

Intermediaries Supervision Department
Securities and Futures Commission
8th Floor, Chater House
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Hong Kong



By Hand

17 November 2011

Dear Sir or Madam

Submission in response to Consultation Paper on the Proposed Guideline on (1) Anti-Money Laundering and Counter-Terrorist Financing and (2) the Proposed Prevention of Money Laundering and Terrorist Financing Guideline Issued by the Securities and Futures Commission for Associated Entities

This is a submission by Linklaters in response to the Consultation Paper on (1) the Proposed Guideline on Anti-Money Laundering and Counter-Terrorist Financing and (2) the Proposed Prevention of Money Laundering and Terrorist Financing Guideline ("**Consultation Paper**") published by the Securities and Futures Commission ("**SFC**") in September 2011. We are grateful for the opportunity to provide comments on the proposed new guideline to be issued by the SFC. We wish to raise one specific issue.

Under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance ("**AMLO**"), a licensed corporation must implement customer due diligence measures, one of which involves, identifying who the customer of the licensed corporation is. As the term "customer" is not defined in the AMLO, the SFC proposes to give helpful guidance on the meaning of "customer" in the new guidance note. In the Consultation Paper, the SFC's view is that the term "customer" means a "client" as that the term is defined under the Securities and Futures Ordinance ("**SFO**") (paragraph 4.1.4a, new guidance note). Relevantly the definition of "client" under the SFO is a person for whom the intermediary provides a service the provision of which constitutes a regulated activity.

As the SFC may be aware, many licensed corporations in Hong Kong provide services to offshore affiliates where the offshore affiliate is acting for an underlying investor. Typically, the offshore affiliate would be regarded as the "client" of the licensed corporation.

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A licensed corporation can undertake simplified due diligence (“SDD”) in certain circumstances under the AMLO. Relevantly, subsection 4(3)(b) of Schedule 2 of the AMLO allows this where the customer is an institution that:

- “(i) is incorporated or established in an equivalent jurisdiction;
- (ii) carries on a business similar to that carried on by a financial institution;
- (iii) has measures in place to ensure compliance with requirements similar to those imposed under Schedule 2; and
- (iv) is supervised for compliance with those requirements by an authority in that jurisdiction that performs functions similar to those of any of the relevant authorities.”

It follows that a licensed corporation can carry out SDD in relation to its offshore affiliates where they are the customer/client and meet the criteria in subsection 4(3)(b) above. When read together with the proposed guidance at paragraph 4.10.7 of the proposed guidance note, it appears that:

- (a) where the offshore affiliate is established and regulated in a FATF member state, the SDD required is limited to checking that the affiliate is so regulated; and
- (b) where the offshore affiliate is established and regulated in any other jurisdiction, it must do more and check that the offshore affiliate has AML/CTF policies/measures to ensure compliance with local requirements which are similar to those required under the AMLO.

We would be grateful of the SFC’s confirmation of this.

In both cases however, it would not appear to be necessary for the licensed corporation to conduct customer due diligence on the underlying investor. That is not a surprising policy result as the offshore affiliate’s home AML/CTF rules should require it to conduct that customer due diligence. However, it would be helpful if this was clarified in the guidance note.

We ask if the SFC could confirm the above points in the new guidelines to assist licensed corporations understand their AML obligations with respect to their offshore affiliates and their underlying customers.

Yours sincerely



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