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3 March 2017

Ms Mable Chan
Deputy Secretary
Financial Services Branch
Financial Services and the Treasury Bureau
Government of the HKSAR
24/F, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Mable,

Consultations on Enhancing Transparency of Beneficial Ownership of Hong Kong Companies and Enhancing Anti-Money Laundering Regulation of Designated Non-Financial Businesses and Professions

I am pleased to enclose our comments to the captioned consultation exercises regarding the Government's proposals to reinforce legislation and regulate certain non-financial businesses and occupations for the purpose of countering money laundering and terrorist financing activities in Hong Kong.

You will note from the attached that although we agree in principle with the spirit of the proposals on requiring Hong Kong companies to ascertain, collect and maintain information on the ultimate controlling shareholder(s) as a means to promote business compliance on anti-money laundering and counter-terrorist financing, there are questions in terms of the practicality, reasonableness and proportionality of the Government's approach to achieving such goals.

We have also commented on the proposals on subjecting specific non-financial businesses and professions to a set of statutory obligations and dissuasive sanctions in another paper also attached.

Thank you very much for giving us the opportunity to share our thoughts, which I hope will be useful to your deliberations.

Sincerely,

Shirley Yuen
CEO

Encl.

Hong Kong General Chamber of Commerce (HKGCC)
Response to the Financial Services and Treasury Bureau Consultation Paper ("CP") on "Enhancing Transparency of Beneficial Ownership of Hong Kong Companies"

HKGCC welcomes this opportunity to respond to the CP. In summary, HKGCC has no objection in principle to the relevant enforcement authorities having access to information on the beneficial ownership of Hong Kong companies for the purpose of countering money-laundering and terrorist-financing activities. However, the CP does not explain why its proposed measures are necessary for these purposes. In addition, the proposed measures are, in some important respects, not reasonably practicable, and excessive. Our more detailed comments are as follows:

1. If Hong Kong in principle wishes to be compliant with the Financial Action Task Force's (FATF) Recommendation 24, the next logical step is to assess the extent to which Hong Kong already complies with the Recommendation. In this context, it is important to note that Recommendation 24 gives member jurisdictions a number of options regarding beneficial ownership information. First, under paragraph 7 of the interpretative note to Recommendation 24, countries should ensure that either (a) information on the beneficial ownership of a company is obtained by that company and available at a specified location in its country; or (b) there are mechanisms in place so that the beneficial ownership of a company can be determined in a timely manner by a competent authority. The CP proposes option (a): CP paragraph 1.7 asserts that "we need to put in place a regime under the Companies Ordinance to enable beneficial ownership information to be captured and maintained". **There is no explanation of why option (b) is not satisfactory, and why the burden needs to be placed on the company**.

2. Moreover, paragraph 8 of the interpretative note to Recommendation 24 gives member jurisdictions a choice of three options to implement paragraph 7 of the interpretative note. Options (a) and (b) are (respectively) to require companies or company registries to obtain and hold up to date information on the company's beneficial ownership, and to take reasonable measures to obtain and hold up-to-date information on its beneficial ownership, while option (c) is to use *existing* information held by financial institutions etc. Countries can choose one or more of these three options. **The CP chooses options (a) and (b), as opposed to simply relying on option (c), but does not explain why.**

3. Leaving aside temporarily the FATF Recommendations (and given that they are recommendations not requirements) HKGCC has consistently stressed the need for a proper regulatory impact assessment (RIA) to be carried out before any new legislation or other policy intervention is implemented, demonstrating clearly that the benefits of the intervention exceed the costs to all stakeholders involved. No such RIA is contained in the CP. **The CP does not explain how and why Hong Kong's existing regime is deficient, and**

why all of the options given in Recommendation 24 need to be selected to avoid harming Hong Kong's international reputation. In other words, the alleged benefit of the CP's proposals - to avoid harm to Hong Kong's reputation as a financial centre - is unconvincing and unpersuasive.

4. **On the costs side of the equation, the CP's proposals would certainly impose an extra burden on Hong Kong companies especially small and medium-sized enterprises (SMEs).** How burdensome these proposals would be would depend on the details of the requirements to be imposed, and in particular what would constitute "reasonable measures" for a Hong Kong company to take to establish the identity of its ultimate beneficial owner(s). We deal with this point in the following paragraphs.

5. CP paragraph 3.6 proposes that a company be required to identify and keep a "register of people with significant control" over the company. In the case of legal entities, paragraph 3.7 states that, to minimize the administrative burden on companies, only legal entities immediately above the company in the ownership chain need to be entered. Given that this information will be contained in the register of members anyway, this would not in itself be burdensome (albeit arguably unnecessary). However, in respect of individuals that have significant control, there is no such qualification. Paragraph 3.7 does not expressly state that only individuals that are direct shareholders of the company, and have significant control need to be entered. So this requirement could extend to individuals who hold the shares indirectly. This is confirmed by CP Annex B Figure 3, which indicates that an individual who has significant influence over a Hong Kong company is registrable, even although the individual holds that influence via two intermediate layers of Hong Kong companies. Whether it is feasible for a Hong Kong company to include such individual's details in the PSC register depends on what is required to satisfy the company's proposed obligation to take reasonable steps to identify who that individual is, which is discussed below.

6. CP paragraph 3.11 proposes an obligation on companies to take reasonable steps to identify persons with significant control over the company, and gives some examples of such reasonable steps. The first method - reviewing a company's register of members, articles of association, statement of capital etc - seems feasible, since this information will be available to the company anyway. The second method, however, is more contentious - "serving a notice on any person or any legal entity (i) that the company knows or has reasonable cause to believe to be registrable in relation to the company or (ii) that knows or may have reasonable cause to know the identity of a person or legal entity with significant control over the company".

7. First of all, it is not clear what the content of the notice should be - this is nowhere specified in the CP. Under (i) presumably the notice could require the person to confirm whether it holds more than 25% of the shares of the company (or otherwise satisfies the significant control test). Under (ii) however, it is unclear what is meant by "may have reasonable cause to know"

who the person with ultimate control is. On one interpretation, this could entail having to send notices to every company, both in Hong Kong and overseas, which has a shareholding (direct or indirect) in the company, in attempt to find out whether there are any individuals in Hong Kong or overseas who have significant control. In HKGCC's view this would be totally impracticable, unreasonable and disproportionate. At most, a Hong Kong company might be required to disclose overseas-based individuals with direct shareholdings in it, but not indirect via overseas-based subsidiaries. In this connection, we recall that both FATF Recommendation 24 and the CP itself recognize that any measures imposed must be "proportionate to the level of risk induced by the ownership structure of the company or the nature of the controlling shareholders".

8. **If, therefore, companies outside Hong Kong are to be compelled to disclose their beneficial ownership, this should be achieved through cooperation between the Hong Kong authorities and their overseas counterparts under Recommendations 37 and 40, not by imposing obligations on Hong Kong companies**. Otherwise, the opportunity cost to Hong Kong businesses in terms of the allocation of resources will be quite high as a result of the need to meet such compliance obligations. The situation for SMEs would be particularly acute given the limited resources available to them.

9. **The CP gives no indication as to whether there would be a positive obligation to update the PSC register, and if so, how frequently the company should update it. This should be specified, so that companies are properly consulted and can express views on this issue.**

10. **The proposal that criminal sanctions be introduced for failing to keep a PSC register is draconian and inappropriate,** particularly since the information it contains may merely replicate what is already contained in the company register. At most, if an obligation to keep a PSC register is to be introduced (and as noted above the need for such a register has not so far been justified), and the company fails to comply with it, the authority should be able to direct the company to put in place a PSC register, and **failure to comply with such direction it may attract an administrative penalty, not a criminal one**.

11. **If an obligation to keep a PSC register is to be introduced (and as noted above the need for such a register has not so far been justified), the details of individuals which are entered in it should *not* be open to public inspection. Such details should only be available to the competent authorities if required for their enforcement functions**. Disclosure to the public would serve no useful purpose, and would constitute a violation of the individuals' right to privacy.

12. Hong Kong should be mindful of any adverse effects on its competitiveness and attractiveness as a place to do business due to the introduction of such

regulatory obligations. In particular, we should be conscious of developments in other jurisdictions and their approach to requiring information on beneficial ownership so as to ensure that our legislations do not compromise our ability to compete. This is where an RIA would be useful because it would allow us to determine which aspects of the FATF Recommendations should be adopted bearing in mind our unique circumstances. An RIA also provides Hong Kong with a sound footing in satisfying FATF, G20 and OECD on our commitment to fulfilling our international obligations but in a manner that does not impinge on our comparative advantages.

In conclusion, HKGCC supports the policy objective of exposing the beneficial ownership of Hong Kong companies to the relevant enforcement authorities, if it can be demonstrated that this is necessary for the performance of their enforcement functions. However, the CP does not explain convincingly why the steps it proposes are necessary, and in some respects they are not reasonably practicable**. We submit that a further round of consultation with further information is necessary before Hong Kong businesses can be expected to support these proposals.** It is regrettable if such further consultation interferes with the Government's intention to implement its proposals by 2018, and that businesses were not given earlier notice of these proposals so that they could have had a proper opportunity to respond. A consultation period of only two months for such an important matter is unreasonably short, particularly when a substantial part of the two months was taken up by the Lunar New Year holidays.

Hong Kong General Chamber of Commerce (HKGCC)
Response to the Financial Services and the Treasury Bureau Consultation Paper ("CP") on "Enhancing Anti-Money Laundering Regulation of Designated Non-Financial Businesses and Professions"

HKGCC welcomes this opportunity to comment on the CP. Our comments are as follows:

1 HKGCC agrees in principle that designated non-financial businesses and professions ("DNFBPs") should be subject to customer due diligence ("CDD") and record-keeping requirements to deter anti-money laundering activities. However, the CP itself notes in paragraph 2.9 that solicitors, accountants and estate agents are already subject to professional self-regulation by their respective regulatory bodies which covers CDD and record-keeping requirements. So it is not clear why additional legislative requirements need to be imposed on them.

2 This is particularly difficult to understand given that: (a) the CP stresses that "[t]he regulatory burden and compliance costs should be minimized as far as reasonably practicable (a statement with which we agree), and (b) the Government is proposing not to extend the proposed legislative requirements to dealers in precious metals and stones, even although they fall within the FATF's definition of DNFBPs and are not subject to self-regulation. The Government's rationale for this exclusion (that no dealer has been found linked to or convicted for money laundering offences in the last five years) seems novel, unusual, and inconsistent with its treatment of the other categories of DFNBPs. Moreover, the proposal to apply the legislative requirements to sectors which are (in the words of the CP) "more ready" - which presumably means they are already subject to such requirements - seems inconsistent with the stated objective of minimising the regulatory burden on businesses, as noted above.

3 At least for those bodies which are currently subject to professional self-regulation imposing CDD and record-keeping requirements, the information currently presented in the CP does not therefore justify the Government's view in paragraph 1.8 that: "As a matter of priority, we need to rein in DNFBPs under the AMLO, so as not to adversely affect the overall rating of Hong Kong in the mutual evaluation", or that: "Our compliance in this respect has a bearing on our hard-earned reputation as a major international financial and business centre in the world". The relevant professional associations may have views on these issues.

4 Assuming, however, that the Government proceeds with its intention to impose CDD and record-keeping requirements on professions which are currently subject to self-regulation, the CP states in paragraph 2.10 that "we intend to leverage on the existing regulatory regimes applicable to the three sectors" and that the relevant professional bodies will take on "statutory oversight for monitoring and ensuring compliance". It is not clear in this context what "leverage" and "statutory oversight" mean: this should be clarified. Again, the relevant professional associations may have views on these issues.

5 If it is indeed the case that the current requirements imposed by the relevant professional bodies for solicitors, accountants and estate agents are sufficient to meet the Government's objectives, an opportunity should also be offered to trust or company service providers (TCSPs) to self-regulate through a professional body imposing CDD and record-keeping requirements (if they have not already done so), in the interests of maintaining a level playing field, and avoiding unnecessary legislation.