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

Dear Sirs,

[Consultation paper on Enhancing Transparency of Beneficial Ownership of Hong Kong Companies](#)

The Hong Kong Institute of Certified Public Accountants ("the Institute") has considered the proposals in the consultation paper, *Enhancing Transparency of Beneficial Ownership of Hong Kong Companies* and our views on the detailed proposals are outlined below. In principle, while we appreciate that there may be public interest arguments in support of making the beneficial ownership ("BO") of companies accessible to the public, we are also aware that not many jurisdictions which have introduced, or are contemplating introducing a requirement for disclosure of BO, adopt the approach of unrestricted access to the relevant registers. The public interest considerations should also be weighed up against the rights of private individuals to maintain a degree of confidentiality for legitimate purposes and the possible implications for Hong Kong's competitiveness if it goes beyond the minimum requirements of international standards and norms in relation to issues that are still new and developing internationally. At a recent members' forum organised by the Institute, a number of our members expressed quite strong views against allowing unrestricted access.

At the same time, taking into account the delicate balance between public interest and private rights in this case, we would recommend that CPA practices and other relevant designated non-financial businesses and professions ("DNFBPs") also be granted access by law to the BO registers of their clients or prospective clients. This will facilitate them to comply with their anti-money laundering ("AML") obligations under the proposals in the concurrent consultation, *Enhancing Anti-Money Laundering Regulation of Designated Non-Financial Business and Professions*, and to take on board the standards on customer due diligence ("CDD") issued by the Financial Action Task Force ("FATF").

Consultation questions

- 1. Do you agree that enhancing transparency of company ownership is important for ensuring that Hong Kong remains an open, trusted and competitive place for doing business?**

We believe that enhancing the transparency of company ownership and control will assist Hong Kong in complying with its FATF obligations, including,



from the profession's point of view, facilitating the process of conducting adequate CDD. In addition, our members have the knowledge and competence to be able to help companies comply with their obligations under the current proposals. Greater corporate transparency should also put Hong Kong in a stronger position to challenge any lingering perceptions that it should be regarded as a tax haven. Such perceptions, however unwarranted these may be, still emerge from time to time and Hong Kong continues to appear on some lists of tax havens, such as the European Union's blacklist issued in 2015.

2. Do you agree that a balanced approach to legislation should be adopted, so as to ensure that our business environment stays competitive while we fulfil our international obligation to enhance transparency of company ownership?

We agree that with the statement in the consultation paper that any "regulatory measures to be introduced should be commensurate with the risks that they seek to mitigate, without incurring undue burden on companies being regulated", or any other persons. If the mechanism for disclosure of BO is unduly burdensome, this may drive more companies to incorporate in overseas jurisdictions which do not require disclosure of ultimate BO or where the disclosure requirements are less onerous.

3. Do you agree with the proposed scope of application, i.e. covering all companies incorporated in Hong Kong, except listed companies regulated under the Securities and Futures Ordinance?

Generally we agree with the proposed scope.

4. Do you think that there should be an exemption for certain types of companies? If so, which, and why?

We would not propose any blanket exemptions other than listed companies.

5. Do you agree with the proposed definition of beneficial ownership, which takes into account the FATF's recommendations and the thresholds commonly adopted by other member jurisdictions?

We note firstly that the proposed definition of BO differs from the definition of the same term contained in the interpretation section of Schedule 2 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) ("AMLO"). This is likely to be confusing, especially given that both are supposedly derived from the FATF Recommendations on disclosure of BO. We believe that the definition in the AMLO (subject to the proposed revision to the threshold, mentioned in paragraph 3.5 of the consultation document) and that to be introduced into the Companies Ordinance should be aligned with one another.

In relation to the proposed definition in the Companies Ordinance, if this is retained, we have some doubt about the inclusion of parts (d) and (e) of the definition, which introduce the concept of "having the right to exercise, or actually exercising, significant influence or control", unless this is more clearly defined. This term is not self-explanatory and it appears to go beyond the FATF definition of BO, which, in the Interpretative Note to Recommendation 10

on CDD refers to: "The identity of the natural persons (if any – as ownership interests can be so diversified that there are no natural persons (whether acting alone or together) exercising control of the legal person or arrangement through ownership) who ultimately have a controlling ownership interest in a legal person" [emphasis added]. In a footnote to the above, the FATF also states: "A controlling ownership interest depends on the ownership structure of the company. It may be based on a threshold, e.g. any person owning more than a certain percentage of the company (e.g. 25%)."

Prima facie, "having the right to exercise, or actually exercising, significant influence or control" may not equate to "having a controlling ownership interest." It is important, therefore, that such terms appearing in legislation be clearly defined, otherwise they could create a burden for companies.

Given this qualification, we also question whether it is appropriate to call the register a "register of people with significant control". It may be better to call it, for example, a "register of beneficial ownership".

6. Do you agree with the proposal of adopting more than 25% as the threshold for determining beneficial ownership?

Yes, but see our response to question 5 above.

7. Do you agree with the proposed content of the PSC register, which shall include registrable individuals and registrable legal entities which meet the relevant conditions in respect of beneficial ownership?

While we agree, in principle, subject to the qualification in our response to question 5 above, we also have some reservations about the practicality of the proposals where a long chain of entities and complex structures are involved, bearing in mind also the proposition in question 2 and our response to that.

In figure 3 of Annex B of the consultation paper, in order to minimise the administrative burden (paragraph 3.7 of the consultation paper refers), HK Company B will be the only legal entity in the chain that needs to be entered on HK Company A's PSC register. However, Person 1 at the top of the chain will also need to be registered. Where there is a long and complex web of companies, trusts and partnerships, etc., it could be significant burden for Company A to have to seek to identify Person 1 in such cases. We understand that, in the United Kingdom ("UK"), and the proposals seem to be based, to some extent, on the UK model, in similar circumstances, Person 1 would not need to be entered onto Company A's register. Furthermore, in the UK, while there may be a need to identify the person at the top of chain in certain circumstances, such as where the intervening legal entities may not be registrable, it seems that that person will also have an obligation to take the initiative to inform Company A that he/ it is a registrable person. Under the current proposals, in contrast, the only obligation on a registrable person or party, who may have information about the identity of a registrable person, is to respond to a notice from the company. More thought may need to be given to this part of the proposals.

Another issue that is not clear under the proposals is the requirements for registration where a person holds an indirect interest, or a mixture of direct and indirect interests, in company that is required to keep a PSC register, where

those interests may be less than 100%. Although figure 4 in Annex B relates to this kind of situation, it does not explain how Person 1's total interest in HK Company D is to be calculated.

In the light of the above points, we would suggest that more details need to be made available about how the proposals will work in practice, in order to minimise uncertainties and give greater comfort and assurance to the various parties that will be affected by them.

8. Do you agree with the proposed format of keeping the PSC register and the required particulars?

Yes, but the law will need to clarify the requirements for registrable legal entities which are not registered in Hong Kong or the Mainland. Documentation for such legal entities may be in a language other than English or Chinese and guidelines should be provided as to level of information and documentation required, whether certified translations will be required, etc. A balance needs to be struck between imposing reasonable documentation requirements and encouraging and facilitating the setting up and operation of businesses in Hong Kong.

9. Do you agree with the ten-year record-keeping requirement?

The consultation paper points out that this is in line with the existing requirement for the register of members under the Companies Ordinance. However, we note also that AMLO contains a six-year record-keeping requirement only and arguably there should be consistency between these two related pieces of legislation, given that the primary purpose of both is to meet FATF standards .

10. Do you think companies should be given the choice to meet the requirement of nominating a person for cooperation with law enforcement agencies by authorising a natural person resident in Hong Kong or a local DNFBP (viz. solicitor, accountant, or trust and company service provider) who would have to be regulated under the AMLO?

Yes, but the role, responsibilities and potential liabilities of a nominated person need to be made clear. For example, will that person have duties relating to maintaining the PSC register or be responsible only for liaison with law enforcement agencies? If the former is the case, the question of who bears responsibility and, potentially, liability under the law, for any defaults relating to the register will need to be clarified. Prima facie, the legal responsibility for maintaining an up-to-date PSC register should remain with the company. This should also be the case where the company outsources the work of maintaining the PSC to a third party such as a company secretarial firm/ company services provider.

11. Do you agree with the proposed manner of keeping the PSC register (i.e. at the registered office of a company or any other place in Hong Kong)?

To facilitate access, we believe that consideration should be given to having a centralised database in addition to, or instead of, registers kept by individual companies. This could also help to ensure the accuracy of the information.

12. Do you agree that the PSC register should be available for public inspection?

As indicated above, while we appreciate that there may public interest arguments for the BO of companies to be accessible to the public, these need to be weighed up against the rights of private individuals to maintain a degree of confidentiality for legitimate purposes and the possible implications for Hong Kong's competitiveness, if it goes beyond the minimum requirements of emerging international standards and norms. On this basis, we consider that the PSC register should not be open for public inspection.

However, for public interest and professional reasons, access should be available to CPA practices and other relevant DNFBPs to facilitate them in complying with their CDD obligations under AMLO, as proposed. This would also be consistent with FATF Recommendations 24 and 25, which contain the statement: "Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22" (i.e., those relating to CDD and DNFBPs). (See also our response to question 1.)

13. If not, whether the PSC register should be accessible only to competent authorities? Why? Why not?

As indicated above, we would suggest that the PSC register also be accessible to relevant DNFBPs in relation to their clients or prospective clients. If the PSC register is accessible only to competent authorities, this could undermine the efficacy of the register and, potentially, impede DNFBPs in conducting CDD.

14. Do you agree with the proposed sanctions on companies for non-compliance with the requirements for keeping a PSC register and making available the PSC register for public inspection, and in respect of the making of false statements?

As indicated above, we would not support making the PSC available for full public inspection at this stage. The comparison with the register of members, directors and company secretaries is questionable, as the information needed for those registers should generally be readily available to the company concerned, whereas information on BOs will often need to be sought from third parties and may need to be sought from overseas. Furthermore, although, potentially, there may also be penalties imposed on addressees of notices issued by the company who fail to respond to requests for information (see question 15), this does not mean that all will respond or respond in a timely manner, or that the information that they provide will be complete and accurate, particularly if they are resident overseas and out of the reach of the Hong Kong law. Therefore, the proposed penalty regime needs to be thought through carefully.

Various important issues still need to be clarified. For example, will the requirement on companies to keep an up-to-date register be on a "best endeavours" basis? What time limits will be imposed on setting up the first register and making any subsequent changes to it? If a DNFBP is nominated to be responsible for cooperating with law enforcement agencies when the

need arises, is it intended that that person will also bear some responsibility for maintaining the PSC register. If a third party, such as a company secretarial firm/ company services provider is engaged to maintain the PSC register on behalf of a company, is it intended that that third party may be held liable for criminal sanctions. We do not think that this should be the case (see also our response to question 10).

As regards the sanction referred to in paragraph 3.18 of the consultation paper, i.e., where any person knowingly or recklessly makes in the PSC register a statement which is misleading, false or deceptive in any material particular, although this appears to be quite draconian, section 895 is a general provision which already exists in the Companies Ordinance. If the reference in that section to "any return, report, financial statements, certificate or other document, required by or for the purposes of any provision of this Ordinance" includes a register kept by a Hong Kong company under the Companies Ordinance, then it would seem that this provision will already apply. If, however, there is any doubt as to whether this section would apply to information provided in relation to a PSC register, we would not suggest making such a connection explicit, given the potentially stringent nature of this penalty. Instead a more lenient penalty, relating specifically to the provision of information for a PSC register, should be considered.

15. Do you agree with the proposed sanctions on a notice addressee who has been served with a notice to confirm beneficial ownership for failing to comply with the notice, and in respect of the making of false statements in the reply to the notice?

We would agree that some form of sanction is desirable to encourage notice addressees to respond to requests for information. However, given that notice addressees may not reside in Hong Kong, there could be practical issues of enforcement. The proposed contents of such notices and method of serving notices, especially on non-resident addressees, need to be clarified; for example, would a process agent in Hong Kong be required and, if so, what would be the potential liability of the process agent, etc? Regarding the sanction proposed in paragraph 3.20 of the of the consultation paper (i.e., relating to the application of the existing section 895 of the Companies Ordinance), we would reiterate the point made in relation to the sanction referred to paragraph 3.18 of the consultation paper (see our response to question 14).

As indicated in our response to question 7, we would suggest that consideration also be given to the idea of imposing a parallel obligation on registrable persons to come forward to notify the company in which they hold their interest that their details should be entered on the PSC register, as appears to be the position under the UK law. We make this suggestion taking in account also concerns expressed by some of our members who undertake corporate services work that some ultimate beneficial owners will be reluctant to disclose their controlling interest, even if access to this information is restricted.



16. Do you think companies should be allowed the option of restricting the participation and/or pecuniary rights of persons when the latter fail to respond to a notice of confirmation?

We do not see a need to give companies the option of restricting the participation and/or pecuniary rights of persons who fail to respond to a notice. Potentially, this is a draconian measure, as legal or beneficial owners should not have their property rights restricted, except in extreme situations. The new requirements should be allowed to operate first to see whether there are any problems in implementation which might require further statutory measures to be taken. In addition, as mentioned above, we would suggest that an obligation also be imposed on registrable persons to come forward and identify themselves to the companies in which they hold a registrable interest.

17. Do you agree that a rectification mechanism should be included to enable applications to the court from anyone aggrieved by the entry in or omission from a PSC register as a registrable individual or a registrable legal entity?

We agree with the proposal.

Should you have any questions on our submission, please feel free to contact me on 2287 7084 or by email at peter@hkicpa.org.hk.

Yours faithfully,

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