香港信託人公會
Hong Kong Trustees' Association

30 June 2015

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Revenue Division
Financial Services and the Treasury Bureau
(Treasury Branch)
24/F, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

For the attention of the AEOI Consultation Team

Dear Sirs,

Subject: Consultation Paper on Automatic Exchange of Financial Account Information in Tax Matters in Hong Kong

(I) Introduction

1. On behalf of the Hong Kong Trustees' Association (HKTA), we refer to the Consultation Paper on Automatic Exchange of Financial Account Information in Tax Matters in Hong Kong released by the Financial Services and the Treasury Bureau on 24 April 2015.

2. With the global trend towards greater tax transparency, we welcome the Hong Kong government's commitment to implementing changes to Hong Kong law to reflect the Automatic Exchange of Financial Account Information in Tax Matters (AEOI) and to adopting a pragmatic approach to its application in Hong Kong while ensuring the effective implementation of international standards and deriving the maximum benefit from existing practices and procedures.

3. The HKTA submission focuses on the need to align the proposed AEOI regime with the existing customer due diligence requirements of Hong Kong law as much as possible to avoid reinventing the wheel and to avoid a duplication of effort and responsibility.

4. Our submission covers various sectors of the trust and fiduciary industry – namely, fund/corporate trust, private trust, and MPF/ORSO schemes.

(II) Fund/Corporate Trust

1. We should say at the outset that much of our submission is premised on the understanding that the legislation implementing the AEOI regime may impose due diligence and reporting obligations on trustees in respect of collective investment schemes in addition to due diligence and reporting obligations on the collective investment schemes themselves.

2. The latter obligations are typically assumed by fund managers and distributors such as banks (including private banks) and independent financial advisers in contractual arrangements entered into on behalf of the collective investment scheme or by brokers in the case of collective investment schemes listed and traded on the Hong Kong Stock Exchange or by placement agents in connection with unauthorised collective investment schemes, all of whom are required to be licensed under the Securities and Futures Ordinance (**SFO**) to undertake type 1 regulated activity (dealing in securities).

3. The existing KYC and customer due diligence practices and procedures of these SFC (and/or, as the case may be, HKMA) regulated fund managers, distributors, banks, advisers, placement agents and brokers, each of whom has 'first hand' access to the investor and to the relevant information, simply need to be fine tuned to accommodate the AEOI regime, as more fully explained herein.

4. In our view, imposing the AEOI regime on the collective investment scheme and making it an FI with the responsibility for due diligence and reporting obligations in respect of its investors being assumed by entities licensed under the SFO is sufficient and that the imposition of additional joint and several due diligence and reporting obligations on trustees is unnecessary.

A. Comments on paragraph 2.12 (a) of the Consultation Paper

1. In relation to the specific feedback sought by paragraph 4.2 (a) of the Consultation Paper (the proposed scope of FIs), we are strongly opposed to trustees of collective

investment schemes being subjected to the obligations of a FI under the AEOI regime where there are already existing practices and procedures which can be modified to accommodate the AEOI regime so that when the law is passed to implement the AEOI regime the disruption to the existing practices and procedures, which have been put in place to comply with existing laws and regulations, can be minimised. In particular, the definitions of FIs and due diligence procedures should generally be aligned with existing Hong Kong regulatory requirements to help minimise variations in regulatory requirements that apply to similar compliance domains e.g. with respect to account classification and tax residence.

2. Over recent years, the asset management and financial services industries in Hong Kong have devoted, and continue to allocate, a considerable amount of time, effort and financial resources to comply with internally, as well as internationally, driven compliance and regulatory developments.

3. In particular, financial institutions in Hong Kong have devoted much time, effort and money first to understand the impact of, and then to put in place measures to comply with, the customer due diligence requirements of two existing laws.

4. First, Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (**AMLO**), a Hong Kong law which carefully delineates which parties are responsible for undertaking customer due diligence in various different situations and provides a sound basis on which to allocate responsibility for compliance with the AEOI regime.

5. Secondly, the US Model 2 Intergovernmental Agreement (**IGA**) that facilitates compliance with the United States Foreign Account Tax Compliance Act (**FATCA**), a US law with extra-territorial impact on business in Hong Kong which requires anti-avoidance measures to be put in place to ensure that offshore investment income of US persons is declared and taxed, an objective which is consistent with the OECD's objective with respect to AEOI.

6. The existing requirements of Hong Kong law and the practices and procedures already operating in Hong Kong must form the basis for any new legislation required to implement the AEOI regime.

7. By way of background, in relation to an investment in a collective investment

scheme in Hong Kong, the investor will deal with an entity licensed under the SFO at the point of sale as the marketing of interests in a collective investment scheme is a regulated activity under the SFO and that entity will be subject to the AMLO (as more fully explained below) in addition to the SFO and FATCA.

8. The AMLO imposes requirements relating to customer due diligence (CDD) and record-keeping on all such entities licensed under the SFO and provides the SFC with the power to supervise compliance with these requirements and other requirements under the AMLO. In addition, section 23 of Schedule 2 to the AMLO requires all reasonable measures to be taken (a) to ensure that proper safeguards exist to prevent a contravention of the AMLO; and (b) to mitigate risks arising from wrongly identifying customers.

9. While it is acknowledged that the objectives of the AMLO, FATCA and the SFO are not completely identical to the AEOI regime, it is submitted that there are similarities in the steps needed to achieve their respective objectives.

10. A pragmatic approach therefore should be taken in relation to imposition of additional obligations on institutions which are already subject to the AMLO, FATCA and the SFO.

11. In deciding whether to impose an entirely new set of requirements on financial institutions in Hong Kong or whether the gist of the AEOI regime can be aligned with the existing customer due diligence and reporting requirements to the extent possible, the latter approach is clearly preferable.

12. Similarly, a pragmatic approach should be taken in relation to imposition of obligations on trustees.

13. The duplication of effort and duplication of responsibility which would result from subjecting trustees to the AEOI regime must be avoided in circumstances where entities licensed under the SFO are already subject to the AMLO, FATCA, SFO and other Hong Kong laws and whose practices and procedures can be fine-tuned to accommodate the new requirements of the AEOI regime.

B. Comments on paragraph 2.12(d) of the Consultation Paper - definition of Financial Institutions (FIs)

A trust company registered under the Trustee Ordinance appears twice on the list in paragraph 2.12 - once under the heading "Custodial Institution" and then again under the heading "Investment entity". We suggest deleting the latter reference to avoid this repetition.

C. Comments on paragraph 4.2(b) of the Consultation Paper - information required with respect to reportable accounts

1. In relation to the specific feedback sought by paragraph 4.2(b) of the Consultation Paper (reporting requirements (paragraph 2.19)), we would like to clarify the extent to which an FI is subject to the AEOI regime when a trustee (in its capacity as a trustee of a collective investment scheme) opens a bank account and whether a simplified set of information requirements should apply.

2. In the ordinary course of business of our trustee members, it is common for bank accounts of collective investment schemes to be required to be opened in the name of the trustee in its capacity as the trustee of that collective investment scheme.

3. Under the AEOI regime, the reporting FI would be required to ascertain, among other things, the name, address, jurisdiction of residence, taxpayer identification number and date and place of birth of each reportable person (which includes controlling persons) and self-certification would apply where applicable.

4. The definition of the term “controlling persons” includes, in the case of a trust, the settlor, the trustee, the beneficiaries and any other natural person exercising ultimate effective control over the trust.

5. Where customer due diligence and reporting is already required to be undertaken by an FI in connection with the investors and bearing in mind the purpose of the AEOI regime is to focus on those investors, it does not make sense to require the FI to also undertake full customer due diligence on the trustee entity. It is submitted that a simplified set of information requirements (such as copies of the trust deed and the trustee's certificate of registration as a trust company, if applicable) should apply in these circumstances.

D. Comments on paragraph 4.2(f) of the Consultation Paper – data privacy

FIs should not need to seek changes to existing documentation nor seek specific

approval from data subjects to collect the data and to make the reports required by the AEOI regime. The reason for this request is to remove the burden of seeking consents and waivers from data subjects (as well as ongoing obligations under local data privacy legislation) which can be costly and time-consuming.

(III) Private Trust

A. Chapter 4 of the Consultation solicits feedback on 7 aspects. We would like to put forward comments on the first two aspects as set out below.

(a) FIs, non-reporting FIs and excluded accounts

1. Para 2.12 of the Consultation proposes to include in the definition of "Financial Institutions"

(a) A trust company registered under the Trustee Ordinance (Cap 29);

(b) Any other person that holds… financial assets for the account of others; and

(c) Any entity that primarily conducts as a business … administering, or managing financial assets or money on behalf of other persons.

2. We are of the view that it is arbitrary to include all registered Trust Companies in the definition. Private trusts, or trustees of private trusts, should not be included as a "financial institution".

3. According to the CRS , the term "Financial Institution " should be interpreted in a manner consistent with similar language set forth in the definition of "financial institution" in the Financial Action Task Force Recommendations" ("FATF Recommendations").

4. FATF Recommendations do not include private trusts and personal investment companies in the definition of "financial institutions."

5. Hong Kong's anti-money laundering law (Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance ("AMLO")) which implements the FATF Recommendations as domestic Hong Kong law – also does not include trust companies and trustees as a "financial institution".

6. Trust companies are likely to have a mixture of non-Reportable Accounts (e.g. where the controlling persons are Hong Kong or Taiwanese residents) and some Excluded Accounts (e.g. retirement funds, estate accounts).

7. Including trusts/ trustees will require more clarification in the new law as to the relevant definitions. Specifically, the definition of Reportable Account refers to Financial Accounts "held by Reportable Person". It is not clear what “held by Reportable Person” means / who the "account holder" is in the context of trusts. Will the trustee as an FI need to collect/ transfer data on just the settlor/ asset contributor or all reportable connected persons (i.e. all discretionary beneficiaries in reportable jurisdictions in the case of a private family trust)? The legislation will need to define who is considered an account holder in the context of a trust relationship where there are settlor, asset contributor, trustee and beneficiaries.

(b) Reporting Requirement [para 2.19, 2.20, 2.21]

1. We support a ‘**wider approach**’ as described in para 2.20 on the due diligence requirements.

2. It is not practicable to only do due diligence on Reportable Accounts rather than on all accounts. Having done some due diligence to ascertain whether an account holder is from a Reportable Jurisdiction, a Trustee needs to keep/ store such due diligence findings for all accounts; a Targeted Approach may not give the trustee a legal basis to keep/ store such information without potential breach of data privacy laws.

3. A trustee cannot voluntarily collect or transfer more data to the IRD than is required by the proposed tax law (or data privacy law). Para 2.33 of the Consultation noted that the FI will be relying on existing “customer relationship” to update/ check individual information. This mechanism is not reliable in the context of a trust relationship where “controlling person” (e.g. a beneficiary) may not be a customer (the customer being the settlor of the trust).

4. Under Hong Kong Personal Data (Privacy) Ordinance ("PDPO"), a

trustee will be able to collect CRS related information and transfer it only if they are "required or authorized" to collect the personal data. Specifically for trustees, it is noted that the present AMLO does not prescribe CDD/ KYC for trustee companies (trust companies are not a "Financial Institution" for AMLO/ FATF purposes). Therefore the legal basis for trustees to collect/ transfer the data will need to be set out in the new law to be introduced.

5. To ensure that trustees can lawfully collect and transfer data for CRS purposes; the new law should authorize (or compel) the wider approach under the Internal Revenue Ordinance ("IRO"), then it will not violate the PDPO as the collection of personal data will be authorized (or required) under the IRO.

B. Comments relating to the sample Checklist Used To Determine Tax Residence(s) of Individuals and Entities ("Sample Checklists") presented at the Focus Group meeting on 6 March 2015:

1. The list of questions in the Sample Checklists are too comprehensive, which is likely to confuse customers/clients. The Sample Checklists are confusing in that it is unclear as to what purpose they intended to serve as they, apart from simply listing out the said common factors, do not provide even the most basic of guidance on how the determination should be made.

2. The questions asked and information proposed to be provided are quite intrusive and include much personal data, which many people would normally expect to keep, and to be kept, confidential, and may well go beyond what is reasonably required for the purpose of determining a person's or entity's "tax residence". Whether this is so will depend upon what is meant by the term "tax residence". On this point service providers will also need to carefully evaluate their obligations under the Personal Data (Privacy) Ordinance in relation to collecting all, or any of, the information. In particular, we may need to notify each customer and obtain their consent to use their personal data for this new purpose. We also have obligations not to collect more personal data than is necessary, or keep the data for longer than necessary.

1. The OECD's latest recommended form of comprehensive double tax treaty defines what the criteria are for persons to be considered as a "resident" of a country or territory for the treaty purposes and these provisions have become increasingly standard for inclusion in the tax treaties to which Hong Kong is a party. It seems

to us that as AEOI is an initiative of the OECD, such standard treaty provisions may be a good starting point for determining what should be meant by "tax resident" and, if that approach were to be adopted, we suggest that the questions to be asked and the information to be provided would be very much simplified and the number of questions and the range of information to be provided would be very much reduced;

4. Furthermore, we understand that the OECD guidance on CRS is for the account holders to "self-certify" their residency. So perhaps it is not the right approach for the service provider to be collecting a whole lot of potentially irrelevant facts, and thereupon put the onus on the service provider to ascertain a customer/client's tax residency;

5. Determination of "Tax Residency" is not a straight forward exercise (especially when tax rules and regulations of multiple jurisdictions may have to be considered). Different countries have different criteria and definitions of "tax residency", and we (the service providers, especially our frontline staff), should not be expected, or be required, to provide our customers/clients with (what could be considered to be) tax advice. Service providers are not in a position to provide any advice on how to determine tax residency, and if they were to provide such checklists to clients, they could be regarded as representing to the clients that they are in a position to explain the rather confusing checklist or provide assistance/ advice based on it. Service providers should not be placed in such a position – If the customer/client gives an incorrect or false answer to their tax residency, and the relevant tax or Government authority tries to hold the customer/client liable/responsible for giving incorrect or false information as to their tax residency, the customer/client could blame the service provider for advising him/her incorrectly or confusing or misleading him/her;

6. AML, ATF and Tax compliance regulations (including FATCA) have already placed an increasing burden on the resources of service providers, which has driven up the cost of our businesses. This additional requirement of AEOI places an additional burden on service providers, who are being used by the tax authorities of various Governments to act as their tax information gathering agent for free, and therefore our involvement should be kept to a minimum (and not involve hand-holding customers/clients through a two page checklist) – perhaps such costs of tax information collection incurred by service providers should be funded or paid for by the relevant tax authority receiving the information, as an agency fee, so that the service providers (acting as tax information collection agents) do not have to

bear the cost;

7. Some of the questions in the Sample Checklists (such as gender, full name, marital status, date of birth, place of birth, citizenship, passport, residential address, etc) are basic KYC questions, which most service providers would require answers to, so are not a problem. However, some of the other questions are too detailed, and could amount to tax advice;

8. We suggest that, apart from basic fundamental questions which a service provider would normally ask for as part of their KYC, when it comes to the question of "what is your tax residency", we simply add that "if you are uncertain as to how to answer this question, we strongly advise you to obtain professional tax and legal advice, or advice from the relevant tax authority, in order to ascertain your tax residency". Or alternatively we give them an IRD prescribed form to complete. We believe that the obligation is for the relevant tax authorities to assist their taxpayers with ascertaining their tax residency.

9. It is suggested that the IRD, in its website, can provide some guidelines or information on the determination of "tax residence" for Hong Kong. As for other jurisdictions, links can be provided that can direct people to respective tax authority's websites (where available) for obtaining similar guidelines or information. Take for example, the Australian Tax Office offers an online tool (https://www.ato.gov.au/calculators-and-tools/are-you-a-resident/) to help people determine if they are an "Australian tax resident". The HKTA suggests that the IRD takes this into consideration and possibly discuss this with other OECD countries.

We also attach some sample trust structure diagrams that show trusts holding various underlying companies and entities, so that the IRD can consider whether the information required under AEOI extends to information about the underlying companies and entities. Please refer to the **appendix** on Trust Schematic, Trust/Limited Partnership Structure and BVI Vista Trust Schematic.

(IV) MPF/ORSO Schemes

Below is a high-level submission consolidating comments from trustees and, as per the earlier discussion with Ms. Mable Chan and Mr. Brian Chiu, to be supplemented by a

detailed submission primarily on the issue of "exemptions". This would be submitted before mid-July.

FSTB's Questions		Comments
<u>Question (A)</u> FIs, non-reporting FIs and excluded accounts	Do you have any views on the proposed scope of FIs (paragraph 2.12), non-reporting FIs (paragraphs 2.15 and 2.16) and excluded accounts (paragraph 2.17), within the framework allowed under CRS?	1. Trustees are of the view that (i) all MPF Schemes (ii) all ORSO Schemes, whether individual ORSO schemes or pooled ORSO schemes (and whether the pooling agreement or the plans participating in the pooling arrangement) should be exempted from AEOI since they are of low risk of being used to evade tax. They should be treated as "non-reporting FIs" to the extent they are FIs. We discuss below how only some pooled ORSO schemes are FIs, while other pooled ORSO schemes are not. 2. Pooled ORSO schemes that are based on insurance arrangements should not even be treated as FIs. ORSO pooling agreements (which are SFC authorized) generally either take the form of a trust arrangement or an insurance arrangement under ORSO (CAP. 426). In implementing FATCA, pooling agreements under trust arrangements were treated as Financial Institutions whereas pooling agreements set up by way of insurance arrangements were not. This view was derived from the definition of Investment Entity under FATCA IGA, which is similar to the definition under section 2.12 (d) (v) of this consultation paper. However, if section 2.12 (d) (iv) is implemented, all collective investment schemes under SFO – including ORSO pooling agreements based on an insurance arrangement -- would be regarded as Financial Institutions. This is inconsistent with the FATCA approach on what constitutes a Financial Institution as it relates to pooling agreements that take the form of insurance. 3. Besides ensuring that MPF schemes and ORSO schemes are non-reporting FIs, trustees believe that all MPF Scheme and ORSO scheme accounts should be included in the list of "excluded accounts". Registered trust company could be classified as either "Custodial institution" or "Investment entity". There may be

FSTB's Questions		Comments
		an issue as to whether separate AEOI reporting would be required for the two different capacities. To the extent that MPF scheme accounts of individual members and ORSO scheme accounts of individual members are treated, for AEOI purposes, as Financial Accounts of the trustees, ensuring that all such MPF individual member accounts and ORSO individual member accounts are excluded accounts may help solve the said problem. 4. Whilst trustees are of the view that ORSO and MPF schemes should, generally (and subject to certain exceptions), qualify for exemption under the Broad Participation Retirement Fund exemption, for the sake of clarity and certainty in the law, the strong preference of the trustees is for separate categories of exemption as "non-reporting FIs" to be specifically established for MPF schemes and for ORSO schemes (individual and pooled). 5. To the extent that unit trust/collective investment scheme investment accounts are treated for AEOI purposes as Financial Accounts of trustees, exemption from the requirement to report on such accounts should be granted to trustees of unit trusts /collective investment schemes for which KYC and AML reviews are normally done by the sponsor entities (namely fund managers), not the trustees. 6. 2.12(d)(vi): The meaning of "managed" should be clarified, in particular for trust/investment entities set up outside Hong Kong but the whole or part of their administration or management is located in Hong Kong. Will these entities be subject to AEOI reporting in Hong Kong? If the answer is positive, such trust/investment entities may be subject to CRS reporting for multiple jurisdictions. 7. Considerations should be given to extending exemption to offshore pension plans the administration of which is handled in HK (e.g. Macau pension plan which is regulated by the

FSTB's Questions		Comments
		Monetary Authority of Macau, should be exempted). 8. Considerations should also be given to specify the following as an excluded account: A transfer agent may hold cash for a short period within the settlement cycle (maximum 7 business days) for an underlying investor ahead of subscription into an "Investment Entity" or subsequent to a redemption from an "Investment Entity". In such instances, after the subscription into the "Investment Entity" is processed, the cash is then delivered to an operating or custodial account in the name of the "Investment Entity". To eliminate the creation of custodial accounts which would open and close in a short window and therefore be potentially reportable, it is proposed that such accounts should not be regarded as Financial Accounts for AEOI purposes provided that: (i) The account is established and used solely for the subscription and redemption into an "Investment Entity". (ii) The monies are delivered to the 'Investment Entity" upon the processing of the subscription (maximum 7 business days), or sent to the underlying investor within the settlement cycle of redemption (maximum 7 business days) from an "Investment Entity".
<u>Question (B)</u> Reporting Requirements	Do you have any views on the reporting requirements proposed in paragraph 2.19, within the framework required by CRS?	1. FIs are required to use reasonable efforts to obtain TIN if a TIN is issued by the AEOI partner or the domestic law of the AEOI partner requires the collection of TIN. A standard should be defined in the legislation, against which FIs are required to adopt in order to discharge their obligation to use "reasonable efforts". 2. Trustees are of the view that the government should provide information as to which AEOI partners issue TINs and require collection of TINs under their domestic law. Such information from the Government is particularly important to trustees as they do not generally know whether TINs are issued by AEOI partners or whether the

FSTB's Questions		Comments
		domestic laws of the AEOI partners require the collection of TIN. The absence of the above information from the Government might give rise to the need of obtaining self-certifications from all pre-existing accounts which are reportable accounts, a very undesirable outcome which is most wasteful of resources. 3. Although we support the wider approach, should it not be adopted in Hong Kong, can IRD clarify what happens each time a new country is added. Are trustees required to report on account holders tax resident in that new country with effect from the announcement by IRD of its inclusion or will there be a grace period? Trustees need clarity on what is required as and when new countries are added. For example, if as at 1 January 2017, trustees need to collect information on Japanese tax residents and that has been the focus of their efforts in the run-up to 1 January 2017, what would happen when Mexico is added to the list on 1 June 2017? Would the trustees be expected to be able to report for Mexico with effect from 1 January 2017 or with effect from 1 June 2017? Moreover, should trustees take the approach of collecting only Japanese information from 1 January 2017, in which case they might not have Mexico information on accounts in existence even as at 1 June 2017. Also, would the concept of "preexisting accounts" be applied for each "new" country as and when the addition is announced? 4. Information should match the reporting requirement under Section I of OECD CRS and, where applicable, be consistent with interpretation of comparable information under Hong Kong IGA - except for additional information such as jurisdiction(s) of residence, TIN(s).

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		5. "Nil" returns should not be made mandatory. If "Nil" return is required, should allow a simple check box for "Nil reporting" on the IRD AEOI Portal in lieu of requirement to submit a nil XML file. For other comments relating to paragraph 2.19, please refer to "Other comments" section below. 6. Consideration should be given to the issue of whether there should be a requirement for data encryption to take place before upload into IRD AEOI Portal or if the IRD AEOI portal can itself marry the digital certificate and xml file --- this is how the Irish ROS portal works. The proposed model where the IRD would provide a tool available for downloading to perform signing/encryption may not be viable in many large financial institutions highly controlled IT environments. 7. Clear guidance should be provided as to the timing of reporting of pre-existing accounts. 8. Relevant customer account terms and conditions (Ts&Cs) of the FIs should be sufficient contractual/ legal basis for 'notification' purpose under which FIs fulfil the AEoI due diligence and reporting requirements. The information to be reported can be accurate and updated based upon the FIs business as usual operational processes, assured by an effective control and governance framework.
<u>Question (C)</u> Due Diligence Procedures	Do you have any views on the due diligence procedures (including the alternative approaches to deal with certain circumstances) proposed in paragraph 3.1, within the	1. A de minimis threshold for both pre-existing individual and new individual accounts (similar to that imposed in the FATCA regime) should apply, otherwise that would result in a large number of accounts being identified as reportable and create a significant burden on FIs' operation. 2. Encourage the authorities to provide best practices to FIs via guidelines and practice notes to aid interpretation of new regulations and allow FIs to adapt for own business needs.

FSTB's Questions		Comments
	framework required by CRS?	3. Optionality in footnotes to paragraph 3.1 should be allowed to help FIs maintain flexibility in operating models. For example, specify mandatory data elements in self-certification subject to reasonableness test; however, any templates for which should only be for reference. 4. The trustees recommend 'day 2' approach to self-certification (ie can open account and complete self- certification within a period of time eg 90 days.). This issue is particularly important for MPF schemes as MPF trustees are subject to the non-refusal requirement under the MPFSO. Guidance is required as to what actions trustees should take if they are unable to obtain any of the information required under the due diligence procedure, including the obtaining of self-certifications. Unless MPF schemes are exempted, trustees need guidance from the IRD and the MPFA as to what to do if self-cert is not obtained at account opening. 5. Provide clear guidance as to due diligence on accounts closed prior to remediation deadlines. Generally, would follow due diligence for pre-existing account holders but clarification is required on what would the consequences be where no self-certification is obtained for account already closed.
<u>Question (D)</u> Requirement for FIs to identify and keep information of accounts concerning reportable jurisdictions	Will you, as FI, identify and keep information of accounts concerning reportable jurisdictions (i.e. only those jurisdictions with CAAs with Hong Kong), or all non-Hong Kong tax resident accounts, notwithstanding the legislative requirement for	1. Strongly propose the adoption of the optional '**wider approach**' described in the Annex 5 of OECD CRS requirements, versus the targeted approach being proposed by the Government, in regard to identifying, collecting and keeping information of account holders with tax residence in both reportable and non-reportable jurisdictions. 2. The alternative and 'targeted approach' proposed by the government will render the implementation and compliance of the AEOI regime prohibitively expensive for FIs, and likely impact the competitiveness of Hong Kong given, at this point, we are not aware of other

FSTB's Questions		Comments
	FIs to report to IRD only information concerning reportable jurisdictions as proposed in paragraph 2.20?	jurisdictions (e.g. Asia Pacific) that propose to adopt a targeted approach. 3. Propose to provide flexibility on the address (e.g. correspondence address, permanent address, residence address, etc)
<u>Question (E)</u> **Proposed sanctions**	Are the proposed sanctions proportionate to the types of offences (paragraphs 2.24 and 2.25)? Do you agree that we should impose sanctions on individual account holders who make false self-certification (paragraph 2.26)?	1. Trustees are of the view that the sanctions suggested under 2.25 are disproportionate to the severity of the act and it is incorrect to impose them by modelling on the AMLO. Sanctions are required in the AML regime in order to deter FIs from being used as a vehicle for laundering money, and, therefore, failure to comply with the AMLO would result in more severe consequences than in the case where a FI fails to comply with the requirements imposed on it in the AEOI regime. Trustees, therefore, submit that proposed sanctions be limited to the company only so that the employees are not subject to such sanctions. However, to the extent employees are, somehow, subject to penalties, the employee must have taken deliberate steps rather than merely permitting the offence to occur given the nature of these reporting duties. There should be an element of willfulness for 2.25(a) in the same manner as 2.25(b). 2. There should also be an explicit defense of "reasonable excuse" added for 2.24 (b) as in 2.24 (a). While companies will carry out due diligence, they cannot guarantee absolute error-free reporting. 3. The trustees also propose that there be a grace period (i.e. soft landing) during which sanctions will not be applied because people may not be able to fully comply with 2.24 and 2.25 at the initial stages. Warnings can be given but fines and imprisonment should not be imposed until the reporting process is shown to be working and "common" knowledge.

FSTB's Questions		Comments
		4. As for 2.26, some trustees believe that, on the one hand, if no sanctions are imposed against persons for making false declarations, it would be unfair to a FI to impose sanctions against it (for a FI cannot verify a person's tax residency status and it relies entirely on the self-certification); on the other hand, however, tax residency is not a simple matter even for people who are living and working abroad and the typical customer may simply not understand what his or her tax obligations are regarding his or her Hong Kong account.
<u>Question (F)</u> Confidentiality and notification	Does your institution have in place any mechanism to update clients' information and to meet the confidentiality safeguards (paragraph 2.33)?	1. Trustees are compliant with privacy requirements including allowing customers to, at any time, update their own personal data and access them. Having said that, apart from general reminders (e.g. reminder message in annual statements for customers to update information), trustees cannot conduct ongoing due diligence to ensure client information is updated on the trustees' own accord. They are solely reliant on the customers informing them of any changes. They cannot independently verify whether a customer is tax resident in any country or keep tabs on the same. 2. Further, requiring refreshing of self-certifications would not be practical either. Once the account is opened (be it for pensions or life insurance given their nature), it is impractical to require the customers to terminate the account (ie. unlike a bank deposit which can be returned, pension and life insurance proceeds are usually invested in mid to long term investments which result in significant fees and losses if liquidated before maturity).
<u>Question (G)</u> IT system	Will you, as FIs, use your self-developed software or the IRD software for preparing the data files of AEOI Returns? What are the	1. More information on what IRD requires for filing and reporting is required to answer this question. For some trustees, given the experience with FATCA, their preliminary view is that it makes more sense for financial institutions to use IRD software to file AEOI returns and that software should be based on XML formats.

FSTB's Questions		Comments
	considerations involved (paragraph 3.9)?	For other trustees, they would consider, after receiving the data specification from IRD, to develop our own software to prepare the data file in the XML format. For these latter trustees, however, they would not, at this preliminary stage, rule out the option to use the software provided by IRD. But this would depend on the user friendliness of the software, in particular, the mechanism to enter data in the form provided in the software. 2. IRD must insist on adoption of the standard OECD CRS schema in XML format across all AEOI Partners to allow maximal traction for FIs in developing cost effective global /regional data management, technology and compliance solutions. 3. IRD should consider allowing third party roles (apart from FIs themselves) to perform all of reporting, including the submission of AEOI returns and all documents incidental thereto for and on behalf of other FIs. 4. Consideration is to be made whether there is should be a requirement for data encryption to take place before upload into IRD AEOI Portal or if the IRD AEOI portal can itself marry the digital certificate and xml file --- this is how the Irish ROS portal works. The proposed model where the IRD would provide a tool available for downloading to perform signing/encryption may not be viable in many large financial institutions highly controlled IT environments.

Other Comments

Consultation paragraph number	Excerpt relevant text (in question) from Consultation Paper	Comments
2.1	adopt pragmatic approach to	It is stipulated in the consultation paper that Hong Kong will put in place necessary domestic legislation

	include all essential requirements of the AEOI standard in our domestic law and will ensure effective implementation of the new standard.	in order to give legal effect to implementing the standard on AEOI. It is expected that the said legislation will have overriding effect on other legislations in relation to the preservation of secrecy, e.g. s77 of ORSO and s41 of MPFSO. As such, no amendment on those legislations is required for providing the required information to IRD. Please clarify if the above understanding is correct. Otherwise, the constraint of releasing MPF/ORSO information under section 41 and section 77 should be cleared first.
2.15	For non-reporting FIs, we intend to include -	It is expected that non-profit organization e.g. charity will be included as non-reporting FI.
2.19(b)	the account number….	It is expected that the account number is the client number of the employer / employee.
2.19(c)	FIs to report to IRD the following information on each reportable account ... (c) the name and identifying number (if any) of the FI;	It is expected FIs will be assigned the identifying numbers upon registration through the AEOI Portal.
2.19(d)	the account balance or value (including, in the case of a cash value insurance contract or annuity contract, the cash value or surrender value) as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year or period, the	If the ORSO schemes mentioned above could not be fully exempted from AEOI, some trustees would like to clarify the below information. (i) Confirmations required for what to report as ORSO account balance as below: <u>For Defined Benefit ("DB") schemes</u>, Employer's surplus resulted from assets minus liabilities will be reported as Employer's account balance. a. The surplus can be obtained from the Actuarial Certification that is applicable to the schemes with single employer. b. For the multi-employer schemes, the Actuarial Certification of the asset and liability valuation is on overall-scheme basis. Reporting "0" as the employer's

	closure of the account;	account balance to report the balance attributable to any particular employer. Employee's vested balance will be reported as Employee's account balance. For Defined Contribution ("DC") schemes, Employer's forfeiture account will be reported as Employer's account balance. This money will be put into employer's parking account initially and will be ultimately transferred to member's accounts or refunded to employer. The money in parking account will not be reported under AEOI. Employee's vested balance will be reported as Employee's account balance. Whilst a member is yet to entitle the unvested balance, the unvested balance will not be reported as employee's account balance until such balance become vested in member's account. Or the unvested balance will become part of forfeiture account if member terminated. (ii) A pension benefits is provided under some ORSO schemes. If the employment of a scheme member (i.e. pensioner) is terminated, the scheme member's account will be terminated and a regular payment will be paid to a pensioner / beneficiary until the pensioner / beneficiary decease. Under this scenario, is it correct to report the actual payments to the pensioner / beneficiary as the gross amount paid or credited to the account holder while account balance equal to zero?
2.23 b	(b) have access to the business premises and the computer systems of FIs, obtain search warrant in cases where the FIs fail to comply with the court order directing	1. The process, pre-conditions and manner under which IRD would have the access must be clearly consulted and defined. Some trustees are of the view that the IRD must obtain a court order before being allowed access to the computer-systems and premises of FIs. 2. 'Computer systems' contain all sorts of business confidential & sensitive materials, as well as customer information that may or may not be related to the specific CRS /AEOI queries or purpose of visit. FIs in most cases will be required to comply with relevant and applicable

	them to comply with the return filing requirement, direct FIs to verify their compliance with the reporting and due diligence procedures, and rectify their AEOI system if found defective, and direct FIs or persons to rectify any arrangement / practice which intends to circumvent the due diligence procedures;	data protection and data privacy regimes in Hong Kong and abroad (eg multinationals) as regards such data and information in possession. Please clarity the scope and manner of access including by whom, timing, etc.
2.24(b)	Penalize FI for furnishing incorrect returns due to failure to observe in full the due diligence requirement	Trustees propose (i) the replacement of "incorrect returns" by "materially incorrect returns" and/or (ii) that the sanction is only imposed should the failure result from recklessness or wilful intent on the part of the FIs.
2.33	FIs would, in line with the existing requirements under the privacy law, need to inform both new and existing account holders on the possible use of the	1. Trustees propose that FIs discharge the responsibility to customer notification through the terms and conditions of the accounts and contracts, subject to Personal Information Collection Statement (PICS). 2. Any separate and individual notifications are neither pragmatic nor necessary under AEOI in order to ensure information to be exchanged on Reportable Account can be accurate and up-to-date (as of year end), Account holders have ready access to account information, and policies and procedures are already in place within FIs to

	personal data collected.	help account holders ensure their personal and financial (eg transaction records, monthly statements are provided by FIs as business-as-usual) information is valid and current. 3. The government is expected to help taxpayers determine and provide them with information with respect to, their residence(s) for tax purposes. That may be done, for example, through the various service channels used for providing information or guidance to taxpayers on the application of tax laws (Section IV para 6 on p.128 of commentary). More broadly, the government should plan for and initiate a communications campaign well ahead of the rollout of the CRS to educate residents and non-residents of Hong Kong on the AEOI regime. Specifically, the campaign should clearly explain the roles and responsibilities of customers / taxpayers and FIs under the CRS due diligence and reporting requirements that will be in effect in Hong Kong. The campaign will complement any "customer relationship" mechanism FIs have in place.
3.1	FIs are required to perform the following due diligence procedures - entire footnote 9	FIs will want all of the alternative approaches (i.e. items (a) to (j) of footnote 9) to be set out in the law i.e. principal provisions and/or Schedules.
General comments		1. Is there a specified data retention period for CRS? Follow MPF Legislation? 2. There are concerns on how the government would ensure that our treaty partners would have sufficient safeguards in place for protecting the confidentiality of data exchanged, and what would be the remedy available (in addition to the suspending of information transmission to the relevant treaty partners) in case of, for example, data leaks. Some trustees are of the view that efforts should be made to ensure that there are sufficient ongoing monitoring by the government on our treaty partners.

		3. It is unclear whether the definition of "Controlling Person" will follow that of the "Controlling Shareholder" under the Listing Rules, to what extent should FIs report if there is more than one controlling person for an entity, and where the controlling person itself is e.g. a trust. 4. It is imperative the Government would circulate the draft amendment bill(s) well ahead of its passage through LegCo to help manage and align industry expectations.

(V) Next Step

As mentioned under the MPF/ORSO schemes section, as agreed we will be submitting to the FSTB a more detailed write-up on exemptions before mid-July. Supplemental information might also be made on other sectors of the trust & fiduciary industry.

Thank you for the opportunity to comment. We would be pleased to engage in further discussions with you in relation to the Consultation Paper and AEOI and provide further industry views and comments covering the three sectors or other general areas, as appropriate. If there are points in our submission that are not accepted, we wish to have the opportunity of discussing our views before the Consultation Conclusions are published.

If you have any questions, please do not hesitate to contact us.

Yours faithfully,

For and on behalf of Hong Kong Trustees' Association Limited

Michael Shue

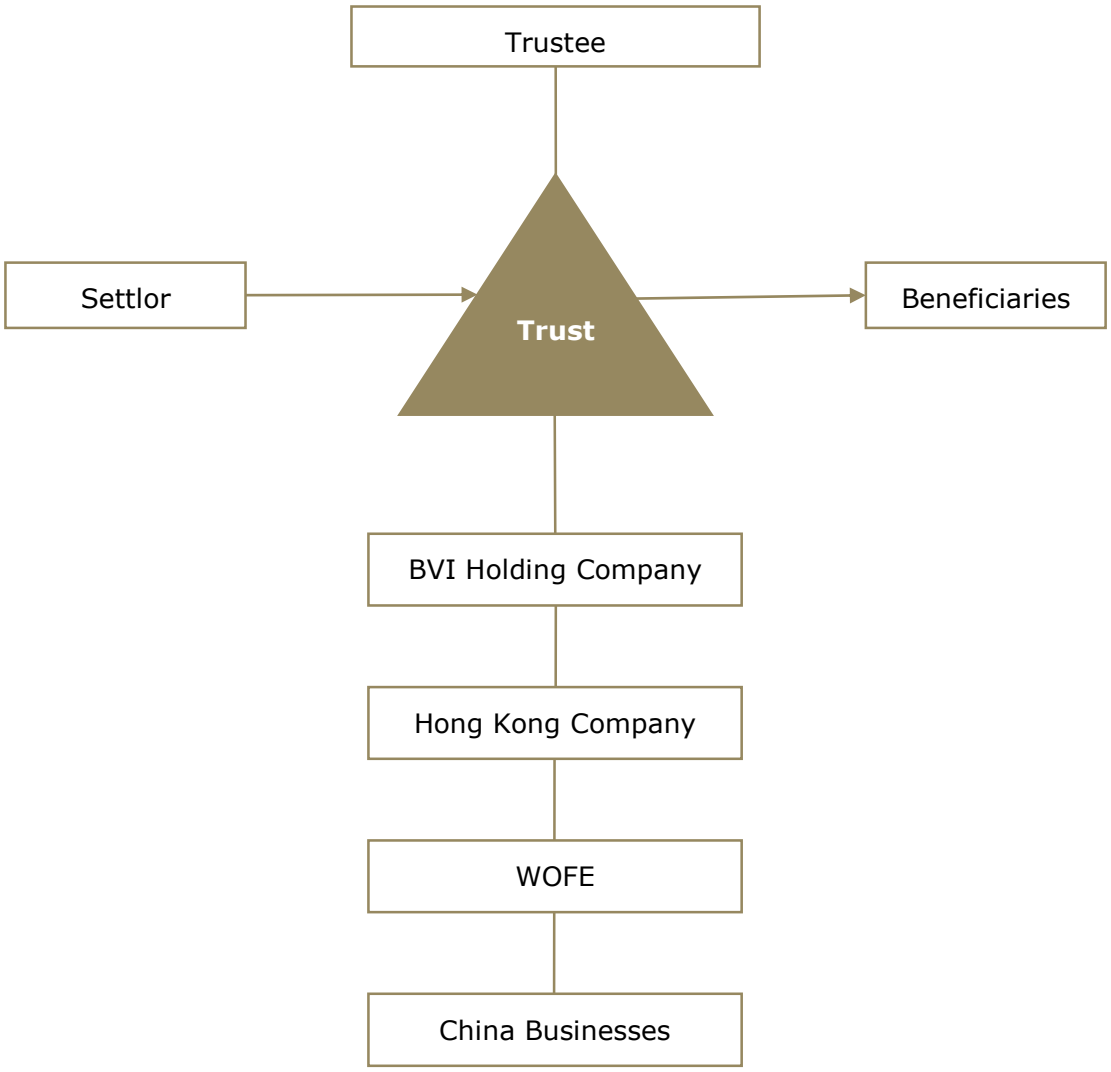
Ka Shi Lau

Enclosure: Appendix

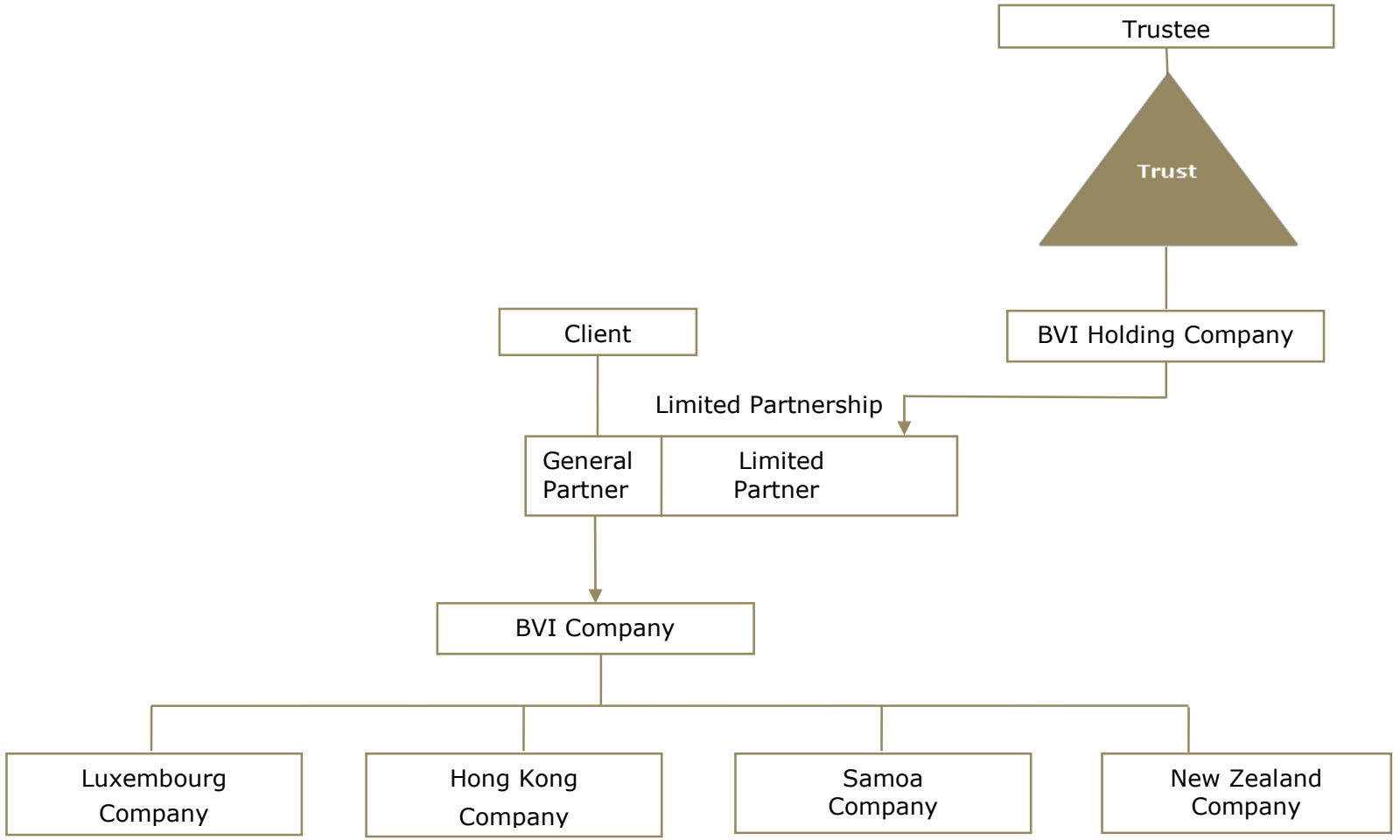
APPENDIX

香港信託人公會
Hong Kong Trustees' Association

Trust Schematic



Trust/Limited Partnership Structure



BVI Vista Trust Schematic