Hong Kong General Chamber of Commerce
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14 December 2020

Mr Ashley Alder, SBS, JP
Chief Executive Officer
Securities and Futures Commission
54/F, One Island East
18 Westlands Road, Quarry Bay
Hong Kong

Dear Mr Alder,

Re: Consultation Paper on Proposed Amendments to the Securities and Futures Commission's Anti- Money Laundering and Counter-Terrorist Financing Guideline (the Guideline)

The Hong Kong General Chamber of Commerce welcomes the opportunity to express our views on the subject consultation.

The Chamber supports the proposed amendments to the Commission's Guideline subject to these being proportionate and conducive to licensed corporations' ability to comply with existing obligations under the city's Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615). To achieve these, we believe that any additional compliance requirements should be facilitative in nature, as well as being reasonably practicable to achieve rather than overly prescriptive.

We hope you will give our comments your due consideration.

Yours sincerely,

George Leung
CEO

Encl.

Securities and Futures Commission's Consultation Paper (CP) on Proposed Amendments to its Anti- Money Laundering and Counter-Terrorist Financing Guideline (the Guideline) September 2020

Response by The Hong Kong General Chamber of Commerce (HKGCC)

Introduction

1. HKGCC welcomes this opportunity to respond to the CP.

2. While the proposed amendments to the Guideline would have a direct impact on businesses in the financial services sector that are licensed by the Securities and Futures Commission (what the CP refers to as "licensed corporations", abbreviated to "LCs"), they could also have a wider indirect potential impact on Hong Kong's position as a global financial centre, and regional financial hub.

3. Having such a position, Hong Kong needs to, and should, be part of the global efforts to combat money laundering and terrorist financing. The Anti-Money Laundering and Counter- Terrorist Financing Ordinance (Cap 615) ("the AMLO") is an important instrument to achieve this objective. Any valuable and proportionate guidance that can be provided to LCs in complying with their existing obligations under the AMLO is therefore welcome. Such guidance not only benefits LCs by helping them to comply (and thereby avoid the potential sanctions for non-compliance). By maximising compliance, it also helps to promote Hong Kong's reputation as a reliable place to do business.

4. We note that the Consultation Questions do not invite comments generally on the CP's proposals, but only on specific aspects of them. For example, Question 1 invites comments on the frequency with which institutional risk assessments should be conducted, but does not invite comments on other aspects of the proposed new "elaborative guidance" on institutional risk assessments. We have views on such other aspects of the CP's proposals, and not just on the specific issues on which answers have been invited. We have therefore set out our views on these other aspects under "General Comments" below, before going on in the following section to address the Consultation Questions.

General Comments

5. We have two general comments on the CP's proposals:

   i. the suggested compliance actions in the proposed amended Guideline should be *facilitative*, not (as is current proposed for many of them) *mandatory*; and

   ii. these suggested compliance actions should be reasonably practicable to achieve, and not excessively granular.

6. We elaborate on each of these comments in turn.

1) The suggested compliance actions in the proposed amended Guideline should be facilitative, not mandatory

7. It is important that the amendments to the Guideline are confined to helping LCs to comply with their *existing* legal obligations, and do not purport to impose *new* legal obligations, or to strengthen the existing ones. Any proposed change to the existing legal requirements would clearly be a matter for determination by LegCo, or (if it concerned amendments to Schedule 2 of the AMLO) by the Secretary for Financial Services and the Treasury,[1] (in either case after appropriate consultation). This is the position, whether or not some of the SFC's proposed amendments are in part (as they appear to be) designed to comply with the guidance from the international Financial Action Task Force.

8. In this respect, we are concerned that many of the proposed amendments to the Guideline purport to impose additional, new requirements on LCs, as opposed to helping them to comply with their existing legal obligations. This is a result of the Guideline's statement that "the use of the word 'must' or 'should' in relation to an action, consideration or measure referred to in this Guideline indicates that it is a **mandatory requirement**" (emphasis added),[2] combined with the fact that many of suggestions and examples in the proposed amended Guideline are indeed prefaced by the word "should". (We refer below to examples of the Guideline's use of the word "should" in this way). The result is that, instead of being merely (as we submit they should be) suggestions and examples to assist LCs in considering what actions to take to meet their *existing* mandatory legal requirements (what the CP refers to as "facilitative guidance"), the proposed amended Guideline purports (perhaps unintentionally) to make these suggestions and examples *new* mandatory requirements in themselves.

9. We have three recommendations to rectify the proposed amended Guideline in this respect:

   i. The use of the word "must" or "should" should be confined to references to LCs' existing legal requirements, or at most to actions that are a *necessary consequence* of complying with these requirements. For example, the statement in the proposed amended Guideline that "FI's should have in place a process to identify and understand the ML/TF risks to which they are exposed…"[3] seems unobjectionable since, without such a process, it is difficult to see how LCs can comply with their duty under the AMLO to "take all reasonable measures…(a) to ensure that proper safeguards exist to prevent a contravention of any requirement under Part 2 or 3 of this Schedule".

   ii. Where actions are required by an existing legal requirement, or are a necessary consequence of complying with such a requirement, the Guideline should refer to the relevant statutory provision. This would help make a clear distinction between actions that are mandatory, and those that are merely suggested actions for LCs to consider.

[1] AMLO s 6.
[2] Guideline para 1.8.
[3] Paragraph 2.1. The term "FI" as used in the proposed amended Guideline appears to equate to the term "LC" as used in the CP.

iii. Where the suggestions and examples of actions that might be taken by LCs are not expressly required by the legislation, or implied as a necessary consequence of compliance with it, the use of the word "should" needs to be avoided, and the wording should be expressed as facilitative, rather than mandatory. In the Annex, we give a non-exhaustive list of examples of how the use of the word "should'' in the proposed amended Guideline should be changed to facilitative language such as "may wish to consider". As this is a general point about how the proposed amended Guideline should be changed, we have not sought to produce an exhaustive list of precisely where the changes need to be made.

2) The suggested compliance actions should be reasonably practicable to achieve, and not excessively granular

10. Even with the word "should" replaced by facilitative language, as recommended above, it is important that all suggested actions, whether in the body of the proposed amended Guideline, or in its Appendices, are reasonably practicable to achieve, and not excessively granular (i.e. detailed).This is because, although the Guideline is not in itself legally binding, it is admissible as evidence in any court proceedings for breach of the AMLO, and the court must take its provisions into account if they are relevant to the issue in question.[4] Moreover, as the Guideline itself notes, LCs which fail to comply with the Guideline may also be subject to disciplinary or other actions under the Securities and Futures Ordinance for non-compliance with the relevant requirements.[5] Imposing expected actions on LCs that are impracticable or excessive would risk harming, rather than promoting Hong Kong's position as a global financial centre, by impeding capital flows into Hong Kong.

11. The AMLO imposes in general terms a duty on LCs to take all reasonable measures (a) to ensure that proper safeguards exist to prevent a contravention of the AMLO and (b) to mitigate money laundering and terrorist financing risks.[6] It is ultimately a matter for the court, in each case where a breach of this requirement is alleged, to determine whether measures taken by the LC were all that could reasonably be expected, and whether proper safeguards existed. However, given the court's obligation to take account of the Guideline in any such proceedings, the fact that a certain compliance action was suggested in the Guideline, but was not taken by the LC (even although it had taken alternative measures to comply), has the potential to count against the LC in such proceedings, or at least place the onus on the LC to explain why it was not taken.

12. It is therefore firstly very important to ensure that the steps suggested in the proposed amended Guideline are reasonably practicable to achieve. While the LCs themselves are best-placed to assess and comment on this, we have concerns on at least two suggested steps in this regard, both in the section dealing with cross-border correspondent relationships:

    i. Obtaining detailed information about a respondent institution's business, and in particular its underlying customers;[7] and

[4] AMLO s 7(4).
[5] Para 1.4.
[6] AMLO Schedule 2 s 23.
[7] Paras 4.20.6 and 4.20.7.

ii. Obtaining detailed information for assessing whether the AML/CTF controls of the respondent institution are effective.[8]

13. Neither of these steps are within the power of the LC itself to secure, since they require the consent and cooperation of the respondent institution. If these suggested steps are to remain in the new Guideline, we therefore recommend that it contain an explicit recognition of the fact that these steps may not always be practicable, depending partly on the respective negotiating positions of the parties, and that disclosure of the information might legitimately be refused on grounds of commercial confidentiality.

14. In terms of the granularity of the suggested actions (or suggested factors to take into account) in the body of the Guideline and its Appendices, a balance has to be struck between giving facilitative guidance, i.e. guidance that helps LCs comply with their legal obligations, and imposing expectations on them that may (if they are not met) count against them in any legal proceedings (as explained above). While the LCs themselves are in the best position to comment on whether the proposed amended Guideline strikes the right balance, it seems to us that the parts of the document attached in Annex 2, by way of example, may be excessively granular and detailed, and limit the LC's opportunity to argue that it had taken all reasonable precautions to avoid a contravention, albeit not having followed all of the Guideline's suggested steps. We recommend that consideration be given to either removing these sections, or considerably simplifying them to make them more general and less specific.

Answers to the Consultation Questions

- *Question 1: Do you agree that the institutional risk assessment should be subject to periodic review at least once every two years or more frequently upon the occurrence of trigger events? Please explain.*

We agree that the institutional risk assessment should be reviewed at regular intervals, but suggest that the two-year period in the Guidelines be referred to as an example of the timeline for review. LCs may wish to conduct their review more frequently, and this should be recognised. Moreover, LCs should be given the discretion to decide whether one trigger event in itself should trigger the need for review, or whether two or more events should trigger a review, depending on the precise circumstances. This should be accommodated in the drafting of the Guideline.

- *Question 2: Do you consider the expanded list of illustrative examples of risk indicators to be sufficiently comprehensive? Please state your views.*

We believe that the expanded list is sufficiently comprehensive. But we defer to the views of LCs on whether all the examples are (a) reasonably practicable for them to achieve and/or (b) not excessively granular (see our General Comment (2) above). In other words, whether any of the examples should be reviewed or modified.

[8] Para 4.20.9.

- *Question 3: Do you agree with the scope of application for the cross-border correspondent relationships provisions for the securities sector? Please explain.*

Yes.

- *Question 4: Do you have any views on the additional due diligence and other risk mitigating measures applied to cross-border correspondent relationships in the securities sector? Please state your views.*

Please see our General Comments 1 and 2 above. As explained in General Comment 1, the word "should" in respect of many of the suggested actions in section 4 on cross-border relationships is inappropriate, and should be replaced by facilitative language, so as not to purport to create additional legal obligations. Moreover, as explained in General Comment 2, some of these suggested actions may be impracticable to be achieve or excessively granular, and should be simplified or removed.

- *Question 5: Do you have any views on the expanded list of illustrative examples of possible simplified and enhanced measures under a risk-based approach? Please state your views.*

We defer to the views of LCs on this question, being those directly affected by these examples and in the best situation to assess their potential impact in practice.

- *Question 6: Do you have any views on the list of illustrative red-flag indicators of suspicious transactions and activities set out in Appendix B to the Proposed Revised Guideline? Please state your views.*

We defer to the views of LCs on this question, being those directly affected by these examples and in the best situation to assess their potential impact in practice.

- *Question 7: Do you have any views on the facilitative guidance permitting delayed third-party deposit due diligence? Please state your views.*

Please see our General Comments 1 and 2 above. As a minimum, the word "should" be removed and replaced by facilitative language. But even if this is done, we believe that many of the suggested compliance actions in the relevant section of the CP (section 11) are excessively granular, and could be simplified or removed, as explained in our General Comment 2.

Conclusion

15. We hope that these comments will be useful in producing a Guideline which will achieve the important objective of facilitating compliance by LCs with their existing obligations under the AMLO, while avoiding imposing additional requirements.

HKGCC Secretariat
December 2020

Annex 1

Non-Exhaustive List of Examples of where the word "should" in the Proposed Amended Guideline should be changed to facilitative language

Paragraph Number	Wording in Proposed Amended Guideline (emphasis in underline added)	Recommended New Wording (emphasis in underline added)
2.3	An FI should take appropriate steps to identify, assess, and understand its ML/TF risks which should include:	An FI should take appropriate steps to identify, assess, and understand its ML/TF risks which may include:
2.4	In conducting the institutional risk assessment, an FI should consider quantitative and qualitative information obtained from relevant internal and external sources...	In conducting the institutional risk assessment, an FI may consider quantitative and qualitative information obtained from relevant internal and external sources...
2.5	The nature and extent of institutional risk assessment procedures should be commensurate with the nature, size and complexity of the business of an FI.	It is suggested that the nature and extent of institutional risk assessment procedures be commensurate with the nature, size and complexity of the business of an FI.
2.6	While there is no complete set of risk indicators, an FI should consider the list of illustrative risk indicators set out in Appendix A associated with the risk factors stated above, in determining the level of risks that may be present in the business operations of an FI or its customer base whenever relevant.	While there is no complete set of risk indicators, an FI may consider the list of illustrative risk indicators set out in Appendix A associated with the risk factors stated above, in determining the level of risks that may be present in the business operations of an FI or its customer base whenever relevant.
2.7	In determining the level of overall risk that the FI is exposed to, an FI should consider a range of factors, including:	Factors which the FI may consider in determining the level of overall risk that the FI is exposed to include:
2.8	An FI should pay particular attention to countries or geographical locations of operation with which its customers and intermediaries are connected where they are subject to high levels of organised crime, increased vulnerabilities to corruption and inadequate systems to prevent and detect ML/TF.	An FI may wish to pay particular attention to countries or geographical locations of operation with which its customers and intermediaries are connected where they are subject to high levels of organised crime, increased vulnerabilities to corruption and inadequate systems to prevent and detect ML/TF.
2.9	The institutional risk assessment should be communicated to, reviewed and approved by the senior management of the FI.	An FI may wish to have the institutional risk assessment communicated to, reviewed and

		approved by the senior management of the FI.
2.10	An FI should review the institutional risk assessment at least every 2 years, or more frequently upon trigger events with material impact on the firm's business and risk exposure (e.g...	It is suggested that an FI review the institutional risk assessment at regular intervals, for example every 2 years. The FI may wish to conduct the review earlier upon the occurrence of one or more trigger events with material impact on the firm's business and risk exposure (e.g...
2.11	An FI should maintain records and relevant documents of the institutional risk assessment, including the risk factors identified and assessed, the information sources taken into account, and the evaluation made on the adequacy and appropriateness of the FI's AML/CFT Systems.	It is suggested that an FI maintains records and relevant documents of the institutional risk assessment, including the risk factors identified and assessed, the information sources taken into account, and the evaluation made on the adequacy and appropriateness of the FI's AML/CFT Systems.
4.20.5	...an FI should apply the following additional due diligence measures when it establishes a cross-border correspondent relationship to mitigate the associated risks:	...it is suggested that an FI apply the following additional due diligence measures when it establishes a cross-border correspondent relationship to mitigate the associated risks:
4.20.6	...the FI should adopt an RBA in applying the additional due diligence measures stated above, taking into account relevant factors such as:	...the FI may consider adopting an RBA in applying the additional due diligence measures stated above, taking into account relevant factors such as:
4.20.10	An FI should obtain approval from its senior management before establishing a cross-border correspondent relationship. In this regard, the level of seniority of the member of an FI's senior management in making such approval should be commensurate with the assessed ML/TF risk.	An FI may wish to obtain approval from its senior management before establishing a cross-border correspondent relationship. In this regard, the level of seniority of the member of an FI's senior management in making such approval could be commensurate with the assessed ML/TF risk.
4.20.13	An FI should monitor the cross-border correspondent relationship in accordance with the guidance set out in Chapter 5, including:	It is suggested that an FI monitor the cross-border correspondent relationship in accordance with the guidance set out in Chapter 5. Steps could include:

Annex 2

Examples of Sections of the Guideline which may be overly granular, and could be simplified or removed (footnotes in the text are omitted)

4.20.10	An FI should obtain approval from its senior management before establishing a cross-border correspondent relationship. In this regard, the level of seniority of the member of an FI's senior management in making such approval should be commensurate with the assessed ML/TF risk.
4.20.11	An FI should clearly understand the respective AML/CFT responsibilities of the FI and the respondent institution within the cross-border correspondent relationship, including the type and nature of services to be provided under the cross- border correspondent relationship, the respondent institution's responsibilities concerning compliance with AML/CFT requirements, and the conditions regarding the provision of documents, data or information on particular transactions and (where applicable) the underlying customers which should be provided by the respondent institution upon the FI's request. The level of detail may vary having regard to the nature of the cross-border correspondent relationship and the associated ML/TF risks. For example, an FI may also consider to impose potential restrictions on the use of the correspondent account by the respondent institution (e.g. limiting transaction types, volumes, etc.) in accordance with its terms of business when the ML/TF risks become higher.

11.3	Third-party deposits or payments should be accepted only under exceptional and legitimate circumstances and when they are reasonably in line with the customer's profile and normal commercial practices. Before an FI accepts any third-party deposit or payment arrangement, it should ensure that adequate policies and procedures are put in place to mitigate the inherently high risk and meet all applicable legal and regulatory requirements. These policies and procedures should be approved by senior management and address, among others: a) the exceptional and legitimate circumstances under which third-party deposits or payments may be accepted and their evaluation criteria; b) the monitoring systems and controls for identifying transactions involving third-party deposits; c) if applicable, the due diligence process for assessing whether third-party deposits or payments meet the evaluation criteria for acceptance; d) if an FI allows the due diligence on the source of a deposit or the evaluation of a third-party deposit to be completed after settling transactions with the deposited funds (please refer to paragraphs 11.9 to 11.11) in exceptional situations, the identification of those exceptional situations and the risk management policies and procedures concerning the conditions under which such delayed due diligence or evaluation may be allowed;

	e) the enhanced monitoring of client accounts involving third-party deposits or payments, and the reporting of any ML/TF suspicions identified to the JFIU; and f) the respective designated managers or staff members responsible for carrying out these policies and procedures. An MIC of AML/CFT should be designated to oversee the proper design and implementation of these policies and procedures.
11.4	To facilitate the prompt identification of the sources of deposits, FIs are strongly encouraged to require their clients to designate bank accounts held in their own names or the names of any acceptable third parties for the making of all deposits. This will make it easier for FIs to ascertain whether deposits have originated from their clients or any acceptable third parties.
Due diligence process for assessing third-party deposits and payments	
11.5	Due diligence process for assessing third-party deposits and payments should include: a) critically evaluating the reasons and the need for third-party deposits or payments; b) taking reasonable measures on a risk-sensitive basis to: (i) verify the identities of the third parties; and (ii) ascertain the relationship between the third parties and the customers; c) obtaining the approval of the MIC of AML/CFT or MLRO for the acceptance for a third-party deposit or payment; and d) documenting the findings of inquiries made and corroborative evidence obtained during the due diligence process as well as the approval of a third-party deposit or payment.
11.6	While a standing approval by the MIC of AML/CFT or MLRO may be given for accepting deposits or payments from or to a particular third party, it should be subject to review periodically or upon trigger events.
11.7	Given that not all third-party payors and payees pose the same level of ML/TF risk, an FI should apply enhanced scrutiny to those third parties which might pose higher risks, and require the dual approval of deposits or payments from or to such third parties by the MIC of AML/CFT (or MLRO) and another member of senior management.
11.8	An FI should exercise extra caution when the relationship between the customer and the third party is hard to verify, the customer is unable to provide details of the identity of the third-party payor for verification before the deposit is made, or one third party is making or receiving payments for or from several seemingly unrelated customers.
Delayed due diligence on the source of a deposit or evaluation of a third-party deposit	
11.9	An FI should perform due diligence on the source of a deposit and evaluation of any third-party deposit (hereafter referred to as “third-party deposit due diligence”) before settling transactions with the deposited funds. However, FIs may, in exceptional

	situations, complete the third-party deposit due diligence after settling transactions with the deposited funds, provided that: a) any risk of ML/TF arising from the delay in completing the third-party deposit due diligence can be effectively managed; b) it is necessary to avoid interruption of the normal conduct of business with the customer; and c) the third-party deposit due diligence is completed as soon as reasonably practicable.
11.10	If an FI allows third-party deposit due diligence to be delayed in exceptional situations, it should adopt appropriate risk management policies and procedures setting out the conditions under which the customer may utilise the deposited funds prior to the completion of the third-party deposit due diligence. These policies and procedures should include: a) establishing a reasonable timeframe for the completion of the third-party deposit due diligence, and the follow-up actions if the stipulated timeframe is exceeded (e.g. to suspend or terminate the business relationship); b) placing appropriate limits on the number, types, and/or amount of transactions that can be performed; c) performing enhanced monitoring of transactions carried out by or for the customer; and d) ensuring senior management is periodically informed of all cases involving delay in completing third-party deposit due diligence.
11.11	If the third-party deposit due diligence cannot be completed within the reasonable timeframe set out in the FI's risk management policies and procedures, the FI should refrain from carrying out further transactions for the customer. The FI should assess whether there are grounds for knowledge or suspicion of ML/TF and filing an STR to the JFIU, particularly where the customer refuses without reasonable explanation to provide information or document requested by the FI, or otherwise refuses to cooperate with the third-party deposit due diligence process.