



中華人民共和國香港特別行政區  
Hong Kong Special Administrative Region of the People's Republic of China

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LEGISLATIVE COUNCIL SECRETARIAT  
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Mr K C YAU  
Principal Assistant Secretary for Commerce &  
Economic Development (Commerce & Industry) SD  
Commerce and Economic Development Bureau  
Level 29, One Pacific Place  
88 Queensway  
Hong Kong

10 June 2011

Dear Mr YAU,

### **Pyramid Schemes Prohibition Bill**

To assist our scrutiny of the Pyramid Schemes Prohibition Bill (the Bill), we should be grateful for your clarifications on the legal and drafting issues set out below.

#### *Clause 5*

- (a) While clause 5(1) preserves the existing offence of knowingly promoting a pyramid scheme, clause 5(2) creates a new offence of participating in and inducing (or attempting to induce) others to participate in a pyramid scheme. While clause 5(2)(b) specifies the matter which a participant must know or ought reasonably to know in order to establish that an offence under the clause has been committed, the word "knowingly" is not explained under clause 5(1). Please explain precisely what a person must "know" in order to establish that an offence under clause 5(1) has been committed by the person. Please also clarify whether the word "knowingly" as used in clause 5(1) requires actual knowledge, or whether deemed or constructive knowledge would suffice (as is the case under clause 5(2)(b)).

- (b) It is noted that the word "knowingly" is not used in relation to the offence of establishing, operating or promoting a pyramid promotional scheme under section 65(1)(a) of the *Consumer Protection Act 2007* of Ireland, nor does it appear in section 44(1) of the *Australian Consumer Law* which provides that a person must not participate in (which includes establish or promote) a pyramid scheme. Has the Administration considered the regulatory regimes in Ireland or Australia in reviewing the effectiveness of Cap. 355 before introducing the Bill? If so, is there any reason why the Administration considers it appropriate to retain "knowingly" in the offence of promoting a pyramid scheme in the Bill instead of adopting the approach in similar legislation in Ireland and Australia? Has the Administration considered whether the inclusion of "knowingly" in clause 5(1) would cause difficulties in prosecuting the offence and whether this would affect the efficacy of the Bill?
- (c) It is further noted that paragraph 3.2(c) of the "Public Consultation Paper on Proposed Legislative Amendments to Eradicate Pyramid Schemes" published by the Administration in December 2010 proposed providing appropriate defences for publishers who innocently published advertisements promoting pyramid schemes. In paragraph 12(c) of the Administration's Paper entitled "Review of Pyramid Selling Prohibition Ordinance (Cap. 355)" prepared for the meeting of the Panel on Economic Development held on 25 October 2010 (Paper No. CB(1)95/10/11(03)), it was further proposed that a defence be made available to a person who committed an offence due to a mistake or information supplied by a third party in circumstances where he took reasonable precautions and exercised due diligence. Please explain why no such defences are provided in the Bill.

#### Clause 6

- (d) Under section 4(2) of Cap. 355, where a director, partner etc is charged with an offence under the Ordinance, he may have a defence if he can prove that the offence was committed without his consent or connivance and that he exercised diligence to prevent the commission of the offence. Under clause 6(1), however, the

consent, connivance or neglect of the director, partner etc has now become an element of the offence which the prosecution has to prove. Please explain the reason for this change of approach.

### *Clause 7*

- (e) What factors will the courts take into account in exercising their power to award compensation under clause 7? Will the Administration consider stipulating the relevant factors in the Bill? For instance, where the convicted promoter of a pyramid scheme makes profits by investing the participation fee received from the victim, is it intended that the courts, in making a compensation order, should take into account the amount of profits made by the promoter over and above the amount of the participation fee? If so, should this be provided in clause 7?

### *Clause 8*

- (f) While section 6 of Cap. 355 specifies the right or claim (i.e. "any right or claim against any person ceasing to promote a pyramid selling scheme by reason of this Ordinance") which is not prejudiced by the Ordinance, clause 8 does not explain what "rights or claims" are not limited, restricted or otherwise affected by the Bill. Please clarify what "rights or claims" are contemplated by clause 8.

### *Drafting matters*

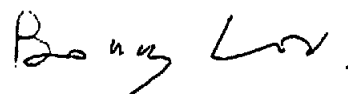
- (g) In clause 1(2), should "by notice published in the Gazette" be added after "the Secretary for Commerce and Economic Development" to achieve consistency with the Chinese text?
- (h) In clause 2, the terms "participation payment" and "recruitment payment" are defined as "see section 3(1)(a)" and "see section 3(1)(b)" respectively. The way these definitions are drafted, when read in conjunction with the opening words of clause 2, i.e. "In this Ordinance –", has resulted in an incomplete sentence being used in the Bill. This drafting approach seems to depart from the previous practice adopted, for instance, in section 1(1) of Schedule

2 to the Minimum Wage Ordinance (Cap. 608) which provides that "assessment" means an assessment referred to in section 6 of this Schedule". Why is this new drafting practice adopted?

- (i) In relation to the definitions of "participation payment" and "recruitment payment" under clause 3, the legislative intent is that such "payment" could be a financial or non-financial benefit. However, the Chinese text renders "participation payment" and "recruitment payment" as "參與費" and "招募得益" respectively. While "得益" correctly reflects the intended meaning of "benefit" (which can be financial or non-financial), "費" may suggest that the benefit in question must be financial in nature. In the circumstances, please consider whether "參與費" accurately reflects the Administration's policy intent.
- (j) It is further noted that in the Chinese text of clause 4(1)(a), the words "(指與新參與者有權在該計劃之下獲供應的貨品或服務相若的貨品或服務)" are included to explain the expression "相若貨品或服務". No such language is included in the English text to explain the expression "comparable goods or services". Please consider whether it is necessary to insert in the English text the words "(that is, goods or services comparable to those with which the new participant is entitled to be supplied under the scheme)" immediately after "comparable goods or services" to ensure that the English text corresponds to the Chinese text as far as possible.

Since the Bills Committee is scheduled to meet on 24 June 2011, we should be grateful for your early reply in both languages, preferably **by 20 June 2011**. Please also send an electronic copy of your reply to [ftse@legco.gov.hk](mailto:ftse@legco.gov.hk).

Yours sincerely,



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