

香港特別行政區政府
商務及經濟發展局
工商及旅遊科



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COMMERCE AND ECONOMIC
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23 May 2011

Ms Debbie Yau
Clerk to Panel on Economic Development
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Ms Yau,

Follow-up to meeting on 28 March 2011
“Outcome of Public Consultation on Proposed Legislative Amendments to
Eradicate Pyramid Schemes”

Thank you for your letter of 29 March 2011. Members may know that the Pyramid Schemes Prohibition Bill, which aims to implement the legislative proposals to prohibit pyramid schemes, was published in the Government Gazette on 20 May.

I now set out our responses to the questions on the list attached to your letter.

Penalty and Disgorgement Orders

“Market misconduct” under the Securities and Futures Ordinance (Cap. 571) may attract civil sanctions under Part XIII of the Ordinance or criminal sanctions under Part XVI. Disgorgement orders are among the civil orders that can be made by the Market Misconduct Tribunal under Part XIII. Where criminal prosecutions are made under Part XVI, a penalty of fine and imprisonment, but not disgorgement orders, may be imposed.

The proposed offences in respect of pyramid schemes are fraudulent and criminal in nature, against which criminal prosecution is warranted and a suitable level of penalty of imprisonment and fine should be the most appropriate deterrent. In our view, our proposal to increase the present maximum penalty to imprisonment for 7 years and a fine of \$1 million on conviction upon indictment, which has had the support of Panel Members, is a sufficiently strong deterrent against taking part in pyramid schemes. In proposing this level, we have had regard to the level of penalties of other offences of a similar nature.

Furthermore, Members may wish to note that under the present Pyramid Selling Prohibition Ordinance (Cap. 355) as well as in the proposed Pyramid Schemes Prohibition Bill, the court is empowered to order a person convicted of an offence under the provisions to pay compensation to victims who have suffered financial loss resulting from the offence. Compensation orders made under the provision do not just have the effect of taking away gains that are obtained by the convicted through the offending acts, they also enable the return of the gains in question to the victims. As far as the interests of victims are concerned, this arrangement addresses their concerns more directly than disgorgement orders.

In the light of the foregoing, we do not intend to empower the court to make disgorgement orders. This notwithstanding, upon the implementation of the proposed Pyramid Schemes Prohibition Bill if enacted, we will keep in view the effectiveness of its operation and will consider the need to step up measures to enhance its deterrent effect as and when appropriate.

Relevant Cases

There are indeed general criminal offences, such as fraud contrary to the Theft Ordinance and the common law offence of conspiracy to defraud, to tackle deception. However, where there is a specific objectionable conduct, putting in place specific provisions to outlaw it may enhance the effectiveness of enforcement. Examples include section 107 of the Securities and Futures Ordinance which prohibits the conduct of “fraudulently inducing persons to invest money”, and the Pyramid Selling Prohibition Ordinance which prohibits pyramid schemes.

As pointed out in paragraph 2.4 of the Public Consultation Paper on Proposed Legislative Amendments to Eradicate Pyramid Schemes, the

----- Court of Appeal has pointed out previously that there are loopholes in the Pyramid Selling Prohibition Ordinance which have rendered it less than effective in achieving its aim (extracted at Annex). While depending on the facts and other circumstances of individual cases, certain cases can be dealt with by the existing general criminal offences mentioned above, the most effective and targeted approach is to tighten the relevant legal definitions as we are now proposing.

Details of two more recent cases being dealt with under the charge of “conspiracy to defraud” are set out below for Members’ reference.

Case Reference	Modus operandi	Charge and case result
DCCC782/ 2006	A company induced elderly persons to join a high-yield cash-planting scheme by promising 400% cash rebates within 18 months. Participants were urged to recruit new participants to receive additional cash rebates. Approximately 300 persons were deceived of \$4 million in total.	Five operators or promoters were each charged with one count of “conspiracy to defraud”. All defendants were convicted and sentenced to three and half years of imprisonment.
DCCC1044/ 2010	A company induced persons to join a high-yield cash-planting scheme by promising 2-3% daily cash rebates in 100 days. A 12-20% of commission would be offered for bringing new participants to join the scheme. Thirty-one persons were deceived of \$250,000.	Eight operators or promoters were each charged with “conspiracy to defraud” and an alternative charge of “conspiracy to promote a pyramid selling scheme”. One of the accused was convicted of one count of “conspiracy to defraud” and sentenced to three years and eight months’ imprisonment.

Yours sincerely,



(K.C. Yau)

for Secretary for Commerce and Economic Development

2.4 We consider that the current provisions of the Ordinance, particularly the definition of “pyramid selling scheme”, are no longer effective in combating objectionable schemes which adopt a pyramid structure in various guises. In 2003 and 2004, when ruling on two cases involving alleged pyramid selling schemes (CACC 96/2003 and CACC 55/2004), the Court of Appeal acquitted the defendants in both cases of charges of breaches of the Ordinance. In the judgments, the Court of Appeal raised the following problems in relation to the definition of “pyramid selling scheme” in the Ordinance:

- (a) section 2(b) of the Ordinance implies that the operation of a pyramid selling scheme **must** involve the selling of goods or services, which means that schemes not involving the sale of goods or services would fall outside the scope of the Ordinance; and
- (b) section 2(b) is also taken to imply that that a pyramid selling scheme must involve the sale of goods and services **by participants**. This means that schemes under which goods or services are not sold by participants (for example, sold by the company directly to new participants) would fall outside the scope of the Ordinance.