trustees' Association', written in a cursive, flowing style.

Executive Committee

Hong Kong Trustees' Association