



## 1 Proposed scope of personnel to be covered

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### **Q1. Do you have any comments on the proposed phased implementation approach?**

ASIFMA and its members are supportive of the proposed phased implementation approach. In particular, ASIFMA would welcome the opportunity to provide feedback and experience from Phase 1, which could then be used to guide the implementation approach and arrangements for Phase 2.

### **Q2. Do you have any comments on the respective scope of personnel proposed to be covered by Phase 1 and Phase 2 of the proposed MRC scheme?**

ASIFMA wishes to note that, since the proposed MRC scheme will be confined to the local banking sector only, it is unclear whether reference checking is required for an existing employee of a non-AI entity sitting within the same Group of the Recruiting AI, who becomes in-scope as a result of internal transfer (whether locally or from overseas). As such, ASIFMA's members have expressed concern that certain AIs may seek to “sidestep” the scheme by hiring from Licensed Corporations or overseas entities only. As currently drafted, the scheme may not prevent “bad apples” rolling into HK from offshore or from other non-bank financial sectors (such as securities and insurance companies).

In relation to Phase 1 specifically, ASIFMA is of the view that it is unclear whether Phase 1 of the proposed MRC scheme includes existing employees who are promoted into Phase 1 roles. The current wording of the Consultation Paper suggests that any existing employees nominated for promotion into Phase 1 roles would be subject to the scheme and therefore, employers would be required to run 10 year reference checks before promoting internal talent. Further guidance from the HKMA on whether such a lookback is required would be appreciated.

In relation to the scope of Phase 2 of the proposed MRC scheme, ASIFMA and its members have the following comments:

- **Heads and deputy heads of key supporting functions:**
  - We would appreciate clarification as to whether the MRC scheme will apply to “heads and deputy heads of key supporting functions” who are not based in Hong Kong, but do have regional oversight of key supporting functions in Hong Kong; and
  - We note that individuals within the HR and Legal functions of Hong Kong AIs are currently unregulated. The inclusion of senior managers of these functions within the scope of the MRC scheme is as such unprecedented in Hong Kong.
- Whilst the Consultation Paper identifies bank branch managers, tellers and customer relationship representatives as within scope of “staff who are client facing in the provision of general banking products and services”, ASIFMA considers that mandatory reference checking on certain categories of junior staff would be disproportionate to their impact on end customers. For example, ASIFMA does not consider that there is a pressing need to address the RBA phenomenon amongst junior bank tellers within authorised institutions. As such, ASIFMA suggests that the HKMA consider narrowing the scope of ‘client facing’ staff to bank

staff providing advisory services or those receiving certain types of performance-based remuneration (ie based on their sales to clients).

- The HKMA has proposed that the MRC scheme cover all in scope employees regardless of whether they are permanent, contract or temporary staff. However, ASIFMA is concerned that requiring equivalent MRC checks to be undertaken on temporary / contract workers may be disproportionate to the duration of their tenure with the recruiting AI and will impose an onerous administrative burden on AIs in relation to these short term staff (who are often hired by AIs to assist in relieving immediate resourcing pressures).
- ASIFMA would appreciate guidance as to whether a reference providing AI is required to provide information to the recruiting AI in circumstances where relevant employee holds an out of scope role within the reference providing AI (for example, where a back office staff member of the reference providing AI applies for a client facing role at the recruiting AI).
- Finally, ASIFMA would be grateful for further guidance as to how the MRC scheme will apply to third party service providers. It is unclear whether the HKMA anticipates that staff assigned or seconded by the third party to an AI would be subject to the scheme.

### **Q3. Do you have any comments on the proposed timeframe for implementation of Phase 2 following the launch of Phase 1?**

ASIFMA and its members consider that implementation of Phase 2 should follow a reasonable time after the HKMA's review of the implementation of Phase 1 has concluded. This timeframe should take into account the time required to:

- consult with the industry on the findings from the HKMA's review and make any necessary refinements to the MRC scheme based on lessons learnt from Phase 1 prior to the implementation of Phase 2; and
- allow the industry to adequately prepare for the implementation of Phase 2, given that the anticipated complexity and wider scope of staff captured by Phase 2 will demand additional operational resources.

ASIFMA and its members anticipate needing 12 months to implement Phase 1, and then depending on how broad the scope of Phase 2 is, requiring at least the same time period again to implement Phase 2.

## **2 Proposed Scope of MRC Information**

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### **Q4. Do you have any comments on the proposed scope of MRC information, in particular information relating to investigation in progress but not yet concluded?**

#### Information relating to an investigation in progress but not yet concluded

ASIFMA agrees with the HKMA's observation that although disclosure of such information would help address concerns about an individual engaged in misconduct leaving an AI during the course of an investigation, care should be taken not to disclose pre-mature or inconclusive investigation information which may otherwise stigmatise a presumed innocent individual.

To manage this risk, ASIFMA and its members suggest that the MRC scheme should exclude the disclosure of any ongoing investigations until its conclusion, as disclosure of an investigation in progress may be unfairly prejudicial to the departing employee and present litigation risks to the reference providing AIs. However, ASIFMA's members do consider that a notification in relation to the investigation should be provided to a recruiting AI once the

investigation has concluded, if the investigation results in an outcome that would otherwise be reportable on the MRC Information Template. To that end, ASIFMA would appreciate if the HKMA could clarify if there is any timeframe for reference providing AIs to provide notification on a recently concluded investigation to a recruiting AI.

#### Litigation risk

Where the disclosure of an investigation that is in progress negatively impacts the departing employee's job prospects, this may expose reference providing AIs to potential litigation risk on the basis that their current / former employee may argue that they have breached their duty of care by providing this information. While the requirement to obtain written consent will reduce litigation risk, it does not eliminate it.

### **Q5. Do you have any comments on the proposed scope of reportable internal and external disciplinary actions to be covered under the MRC scheme?**

ASIFMA and its members are supportive of including serious disciplinary actions within the scope of the MRC scheme. In addition we agree with the HKMA's suggestion that disciplinary actions arising from misconduct of a minor nature (e.g. minor breach of internal staff codes such as repeated losses of staff card) and performance related matters (e.g. consistently poor performance) need not be included for the purposes of the MRC scheme.

In addition, ASIFMA would suggest that standards of materiality and causation be adopted with respect to each of the items listed in paragraph 35 of the Consultation Paper (e.g. material breach of legal or regulatory requirements, incidents resulting in adverse findings of honesty, integrity, etc.)

ASIFMA and its members would also appreciate clarification as to:

- Disciplinary actions relating to remuneration:
  - In relation to remuneration, can the HKMA provide clarification as to whether a reduction in remuneration as a result of the performance of the individual, economic conditions, or even a change in role or responsibilities would fall within the scope of matters to be disclosed.
  - Further guidance on the definition of "claw back" would also be helpful. For example, does the HKMA envisage that this refers more generally to any circumstances whenever any portion of a representative's unvested bonuses is forfeited or reduced, or where actual payment of yet unpaid bonuses is withheld or reduced?
- Whether verbal warnings are included or excluded from the scope of internal disciplinary actions to be reported.
- Whether asking employees to take paid or unpaid leave for risk management reasons while carrying out an investigation would constitute disciplinary action and need to be disclosed. Given that this request would occur before the conclusion of an investigation, ASIFMA is of the view that such leave is not a form of disciplinary action. ASIFMA also considers this to be supported by relevant case law.
- The scope of "reportable external disciplinary actions", particularly as it applies to Phase 2. ASIFMA wishes to note that certain Phase 2 staff may not be required to disclose external disciplinary actions to their employers (for example, disciplinary actions relating to driving violations or anti-social behaviour) and therefore, the reference providing AI may not have all relevant information available to disclose to the Recruiting AI. Given this, reference providing AIs' disclosure of information should be taken to be on a best efforts / best endeavours basis only.
- Whether reference providing AIs are only obliged to provide information in respect to issues that occurred during the time the individual was employed with the reference providing AI, and not information that the AI may have collected from previous employers via its own reference checks.

## Q6. Do you have any comments on the proposed MRC Information Template in Annex 2 to this paper?

In respect of the MRC Information Template in Annex 2:

- In relation to the first paragraph:
  - the recruiting AI is required to provide the two dates covering the period it is seeking information for. This seems unnecessary and ASIFMA suggests revising the first paragraph to read: “*The information should cover any period falling within 10 years prior to the date of this request where the following individual is employed by your institution.*”
- ASIFMA suggests amending the first sentence to read “*We have made a conditional offer of employment to the following individual...*” (provided that the HKMA is comfortable with the MRC process commencing once a conditional offer has been made). In relation to the section titled ‘information of employment record’, ASIFMA suggests that reference providing AIs instead be allowed to state the job / business title of the relevant individual. Job specifications are typically long and detailed documents, which may not be particularly useful in assisting AIs halt the roll of bad apples within the banking industry.
- In relation to Question 1, ASIFMA would appreciate guidance as to whether a candidate’s ‘involvement’ in an internal/external disciplinary action is intended to capture an investigation where allegations were made against the candidate but no detrimental findings were substantiated against them (for example, because the findings at the conclusion of the investigation are inconclusive) .
- More guidance from the HKMA on the expected level of detail expected when providing a description of an incident/breach on the MRC Template would also be helpful. Whilst ASIFMA appreciates that the description should contain sufficient case details for the recruiting bank to be able to assess on the materiality of the breach in so far as it relates to the individuals’ conduct and fitness and propriety, such as the root cause and ultimate responsible party for the breach / incident, ASIFMA is also mindful of personal data/privacy concerns, and the confidentiality and sensitivity of company information, and the need to manage litigation and privilege issues as they arise.
- Relatedly, to the extent that a finding of misconduct has not been made by a legal or regulatory body, ASIFMA considers that reference providing AIs should not be required to make a definitive assessment as to whether the relevant staff have breached applicable laws / regulations.

## 3 Duration of MRC Information

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### Q7. Do you have any comments on the proposed duration of MRC information coverage, i.e. 10 years of employment records?

ASIFMA and its members consider that a duration of 7 years would be more appropriate than the 10 years proposed by the HKMA. This is on the basis that:

- existing Hong Kong law only requires retention of employment records for 7 years from the cessation of employment. Further, under the [Personal Data \(Privacy\) Ordinance Code of Practice on Human Resource Management](#), Hong Kong employers are recommended to hold employment related data for no longer than 7 years from the date the employee leaves employment, unless express consent is provided by the employee or there is a subsisting reason to retain the data for longer. While the MRC scheme may in the future be considered such a reason, AIs at present are unlikely to hold 10 years of employment records. As such, ASIFMA and

its members consider a 10 year retention period will be impossible to comply with in practice at the commencement of the MRC regime, unless there is a lengthy transition period in place;

- while CE, ACE and EO applications require 10 years of employment history to be provided, the industry already regards this as imposing onerous storage and retention requirements, which would be compounded by requiring storage of records for all in-scope employees; and
- in practice, AIs are likely to need to hold all employees' records for the MRC-prescribed retention period, as an out of scope employee may later become an in scope employee, which will further exacerbate the record keeping burden.

**Q8. Do you foresee any difficulties for AIs to maintain 10 years of employment records of their employees for MRC purpose?**

Yes. ASIFMA recommends the adoption of a shorter retention period, for the reasons discussed above in response to question 7.

## 4 Obligations of Recruiting AIs

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**Q9. Do you have any comments on the requirements to obtain consent from the prospective employee?**

ASIFMA and its members:

- would appreciate guidance from the HKMA as to whether the HKMA considers an AI can proceed with employment if a prospective employee refuses to provide their consent to the MRC process; and
- consider that a recruiting AI should be required to inform a reference providing AI as soon as practicable if a prospective employee's consent is subsequently withdrawn.

ASIFMA is also of the view that an industry-led template consent (developed in consultation with the HKMA) should be drafted to assist with this process and ensure that consent is obtained consistently and fairly.

**Q10. Do you foresee any practical issues in reaching out to existing and former employer AIs of the prospective employee in the past 10 years?**

ASIFMA and its members envisage a number of practical issues, including:

- where prospective employees do not disclose all of their past roles to recruiting AIs. ASIFMA would welcome confirmation from the HKMA that a recruiting AI will not be held liable for failure to obtain any records for a job that was not disclosed by an employee during their application process and which falls within the relevant period for the MRC scheme, and that a recruiting AI is not expected to verify the details of any "gaps" in an employee's employment history; and
- what a recruiting AI's obligations are where a reference providing AI has ceased to exist since the time of an individual's employment with that AI.

ASIFMA and its members would also appreciate:

- guidance as to whether recruiting AIs are only required to check their internal group records where the relevant employee was employed by an AI within that group (i.e. an entity subject to the MRC scheme);

- guidance as to what a recruiting AI's obligation is where dealing with a reference providing AI which has ceased to exist; and
- confirmation that the HKMA considers that a recruiting AI may commence the MRC process after (rather than before) a conditional offer of employment is made, given that requiring the MRC process to be undertaken before this stage may have a chilling effect on staff mobility (as an individual's current employer would be notified by a recruiting AI commencing the reference check process prior to the individual accepting a new role with the recruiting AI and presumably before the individual resigned from their current role).

### **Q11. Do you foresee any practical issues in providing an opportunity to be heard to the prospective employee?**

ASIFMA and its members are of the view that providing an opportunity to be heard to the prospective employee may result in some practical issues that are unable to be easily resolved, particularly in relation to disclosure of misconduct, and that members should not be obligated to provide an opportunity to be heard in all circumstances.

In particular, ASIFMA is concerned that:

- introducing this requirement unnecessarily exposes the recruiting AI to potential complaints of an unfair recruitment process if the prospective employee is dissatisfied with the process;
- if the candidate is to be heard, he/she will naturally ask for details of the investigation in order to do so, and this may be viewed as an opportunity to re-open the previous investigation. This may cause particular difficulties where the candidate was not aware of the investigation at the time it was carried out, for example, due to their departure from the firm before the commencement of the investigation, the sensitivity of the allegations or tipping off concerns; and
- as such, an opportunity to be heard would likely create an additional obligation on the recruiting AI to further investigate (if new facts are provided by the candidate beyond what is included in the MRC form, or conflicts with what is included in the MRC form). The recruiting AI is then limited in the scope of its investigations and reliant on the reference providing AI to provide more information, increasing the burden on both parties.

One alternative to providing an opportunity to be heard would be for a reference providing AI to briefly state what the employee's position was in respect of the main allegation against him/her (e.g. admitted or denied), and for the recruiting bank to then consider this and not need to provide the candidate with an opportunity to be heard. This could help manage the risks of defamation or breach of duty of care claims by the candidate against the reference providing AI.

### **Q12. Do you have any other comments in relation to the obligations of recruiting AIs under the MRC scheme?**

ASIFMA and its members:

- note that the HKMA has proposed that AIs should put in place adequate internal systems and controls, policies and procedures to safeguard integrity and confidentiality of information obtained and processed during the MRC process. However, it would be appreciated if the HKMA could clarify to what extent it envisages that this information may be shared with other entities within the AI's group (eg affiliates) and used in relation to matters such as an affiliate's decision as to whether to hire a particular employee.

ASIFMA and its members would also appreciate clarification / guidance from the HKMA as to:

- whether a recruiting AI is deemed to have discharged its obligations where a reference providing AI refuses to provide additional information in response to a recruiting AI's follow up question;
- the extent of information to be sought by recruiting banks "for clarifications and further information to facilitate its consideration", given that recruiting and reference providing AIs will generally be competitors, and should not be compelled to disclose confidential and proprietary information about their business and employees, as well as weaknesses in its operations. As such, disclosure of information under the MRC scheme may have a significant anti-competitive effect;
- whether recruiting AIs are required to keep MRC information on file for a given period of time after making the decision to hire an employee, and in particular whether they would be required to provide this MRC information to a future recruiting AI looking to employ one of their staff;
- the legal and/or regulatory consequences for a recruiting AI which chooses to hire an individual despite having being told about misconduct in their previous employment history. In particular, ASIFMA members would appreciate guidance from the HKMA as to whether AIs should have regard to the following in making a hiring decision in relation to an employee who has engaged in past misconduct:
  - how recent the misconduct in question was; and
  - the factors set out in the SFC Fit and Proper Guidelines in relation to whether an employee remains fit and proper, including in relation to prospective employees licensed by other regulators or who are not regulated.

## 5 Obligations of reference providing AIs

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### **Q13. Do you have any comments on the requirement for the reference providing AIs to respond to MRC requests within 10 working days?**

ASIFMA and its members consider that it would be more appropriate to allow reference providing AIs to respond to MRC requests within six weeks of the request, to align with the standards set by the Financial Conduct Authority under the Senior Manager Certification Regime. This is on the basis that:

- existing processes for background checks take significantly longer than 10 working days, and generally recruiting banks expect to wait between 1-3 months to receive a standard reference report at present;
- if the MRC scheme is rolled out to all proposed Phase 2 employees, this will impose a significant burden on AIs, which will make complying with the 10 working day time period very difficult, particularly for banks with a large number of licensed representatives and given that the information to be provided will generally be sourced from a range of different units within an AI rather than one central function; and
- six weeks would be more aligned with international standards – as mentioned above, the UK FCA requires FIs to provide references within six weeks of a request.

Additionally, a recruiting AI will generally be considered to have discharged its obligations after waiting for 1 month. It would be much appreciated if the HKMA could indicate as to when a recruiting AI would be treated as having discharged its obligation in the case where the reference providing AI has given an estimated timeframe that a further response will be made but who has in fact not provided that response within the estimated timeframe.

#### **Q14. Do you have any comments on the requirements for reference providing AIs to provide updated MRC information to recruiting AI?**

ASIFMA and its members:

- are concerned that where an individual withdraws their consent to the MRC process (for example, after accepting a new position with the recruiting AI) any updates regarding investigations provided by reference providing AIs will no longer be provided subject to that consent. In addition, in circumstances where the consent is withdrawn, it is unclear as to whether recruiting AIs are expected to notify reference providing AIs that this has occurred. If no such notification is provided, reference providing AIs may provide updates regarding investigations without being aware that doing so exposes them to potential liability as a result of the withdrawal of the consent;
- consider that where a reference providing AI has notified the recruiting AI of an ongoing investigation into an individual and the investigation subsequently concludes, that the individual has not committed misconduct, the reference providing AI should notify the recruiting AI of this fact;
- are concerned that the requirement to update recruiting AIs in relation to investigations which conclude within 10 years of an employee having left a reference providing AI is particularly onerous, and consider that it would be reasonable for this requirement to apply only in relation to investigations which conclude within five years of an employee's departure;
- would appreciate clarification from the HKMA as to whether, if a reference providing AI provides updated MRC information (for example, indicating that an investigation has concluded that the individual has been found to have committed significant misconduct) to a recruiting AI after an individual has joined the recruiting AI, the recruiting AI is required to re-assess the individual and consider termination on the basis of this information; and
- would appreciate clarification from the HKMA as to whether a reference providing AI must update a recruiting AI with information regarding a former employee's misconduct that is discovered in the course of an investigation where the former employee is not the subject of the investigation.

#### **Q15. Do you have any other comments in relation to the obligations of reference providing AIs under the MRC scheme?**

The Consultation Paper provides at paragraph 49 that *'all information provided under the proposed MRC scheme should be supported by written documents'*. ASIFMA and its members have significant concerns about this requirement, on the basis that it is unclear whether the HKMA envisages such written documents being provided to recruiting AIs. The documents supporting the information proposed to be disclosed under the MRC scheme may include information regarding highly sensitive matters, including proprietary information, employee remuneration and internal investigations, which reference providing AIs should not be required to share with their competitors. In addition, it is likely that at least some of this information may be subject to legal professional privilege and reference providing AIs should similarly not be required to waive privilege in providing these documents to recruiting AIs.

Documents evidencing on-going internal investigations may also contain information that will form the basis for regulatory notification / sanction or civil dispute if the allegation(s) are proven. Disclosure of such sensitive/confidential information prior to conclusion of the investigation exposes the subject to significant regulatory, litigation and reputational risks.

ASIFMA and its members consider that reference providing AIs' obligation in this regard should be limited to providing an accurate factual summary of the relevant matters in the MRC form itself.



While ASIFMA and its members acknowledge that the references provided by reference providing AIs should be true, accurate and capable of substantiation, we consider that requiring references to be “fair” and “complete” imposes an excessive burden on reference providing AIs, as well as exposing these institutions to liability in relation to information being provided on a best endeavours basis and within an extremely short time frame.

Further, while the Consultation Paper provides guidance as to the point at which a recruiting AI is considered to have discharged its obligations under the MRC scheme, it is unclear at which point a reference providing AI should be considered to have discharged its duty under the MRC scheme. In particular, ASIFMA would appreciate guidance as to whether a reference providing AI has discharged its obligations where it refuses to provide follow up information to a recruiting AI on the basis that the follow up information is outside the scope of the MRC scheme.

## 6 Other operational requirements

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### **Q16. Do you have any comments or foresee any practical issues in fulfilling the operational requirements?**

Yes. ASIFMA members anticipate that there will be practical difficulties from an operational perspective, including:

- resource constraints;
- knowledge / subject matter expertise constraints on the part of those teams involved in the MRC process;
- difficulties associated with the suggested response time of 10 working days;
- difficulties in relation to completion of the reference check itself;
- difficulties with providing responses in relation to 10 years of employment history given that, as discussed above in response to question 7, members generally do not hold employment records for more than 7 years at present; and
- the obligation to update recruiting AIs of the outcome of concluded investigations.

In particular, in relation to resource constraints, ASIFMA wishes to flag that a number of its members currently rely on third party agents or overseas group entities to handle reference check processes on their behalf. Given the scope and sensitivity of the information covered by the proposed MRC scheme, ASIFMA’s members anticipate that they will need to onshore this process, to ensure this sensitive information is handled appropriately and references are provided to recruiting AIs with input from the Legal and Compliance divisions of the reference providing AI. This is likely to have significant cost and resource implications for ASIFMA’s members.

ASIFMA members would appreciate clarity from the HKMA in relation to whether AIs may continue to rely on third party agents in relation to reference checks and the collecting of MRC information.

### **Q17. Do you have any comments on the proposal for an internal network of an industry association to facilitate the exchange of requests and information under the proposed MRC scheme?**

Whilst ASIFMA is open to a proposal for industry associations to facilitate the exchange of requests and information, further clarity is required as to the types and extent of information AIs are expected to share or exchange. In particular, ASIFMA is concerned that disclosing information regarding an individual’s disciplinary record in an internal network raises confidentiality concerns, and further consideration should be given as to how these concerns

will be managed effectively. As such, ASIFMA proposes revisiting the question of an internal network by way of industry consultation, once Phase 1 has been completed and the industry has further clarity on the scope of reportable information under the MRC scheme.

## 7 Implementation approach

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### **Q18. Do you have any comments on implementing the proposed MRC scheme through an industry-led effort with the endorsement of the HKMA, rather than a supervisory requirement upfront?**

ASIFMA and its members are supportive of implementing the proposed MRC scheme through an industry-led initiative.

ASIFMA members would also welcome clarification as to:

- how AIs can manage the risk of claims by existing/former employees within the framework of an industry-led initiative. ASIFMA notes that for some AIs, written consent and waiver of liability may not be sufficient to shield them from liability in their home jurisdictions;
- how AIs should respond to an employees' data erasure request, if that request contradicts the requirement to retain the relevant data in order to comply with the MRC scheme; and
- what the consequences of failure to comply with the MRC scheme would be (including in respect of the decision to hire an employee with poor references as disclosed through a MRC check); and
- how the HKMA would ensure AIs' compliance if the MRC scheme was not a supervisory requirement.

### **Q19. Do you have any comments on confining the mandatory reference checking within the Hong Kong banking industry at the beginning?**

ASIFMA and its members agree it would be sensible to confine the MRC to the Hong Kong banking industry at present, particularly given that former employers located outside of Hong Kong (or the Hong Kong banking sector) may not be willing to provide references. Additionally, banks located outside of Hong Kong may be subject to restrictions under foreign personal data and privacy laws which prevent compliance with a request for a reference check under the MRC scheme. We consider that it would be difficult to expand the MRC scheme beyond the Hong Kong banking industry in the future without increased international cooperation in relation to this area (for example, as a result of guidance from the Financial Stability Board or the International Organisation of Securities Commissions).

### **Q20. Do you have any other comments on the proposed MRC scheme and other suggestions that can help to tackle RBA phenomenon?**

The proposed MRC scheme may potentially impact on individuals' privacy, and as such it may be appropriate for the HKMA to consult with the Office of the Privacy Commissioner for Personal Data if such consultation has not already taken place.