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特許秘書

The Hong Kong Institute of Chartered Secretaries

(Incorporated in Hong Kong with limited liability by guarantee)

Submission:

Consultation on Enhancing Anti-Money Laundering Regulation of
Designated Non-Financial Businesses and Professions (Consultation)

27 February 2017

By Email Only: aml_consultation@fstb.gov.hk

Division 5, Financial Services Branch
Financial Services and the Treasury Bureau
24/F, Central Government Offices
Tim Mei Avenue, Tamar, Central
Hong Kong

Dear Sirs,

Re: Consultation on Enhancing Anti-Money Laundering Regulation of Designated Non-Financial Businesses and Professions (Consultation)

About HKICS

The Hong Kong Institute of Chartered Secretaries (HKICS) is an independent professional institute representing Chartered Secretaries as governance professionals in Hong Kong and Mainland China with around 5,800 members and 3,200 students. HKICS is rooted with the Institute of Chartered Secretaries and Administrators (ICSA) in the United Kingdom with 9 divisions and over 30,000 members and 10,000 students internationally. It is also a Founder Member of the Corporate Secretaries International Association (CSIA), an international organisation comprising 16 national member organisations to promote good governance globally.

HKICS AML/CFT Standards

In 2008, HKICS, was amongst the first professional bodies to issue anti-money laundering and counter-terrorist financing (AML/CFT) guidelines to set standards for its members (Members). These guidelines were also made publicly available through HKICS's website and served as a catalyst for proper AML/CFT compliance. These guidelines could be found at:

<https://www.hkics.org.hk/index.php?room=10&action=detail&page=72>.

Therefrom, over the last decade, HKICS has been working with the Narcotics Division, Security Bureau to enhance AML/CFT standards for its Members. The wider aim is to raise general public awareness on the topic. HKICS also conducted various trainings and conferences on AML/CFT related topics, including annual conferences as from 2009 with the Narcotics Division entitled "Be Our Gatekeeper" to highlight the gatekeeping role of the Chartered Secretaries, and also for public education.

In May 2016, with the gracious input and comments by the Financial Services and the Treasury Bureau (FSTB), HKICS honed in to set standards for those in the business of acting as corporate service providers (CSPs) under Financial Action Task Force (FATF) Recommendation 22. The nexus was HKICS's AML/CFT work over the years; the sizeable proportion of its Members being involved with CSPs (aside from other cross industry governance functions); and the need for specific regulation in accordance with FATF Recommendation 22 and other related recommendations.

Also, HKICS has a desire to assist Hong Kong to move up the ranks in the upcoming FATF mutual evaluation (ME) in 2018. As there are only general, as against specific regulations under the Organised and Serious Crimes Ordinance, HKICS rose to the challenge and issued CSP related AML/CFT guidelines (**Guidelines**) that converged with those of financial institutions under Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (AMLO). This self-regulatory approach is a concept consistent with FATF. The relevance of the CSP standards, which was two years in the making, was vindicated when Panama Papers broke showing the importance of specific CSP regulations.

In addition to the Guidelines to set CSP standards, HKICS developed an accreditation programme (Accreditation Programme) whereby those CSPs desiring to demonstrate to the public that they adhered to HKICS's Guidelines could do so. Following an audit (by accountants) of a CSP's AML/CFT practices being compliant with the Guidelines, it may enter into the HKICS AML/CFT Charter (Charter) with HKICS and be licensed to use the logo below and listed on HKICS's website for public searches as a public service. There will be need for re-Accreditation after a two-year period for continuous monitoring.

Under the Charter, following advice by FSTB, a fit and proper professional 'Responsible Person' (not necessarily an HKICS Member) was required to be appointed by the CSP to assume responsibility for compliance by the CSP with the Charter, the Guidelines and related obligations thereunder. Material failure with compliance could lead to discipline, including public censure of the Responsible Person along with the removal of the CSP from the approved list of HKICS AML/CFT Organisation on HKICS's website.

To date, the following leading CSPs have accredited themselves as HKICS AML/CFT Organisations and are permitted to use the HKICS AML/CFT Organisation logo:



Serial number	Organisation	Responsible Person	Founding subscriber/ Subscriber
001-201605	Tricor Services Limited	Mrs Natalia Seng FCIS FCS(PE), Chief Executive Officer – China & Hong Kong, Tricor Group/Tricor Services Limited	Founding subscriber
002-201605	SW Corporate Services Group Limited	Dr Maurice Ngai FCIS FCS(PE), Director and Chief Executive Officer	Founding subscriber
003-201605	Ernst & Young Company Secretarial Services Limited	Ms Jenny Choi FCIS FCS (PE), Senior Manager, Global Compliance & Reporting – Corporate Secretarial Services	Founding subscriber
004-201605	Reanda EFA Secretarial Limited	Ms Sie Ki FCIS FCS(PE), Company Secretary	Founding subscriber
005-201605	McCabe Secretarial Services Limited	Ms Lau Mei Po, Teresa ACIS ACS, Director	Founding subscriber
006-201605	Vistra Corporate Services (HK) Limited	Mr Vincent Bremmer, Managing Director	Founding subscriber
007-201701	Harneys Corporate Services (Asia) Limited	Mr Scott Reid, Regional Managing Director	Subscriber

The above is intended to set the stage that in respect of regulation of the CSP sector, HKICS has set a globally advanced Accreditation Programme over standards that converged with those of financial institutions as part of industry self-regulation. It is accordingly in a position to offer views as to AML/CFT issues relating to CSP businesses and how best to comply with FATF requirements thereto consistent with international best practices. However, HKICS does not offer views as to other designated non-financial businesses and professions (DNFBPs) but only as to CSPs as referred to under the Charter. The HKICS CSP Guidelines, Accreditation Programme, and Charter could be found under 'AML/CFT Charter' tab at HKICS's official website at www.hkics.org.hk.

Basic Submission

In relation to the Consultation we have collated Members' views which are expressed herein. Our basic submission, based on Members' views, is that we support the need for licensing of CSPs (as a class of DNFBP) with the Companies Registry being the lead regulator in this respect. We submit that this approach is consistent with our advocacy over the last decade that instead of Narcotics Division, the Companies Registry is in a better position to understand CSP practices and should be the lead AML/CFT regulator for the CSP sector.

However, with regard to the manner of licensing CSPs, we have grave reservations with the proposal under the Consultation which allows any natural person over 18, who is an undischarged bankrupt, and not having committed certain offences to be licensed as CSPs. We find no justifiable reason whatsoever for any unqualified natural person to become a CSP. We submit that if any unqualified person could fulfil the role, Hong Kong would not fare well under the upcoming 2018 ME based on the risk-based approach (RBA) under FATF Recommendation 1:

***"1. Assessing risks and applying a risk-based approach.** Countries should identify, assess, and understand the money laundering and terrorist financing risks for the country, and should take action, including designating an authority or mechanism to coordinate actions to assess risks, and apply resources, aimed at ensuring the risks are mitigated effectively. Based on that assessment, countries should apply a risk-based approach (RBA) to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified." [our emphasis]*

To explain further, we understand that the Consultation proposal is modelled upon the regulation of money service operator, where the money service operator is in business for itself. In contrast, in accordance with FATF Recommendation 22, a CSP is in the business of being an intermediary for carrying out *inter alia* any of the following businesses for others:

- "(e) ...company service providers – when they prepare for or carry out transactions for a client concerning the following activities:
- acting as a formation agent of legal persons;
 - acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;
 - providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement..."

We submit that as the licensing of a CSP involves intermediary regulation, in assessing whether the person is fit and proper would require a consideration of the person's professionalism to comply with FATF Recommendation 22. This would also involve compliance with FATF Recommendations 10, 11, 12, 15 and 17 as referred to under FATF Recommendation 22. We highlight some of the provisions:

22. DNFBPs: customer due diligence. The customer due diligence and record-keeping requirements set out in Recommendations 10, 11, 12, 15, and 17, apply to designated non-financial businesses and professions (DNFBPs)...

***"10. Customer due diligence.** The CDD measures to be taken are as follows:*

- (a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.*
- (b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the*

beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer.

- (c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.*
- (d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds...'*

'11. Record-keeping

[R]equired to maintain, for at least five years, all necessary records on transactions, both domestic and international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved, if any) so as to provide, if necessary, evidence for prosecution of criminal activity.

[R]equired to keep all records obtained through CDD measures (e.g. copies or records of official identification documents like passports, identity cards, driving licences or similar documents), account files and business correspondence, including the results of any analysis undertaken (e.g. inquiries to establish the background and purpose of complex, unusual large transactions), for at least five years after the business relationship is ended, or after the date of the occasional transaction.

[T]he CDD information and the transaction records should be available to domestic competent authorities upon appropriate authority...'

'12. Politically exposed persons

[R]equired, in relation to foreign politically exposed persons (PEPs) (whether as customer or beneficial owner), in addition to performing normal customer due diligence measures, to:

- (a) have appropriate risk-management systems to determine whether the customer or the beneficial owner is a politically exposed person;*
- (b) obtain senior management approval for establishing (or continuing, for existing customers) such business relationships;*
- (c) take reasonable measures to establish the source of wealth and source of funds; and*
- (d) conduct enhanced ongoing monitoring of the business relationship...'*

We do not intend to belabour the point by quoting the full provisions of FATF Recommendation 22 and related FATF Recommendations 10, 11, 12, 15 and 17 in verbatim. But in essence there is a serious question as to how could any unqualified person perform even the above abridged roles? The further question is then how could any proposed regulation allow that, especially in view of the upcoming 2018 ME. For example, if HKICS members are within the class of persons being licensed, they are in addition to the expected fit and proper criteria, professionals in a defensible position to be licensed. There is little doubt that Chartered Secretaries are in a position to comply with FATF Recommendation 22 and the related recommendations with the background set forth under 'HKICS/AML Standards'.

We submit that in view of all these only 'specified intermediary', which is time tested under AMLO based on certain class of professionalisms, should be in the position to be licensed to be a CSP. A 'specified intermediary' under Schedule 2, paragraph 18(3)(a)(i) to (iv) and (b) of AMLO, is namely any of the following:

- (a) (i) a solicitor practising in Hong Kong;
- (ii) a certified public accountant practising in Hong Kong;
- (iii) a current member of The Hong Kong Institute of Chartered Secretaries practising in Hong Kong;
- (iv) a trust company registered under Part 8 of the Trustee Ordinance (Cap 29) carrying on

- trust business in Hong Kong; and
- (b) a financial institution that is an authorized institution, a licensed corporation, an authorized insurer, an appointed insurance agent or an authorized insurance broker...'

We submit that the current proposal under the Consultation would not be commensurate with reduction of AML/CFT risks, and would highlight weaknesses in Hong Kong's AML/CFT risk mitigation because prescriptive rules are in themselves insufficient even backed by the threat of sanctions. In the British Virgin Islands, Singapore, and many other jurisdictions, only properly trained and qualified persons, are permitted to carry on CSP business. An obvious issue is that the absence of professional and ethical rules upon unqualified natural persons, how would customer due diligence be conducted? Also would records be altered? What about cooperation with competent authorities? We cannot agree with any proposal which 'officialiates' unqualified persons to fulfil any AML/CFT roles as this would affect Hong Kong's position in the upcoming 2018 ME, especially with the state of international regulations of Hong Kong's business competitors.

As correctly identified in paragraph 1.7 of the Consultation, '[a]s the international community strengthens regulation in accordance with the FATF recommendations, Hong Kong is obliged to implement a credible regime to enhance regulation of DNFBPs, so as to safeguard the integrity of our financial markets, and to ensure that our reputation as an international financial centre is reinforced by a clean and safe business environment.' A regime whereby any natural person could be licensed defeats the purpose. We submit that as a minimum the person to be licensed has to be a specified intermediary for a practical and defensible proposal. Only by building this within the basics of the proposal under the Consultation, could Hong Kong, in accordance with paragraph 1.8, 'rein in DNFBPs under the AMLO, so as not to adversely affect the overall rating of Hong Kong in the mutual evaluation...on our hard-earned reputation as a major international financial and business centre in the world'. This approach is also consistent with international regulations which calls for a degree of professionalism for those carrying on CSP businesses.

The Consultation Questions

The above sets out our basic submission from a collation of Members' views. To assist you further under the Consultation, we provide the following additional comments to the Consultation and questions thereunder based on Members' views:

- There appears to be a disconnect between paragraphs 2.7 and 2.8 of the Consultation. As correctly pointed out in paragraph 2.7 FATF's requirements are for CSPs (as a class of DNFBPs) to implement CDD measures and record-keeping. The current proposal under paragraph 2.8 is simply prescriptive of CDD and record-keeping. The powers and haphazard monitoring of licencees are not backed by credible proposals. It is also not in line with the international expectation of the professionalism of those engaged in CSP business, which is a topic that has been brought to the forefront following Panama Papers in 2016. If the licensing was in respect of 'specified intermediary', then, as explained above, because of their professionalism of those being licensed, the proposal is defensible.

We would supplement Chapter 2 of the Consultation by adding that HKICS is self-regulator of its Members and HKICS AML/CFT Charter members backed by discipline. HKICS's regulation is explained in an open and transparent manner to the public at HKICS's official website. HKICS believes that the Guidelines, which was commented to by FSTB and launched in the presence of FSTB, converges CSP practice with those of financial institution under AMLO. This illustrates why HKICS Members as professional 'specified intermediary' should be within the class of persons capable of being licensed based because of HKICS's globally advanced CSP best practice standards.

- Question 1. Do you agree with the application of a risk-sensitive approach, whereby the CDD measures to be undertaken by DNFBPs should be commensurate with the risk profiles of customers?

The approach set forth under HKICS's Guidelines which follows financial institutions standards is a RBA approach. We have no issue with such an approach.

- Question 2. Do you agree that DNFBPs should be subject to enhanced CDD measures when dealing with customers presenting a high risk of money laundering or terrorist financing?

The approach is set forth under HKICS's Guidelines which follows financial institutions standards. We have no issue with such an approach.

- Question 3. Do you think DNFBPs should be allowed the flexibility to undertake simplified CDD measures on low-risk cases, with reference to the list of eligible customers and products as specified in the AMLO?

The approach is set forth under HKICS's Guidelines which follows financial institutions standards. We have no issue with such an approach.

- Question 4. Do you think there are other justified addition to the specified list of customers and products eligible for simplified CDD treatment under the AMLO by DNFBPs? If so, what are they; and what are the justifications (please support with statistics where applicable)?

We do not believe that there should be deviation from financial institutions' practices.

- Question 5. Do you agree that DNFBPs should be subject to a six-year record-keeping requirement on a par with financial institutions?

The approach set forth under HKICS's Guidelines is 7 years to tie in with retention of tax records. We have no issue with 6 years being adopted, but would keep the 7 years approach which is above FATF requirements.

- Question 6. Do you agree with the proposed designation of the respective regulatory authority for solicitors, accountants, real estate agents and TCSPs?

That is for these professional bodies to submit upon. For the purpose of FATF Recommendation 1, under the RBA, they should have proper AML/CFT regulations consistent with any regulations under the licensing regime. There has to be 'equivalence' to make the position defensible.

- Question 7. Do you agree that, instead of introducing one new single regulatory body for solicitors, accountants and estate agents, the prevailing investigation, disciplinary and appeal mechanisms under the respective governing Ordinances of the professions should be relied upon to enforce the statutory CDD and record keeping requirements?

The current proposal does no more than a centralised register of persons engaged in the DNFBP business. If our suggested adoption of licensing being only of specified intermediary is adopted, we do not see that it matters whether the records are kept with the professional bodies themselves or centralised with the Companies Registry. The importance is the ability for public searches as with HKICS AML/CFT Charter members and their Responsible Persons under www.hkics.org.hk. There is no harm in a centralised repository of information.

- Question 8. Do you consider it necessary to introduce new criminal sanctions for non-compliance with the statutory CDD and record-keeping requirements under the AMLO by DNFBPs?

As this has not been suggested under the Consultation, we have no issue with such an approach.

- Question 9. Do you think that the Law Society, the HKICPA and the EAA should be given inspection and search powers similar to those available to AML regulatory authorities for financial institutions under Part 3 of the AMLO?

That is for these professional bodies to submit, as they deem appropriate. However, such powers are in general consistent with periodic monitoring and compliance review. Further, we submit that the power should not just be present for conducting investigation and seizure with warrant under paragraph 3.26 of the Consultation, but more generalised powers for periodic monitoring and compliance review.

- Question 10. Do you agree with the provision of a 90-day transitional period for existing TCSP operators to migrate to the new licensing regime?

We have no issue.

- Question 11. Do you think the criteria for determining the fitness and properness of TCSPs appropriate? If not, what criteria should be included or excluded?

We disagree as it is not defensible under the RBA for non-professional persons to be licensed. We have set forth our views under 'Basic Submission', and submit that only specified intermediary should be licensed aside from any exempted professional bodies, if any. There is a world of difference between prescription on paper, and the demonstrable professionalism in implementation to make the proposal defensible and to move up Hong Kong's ranking in the upcoming 2018 ME for Hong Kong's hard earned AML/CFT reputation.

- Question 12. Do you agree with the three-year validity of a TCSP licence (renewable on application)? If not, what should be the validity period?

The Guidelines required reaccreditation every two years as continuous monitoring process. However, we have no issue with three-year validity, where only professional specified intermediary are to be licensed because the underlying continuous monitoring (and we add training), critical under a RBA could be achieved through the relevant professional or statutory body or entity. Also, we would like to see details as to the grounds of revocation of licenses and would comment at the Bills stage, as appropriate.

- Question 13. Do you agree that any persons operating TCSP business without a valid licence should be liable to criminal sanctions (including a fine at level 6 and/or imprisonment of up to six months)?

We agree.

- Question 14. Do you agree with the proposed supervisory sanctions for TCSPs in respect of non-compliance with statutory CDD and record-keeping requirements?

We will comment at the Bills Stage as we have not seen the list of sanctions.

- Question 15. Do you agree with the re-constitution of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Review Tribunal to cover appeals against future decisions of the Registrar of Companies in respect of the licensing and disciplinary regime for TCSPs?

We agree to the proposal as with financial institutions' regulations.

- Question 16. Do you agree that the threshold for determining controlling interest of beneficial ownership under the AMLO should be revised from not less than 10% to more than 25%, to align with the future requirement under the Companies Ordinance?

We agree with the harmonisation.

The Registered Agent

We would like to add that the terminology of 'Registered Agent' under international CSP practice is synonym to a resident or statutory agent. This means much more than a filing agent for electronic forms at the Companies Registry excluding applications for incorporation of local companies and non-Hong Kong companies. Despite the warning that the registration of such Registered Agent 'should not be regarded as conferring a licence on the Agent or as providing any recognition of any qualification of the Agent' at the Companies Registry's website (<https://www.eregistry.gov.hk/icris-ext/apps/uam52a/index?m=n>) there is a general confusion from international counterparts that the Hong Kong Registered Agent is akin to the BVI or other jurisdiction's Registered Agent which are professional qualified intermediaries that comply with FATF Recommendations as to CDD and record keeping. We strongly suggest the replacement with a name like 'E-Form Delivery Agent' or some similar name.

Should you have any questions on the above submission, please feel free to contact Samantha Suen FCIS FCS(PE), Chief Executive, HKICS or Mohan Datwani FCIS FCS(PE), Senior Director and Head of Technical and Research, HKICS at 2881 6177 or research@hkics.org.hk.

Yours faithfully,

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Chairman, Professional Services Panel, HKICS