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By Fax (2527 0790)

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Ms Eureka CHEUNG
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services) 5
Financial Services and the Treasury Bureau
24/F, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Ms CHEUNG,

**Anti-Money Laundering and Counter-Terrorist Financing
(Financial Institutions) (Amendment) Bill 2017**

To assist our scrutiny of the legal and drafting aspects of the above Bill, we should be grateful for your clarification of the following issues:

Clause 7 – proposed section 5A of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615)

1. The Financial Action Task Force ("FATF") defines designated non-financial businesses and professions ("DNFBPs") to cover casinos, dealers in precious metals and stones, real estate agents, lawyers, notaries, accountants, and trust or company service providers ("TCSPs").¹ Solicitors, foreign lawyers, accountants, estate agents and TCSPs are the only DNFBPs sought to be regulated under the Bill. Has FATF explained why the anti-money laundering/counter-terrorist financing ("AML/CTF") requirements relating to customer due diligence ("CDD") and record-keeping need not apply to other non-financial businesses and professions (e.g. architects, surveyors, planners and property management companies etc.) who may also be involved in real estate projects and/or manage customers' assets?

¹ See paragraph 7 of LC Paper No. CB(1)363/16-17(05).

2. The proposed section 5A(3) to (5) of Cap. 615 requires a DNFBP, "in Hong Kong", to prepare for, carry out or be involved in a specified transaction in order for an AML/CTF requirement set out in Schedule 2 to apply to that DNFBP/transaction. Please provide examples to illustrate whether the requisite geographical nexus with Hong Kong would be established in any given case where:
 - (a) the DNFBP, the client or the subject matter of the transaction (e.g. the real estate or business entity to be bought or sold, the assets or accounts to be managed, the company to be created, operated or managed, or the trust or corporation for which the TCSP is to act as a trustee or nominee shareholder) is located outside Hong Kong, e.g. Mainland China or Cayman Islands;
 - (b) the relevant transaction documents or the DNFBP's service agreements with the client choose a foreign governing law; or
 - (c) the DNFBP (or its overseas operations) provides services to the client via a website or server located outside Hong Kong.
3. In the proposed section 5A(3):
 - (a) Why is paragraph (d) limited to "the creation, operation or management of corporations", while paragraph (e) applies to the creation etc. of all legal persons or legal arrangements?
 - (b) What would constitute the buying or selling of a "business entity" under paragraph (f)? Would the sale or purchase of: (i) shares or other equity interests in; or (ii) substantial assets (e.g. receivables, intellectual property and goodwill etc.) of, a business constitute the selling or buying of a "business entity"?

Clause 8 – proposed section 7 of Cap. 615

4. In relation to the proposed section 7(5A) of Cap. 615:
 - (a) In case of conflict between a guideline published under section 7(1) (as amended) and a practice direction referred to in section 7(5A) regarding the operation of or compliance with an AML/CTF requirement, which instrument would prevail?
 - (b) Should there be another provision similar to the proposed subsection (5A) so that the Hong Kong Institute of Certified Public Accountants, in considering whether an accountant has

contravened an AML/CTF requirement, may have regard to or take into account any relevant statement of professional ethics, or standards of accounting, auditing and assurance practices, issued or specified by its Council pursuant to section 18A of the Professional Accountants Ordinance (Cap. 50)?

Clauses 16 and 18 – proposed new section 39A and Part 5A of Cap. 615

5. Clause 16 seeks to add a new section 39A to require a money service operator ("MSO") to display the original of its MSO licence in a conspicuous place at the premises specified in the licence. Should the proposed Part 5A similarly require a TCSP licensee to display its original TCSP licence at the licensee's business premises?

Clause 18 – proposed new Part 5A of Cap. 615

6. According to paragraph 14 of the Explanatory Memorandum, the new Part 5A corresponds to the existing Part 5 (relating to MSOs) except for differences specific to TCSPs. Please elaborate on such differences between the licensing regimes under Parts 5 and 5A.
7. Paragraphs (b)(iv) and (c)(iii) of the definition of "ultimate owner" under the proposed section 53A refer to the term "ultimate control". Please explain the meaning of this undefined term, and consider defining it in the Bill.² It is further noted that under the Companies (Amendment) Bill 2017 ("CO Bill"), a "registrable person" means a person having "significant control", which in turn is defined by reference to, among other factors, holding more than 25% of the shares, capital, profits or voting rights in a company, having the right to appoint or remove a majority of its directors, or exercising "significant influence or control" over the company (proposed sections 653C and 653E of, and Schedule 5A to, the Companies Ordinance (Cap. 622)). Please also explain the relationship, if any, between "ultimate control", "significant control" and "significant influence" in relation to a company subject to AML/CTF regulation.

² According to paragraph 15 of FATF's Guidance on Transparency and Beneficial Ownership (October 2014), "beneficial owner" refers to "the natural person(s) who *ultimately owns or controls* a customer and/or the natural person on whose behalf a transaction is being conducted", including "those persons who exercise *ultimate effective control* over a legal person or arrangement", and the italicised terms refer to "situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control". The FATF definition seems to focus on the natural persons who actually own and take advantage of capital or assets of the legal person, or exert effective control over it (whether or not they occupy formal positions within that legal person).

8. The proposed section 53D(3) requires the Registrar of Companies ("Registrar") to make the register of TCSP licensees available for public inspection during normal office hours. Should the Registrar also be required to publish the register online (e.g. via the website of the Companies Registry ("CR")) for around-the-clock access?
9. The proposed section 53E(2) and (3) provides that an entry in or extract from the register certified by the Registrar would constitute "evidence" of the facts stated therein, while under the proposed section 53E(4) a certificate signed by the Registrar is "conclusive evidence" of the facts stated in it. Please explain why the Registrar's certificate under the proposed subsection (4) would be "conclusive" and cannot be rebutted by evidence to the contrary.
10. Please consider whether the proposed section 53F should make it a criminal offence for a TCSP licensee to carry on a trust or company service ("TCS") business: (a) from a mobile (rather than fixed) location; (b) at an address other than that specified in the licence under the proposed section 53N(2)(b); or (c) in breach of any conditions imposed under the proposed sections 53J, 53L and 53M.
11. Clause 27 proposes adding a new Schedule 3A to specify various fees payable under the proposed Part 5A. It is noted that the application fees payable under the proposed sections 53G(2)(b)(ii) and 53K(2)(c) for granting and renewing a licence (\$3,440 and \$2,910 respectively, plus \$975 for each person subject to the fit and proper test) are non-refundable upon revocation, suspension or cancellation of a licence: see proposed sections 53R(5) and 53X(3):
 - (a) Are there any circumstances in which these fees would be refundable at all? For example, would the fee be refunded if a licence application is withdrawn (see section 53ZQ(4)(c))?
 - (b) The amounts proposed in Schedule 3A in respect of TCSPs appear to be slightly higher than those set out in Schedule 3 in respect of MSOs. How are the proposed fees calculated?
12. For an applicant who is a corporation, the fit and proper test would apply to each director and "ultimate owner" under the proposed section 53H(3). Should the test also apply to each manager, secretary or officer of the corporation? How about a shareholder who owns 25% or less of the issued share capital of the corporation (and as such does not fall within the definition of "ultimate owner")?

It seems that the 25% ownership threshold, which would also apply under the new definition of "beneficial owner" in section 1(1) of Schedule 2 (as amended by clause 26), is intended to align with the definitions of "registrable person" and "significant control" under the CO Bill. Why is the line drawn at 25% for AML/CTF purposes?

13. The questions in paragraph 12 above also apply in relation to:
 - (a) the revocation or suspension of a corporation's licence under the proposed section 53Q(2)(c); and
 - (b) the Registrar's approval for a person to become an ultimate owner or a director of a TCS licensee under the proposed sections 53S and 53U.
14. In the proposed section 53I, a conviction involving a finding of fraud, corruption or dishonesty only appears under paragraph (b)(iii) in relation to convictions outside Hong Kong, but not under (a) in respect of convictions under local law. Should a similar item relating to such a conviction be added under paragraph (a)? If so, should section 30(4)(a) relating to MSOs also be similarly amended?
15. For the purpose of determining whether corporation A is a fit and proper person under the proposed section 53I(e), would it also be a relevant consideration if a director or an ultimate owner of corporation A is also a director or an ultimate owner of corporation B which is in liquidation or subject to winding up or receivership?
16. Under the proposed sections 53J(4), 53L(4) and 53M(4), a condition would take effect at the time the licensee *receives* the notice informing him of the decision, while the 21-day period under the existing section 59(1) for applying for a review of the decision starts to run from the juncture "after the notice ... has been *sent*". Please explain the discrepant methods of reckoning time.
17. The proposed sections 53R(3) and 53ZA(3) require the Registrar to give the licensee "a reasonable opportunity to be heard" before revoking or suspending a licence or exercising a disciplinary power:
 - (a) Would the Registrar send the licensee a notice to show cause, indicating her intention to exercise the relevant power and the grounds for doing so, and ask the licensee to respond? How much time would the licensee be given to respond?

- (b) Would the licensee be able to state his case in writing and/or orally with the assistance of his legal representative?
18. Under section 34(8) of Cap. 615, an MSO licensee who fails to surrender the revoked licence within the time specified in the notice of revocation commits an offence punishable by a fine at level 5. Should a similar provision be added to the proposed section 53R in relation to the revocation of a TCSP licence?
 19. Would a licensee who, without reasonable excuse, allows another person to become an ultimate owner, partner or director of the licensee without first applying for the Registrar's approval commit an offence under the proposed sections 53S(6), 53T(6) and 53U(6)?
 20. Should the proposed section 53X(1) require the licensee to notify the Registrar of his intention to cease business, say, at least a week (or 48 hours) before the intended date of cessation, and to return the licence to the Registrar for cancellation (see section 41(1)(b))?
 21. The proposed 53Z(2)(a)(i) refers to "a requirement set out in Schedule 2 that applies to a DNFBP who is a TCSP licensee". How, if at all, is that expression different from "an AML/CTF requirement that applies to a DNFBP who is a TCSP licensee" under the proposed section 5A(5) where "AML/CTF requirement" is defined as "a requirement set out in Part 2, 3 or 4 of Schedule 2"?
 22. Under the proposed section 53ZB, should the Registrar be required:
 - (a) to consult the public or stakeholders (e.g. TCSPs) before publishing guidelines indicating how she proposes exercising the disciplinary power to impose a pecuniary penalty; and
 - (b) to publish the guidelines electronically (e.g. via CR's website) under the proposed subsection (2)(b)?
 23. In relation to the proposed section 53ZC:
 - (a) As a pecuniary penalty ordered under section 53Z(3)(c) would not in any event exceed \$500,000 (which is well within the District Court's civil jurisdictional limit of \$1,000,000 under section 32 or 33 of the District Court Ordinance (Cap. 336)), why does the proposed section 53ZC(3) seek to invoke the civil jurisdiction of the Court of First Instance ("CFI") instead?

- (b) Please identify the relevant provisions of the Rules of the High Court (Cap. 4A) which govern how the Registrar would apply to CFI to register an order to pay a pecuniary penalty.
 - (c) Under section 17A of the Public Finance Ordinance (Cap. 2), any fine or penalty imposed by or under the authority of any Ordinance must be paid into the general revenue ("GR"). Please confirm whether any pecuniary penalty or money recovered pursuant to an order registered under the proposed section 53ZC would be paid into the CR Trading Fund under Cap. 430B, or to GR in accordance with section 17A of Cap. 2.
24. Under the proposed section 53ZD, the Registrar may exercise her disciplinary power against a *director* of a corporate licensee in certain circumstances. Please consider whether a manager, secretary or other officer of the licensee should similarly be subject to disciplinary actions, given that a *director, manager, secretary or other similar officer* of a body corporate may be punished for an offence under section 43Q of the Employment Ordinance (Cap. 57) if the offence is proved to have been committed by the corporation with their consent or connivance, or attributable to their neglect.
25. In relation to a licensee who is a partnership, please advise whether:
- (a) a financial penalty (as opposed to a criminal fine) imposed on the partnership under the proposed section 53Z(3)(c) would be levied against the assets of the partnership,³ or enforceable against every partner jointly with the others in accordance with section 11 of the Partnership Ordinance (Cap. 38); and
 - (b) the Bill should also enable the Registrar to exercise a disciplinary power against an individual partner who caused or allowed the partnership's contravention of an AML/CTF requirement or failed to take reasonable steps to prevent it.
26. New offences of obstructing an authorized officer would be created under the proposed sections 53ZF(5) and 53ZG(5). Unlike, for example, section 10(1) of the Product Eco-responsibility Ordinance (Cap. 603) which refers to "wilfully obstructs", no adverb is used here to qualify "obstructs". Please advise what mental element or *mens rea*, if any, is required for the commission of these offences.

³ See section 5(10) of Cap. 615 and *R v. Stevenson & Sons (A Partnership) and others* [2008] 2 Cr. App. R. 14.

27. Under the proposed section 53ZJ, paragraph (e) would permit a specified person to disclose information for the purpose of seeking or giving legal or other professional advice "in connection with any matter arising under" the Bill, while paragraph (f) allows disclosure "in connection with any judicial or other proceeding to which the specified person is a party". Is it the Bill's policy intent to allow disclosure under paragraph (f) *only* in connection with proceedings arising under the Bill? If so, should paragraph (f) make this clear?
28. In relation to the proposed section 53ZK:
- (a) Please provide examples of public officers who may be authorized by the Financial Secretary under subsection (6) to receive information under subsection (1)(d)(vii).
 - (b) Please consider whether the Estate Agents Authority ("EAA") should be added to subsection (1)(d) insofar as a TCSP and an estate agent may both be implicated in a real estate transaction involving a TCS (e.g. the formation of a company or trust to hold the subject property) and the information gathered by the Registrar about the TCSP may also be relevant to EAA's investigations under the Estate Agents Ordinance (Cap. 511).
 - (c) What are the justifications for allowing disclosures under the proposed subsection (1)(e)? Does FATF require the Registrar to make such disclosure to overseas authorities? If so, please identify the relevant provisions of FATF's Recommendations.
29. How would an instrument in electronic form be delivered by non-electronic means under the proposed section 53ZP(6)(b)(ii)?

Clause 20 – amended section 54 of Cap. 615

30. Why is the Registrar's decision under the new section 53O(1)(b) and (2)(b) to grant or renew a licence for a period *shorter than three years* not a "specified decision" subject to review under the amended section 54 (see paragraph (e) of the proposed definition)?

Section 81 of Cap. 615 – legal professional privilege

31. Section 81(1) of Cap. 615 preserves any claims, rights or entitlements arising on the ground of legal professional privilege. Section 39A(2) of the Legal Practitioners Ordinance (Cap. 159) provides that solicitor-client privilege exists between a foreign lawyer and his client to the same extent as the privilege exists between a solicitor and his client. Since Cap. 615 as amended by the Bill would also apply to foreign lawyers, please consider whether it is necessary to amend section 81(2), which currently mentions counsel and solicitor only, to include a foreign lawyer who is qualified and registered to practise foreign law in Hong Kong as a legal practitioner whose client's name and address may be subject to disclosure under Cap. 615 despite section 81(1).

Clause 25 – amended Schedule 1 to Cap. 615

32. TCS is proposed to be defined under clause 25(3) to include "acting ... as a nominee shareholder for a person *other than* a corporation whose securities are listed on a recognized stock market" (see paragraph (d)(ii) of the proposed definition). Why is acting as a nominee shareholder for a listed corporation excluded?

Clause 26 – amended Schedule 2 to Cap. 615

33. Please explain why the sunset clause in section 18(5) of Schedule 2 is sought to be repealed (see clause 26(102)). Would it accord with FATF's Recommendations to let financial institutions continue to conduct CDD via a lawyer, an accountant or a TCSP licensee?

Clauses 30, 34 and 36 – proposed changes to Cap. 50, Cap. 159 and Cap. 511

34. While clauses 30(2) and 34(1) refer to "failed to comply with an AML/CTF requirement", clause 36(3) refers to "contravened or failed to comply with an AML/CTF requirement". Please explain the difference, if any, between these two expressions, and why the latter formulation is proposed to be used in relation to Cap. 511.

Public consultation

35. Please provide details of the views received from January to March 2017 on the scope, coverage and parameters of the legislative proposal, and how those views have been addressed in the Bill (see paragraphs 25 to 27 of the LegCo Brief (File Ref.: B&M/4/1/41C)).

We look forward to receiving your reply in both languages as soon as possible. Our comments, if any, on the Chinese text of the Bill would follow in due course.

Yours sincerely,

A handwritten signature in blue ink that reads "Bonny Loo".

(Bonny LOO)
Assistant Legal Adviser

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