

8 March 2023

Carmen Chu
Executive Director (Enforcement and AML)
Hong Kong Monetary Authority

Dear Madam,

ASIFMA response to HKMA Consultation on HKMA Updated Guideline on AML & CFT

The Asia Securities Industry & Financial Markets Association (“**ASIFMA**¹”) is grateful for the opportunity to respond to the Hong Kong Monetary Authority (“HKMA”) consultation on HKMA’s Updated Guideline on Anti-Money Laundering and Counter-Financing Terrorism. Feedback set out in this response has been collected from ASIFMA’s KYC Standardisation Working Group, which has been closely following global, regional, and local developments relating to KYC Compliance in recent years.

Members are supportive of continued dialogue between the HKMA on this important topic and we would welcome the opportunity to discuss our response in further detail. Please do not hesitate to reach out should you have any questions on our response.

Sincerely,

Laurence Van der Loo
Executive Director, Technology & Operations
Asia Securities Industry & Financial Markets Association

¹ ASIFMA is an independent, regional trade association with over 165 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, professional and consulting firms, and market infrastructure service providers. Together, we harness the shared interests of the financial industry to promote the development of liquid, deep and broad capital markets in Asia. ASIFMA advocates stable, innovative, competitive and efficient Asian capital markets that are necessary to support the region’s economic growth. We drive consensus, advocate solutions and effect change around key issues through the collective strength and clarity of one industry voice. Our many initiatives include consultations with regulators and exchanges, development of uniform industry standards, advocacy for enhanced markets through policy papers, and lowering the cost of doing business in the region. Through the GFMA alliance with SIFMA in the United States and AFME in Europe, ASIFMA also provides insights on global best practices and standards to benefit the region.

DEVELOPING ASIAN CAPITAL MARKETS

	Section	Comments/Recommendations
1.	4.2.1. An AI should carry out CDD measures in relation to a customer: (a) before establishing a business relationship with the customer;	Under certain circumstances with corporate clients, CDD/KYC will only begin once the contract is signed with the client. Would HKMA consider signing a contract as equal to establishing a relationship or would the HKMA consider the terms and conditions within the contracts itself as well as controls implicated which indicates that there will be no service offering/transactions until completion of CDD even the contract is signed. i.e.: 1) sign the contract; 2) perform CDD/KYC; 3) subject to completion of step 2 then establishing a business relationship; 4) servicing offering and transactions.
2.	4.3.1 a digital identification system that is recognised by the HKMA (e.g. iAM Smart of Hong Kong); or	We suggest that the HKMA specifies the definition of “a digital identification system that is recognised by the HKMA” and further guidance on the criteria in assessing what could qualify as a HKMA recognized digital identification system (in addition to iAM Smart).
3.	4.3.10 In respect of trusts, an AI should identify and verify the trust as a customer in accordance with the requirements set out in paragraphs 4.3.11 and 4.3.12. The AI should also regard the trustee (footnote 22) as its customer if the trustee enters into a business relationship or carries out occasional transactions on behalf of the trust, which is generally the case if the trust does not possess a separate legal personality. In such a case, the AI should identify and verify the identity of the trustee in line with the identification and verification requirements for a customer that is a natural person or a legal person, where applicable. Footnote 22 “For the avoidance of doubt, the AMLO defines a beneficial owner in relation to a trust to include trustee (see paragraph 4.4.10). Depending on the nature of the roles and activities which the trustee is authorised to conduct (e.g. if a trustee is also regarded as the customer or the PPTA), an AI should apply the higher of the relevant requirements set out in this	<p>We submit that clarification is needed on the identification and verification requirements when the BO is a corporate trustee. There is confusion given that section 4.4.1 provides that Beneficial Owner refers to a natural person.</p> <p>We suggest that identification and verification of the identity of the corporate trustee at the corporate level should satisfy the identification and verification requirements of the beneficial owner in relation to a trust. Otherwise, our interpretation is that given 4.4.1 requires a BO to be a natural person, the corporate trustee should be considered an intermediate layer instead of a BO, such that the beneficial owners of the corporate trustee should be identified and verified as the beneficial owners of the trust.</p> <p>If the HKMA is of the opinion that a corporate trustee should be considered as an intermediate layer, we alternatively suggest that for a corporate trustee who is acting in</p>

	Guideline for the purpose of identification and verification of the identity of the trustee.”	its professional capacity, e.g. a TCSP Licensee, we strongly suggest that simplified due diligence (SDD) can be applied to the corporate trustee, such that the BO of the corporate trustee are not required to be identified and verified.
4.	Footnote 27 “In some jurisdictions, corporations are required to maintain registers of their beneficial owners (e.g. the significant controllers register maintained in accordance with the Companies Ordinance of Hong Kong). An AI may refer to such registers to assist in identifying the beneficial owners of its customers. Where a register of the beneficial owners is not made publicly available, the AI may obtain the record directly from its customers.”	We suggest that individual ID information maintained with Companies Registry (ICRIS) can be used for identity verification per 4.4.4 and this be clarified.
5.	4.4.3 The verification requirements for a customer and a beneficial owner are different under the AMLO. In determining what constitutes reasonable measures to verify the identity of a beneficial owner of a customer, an AI should consider and give due regard to the ML/TF risks posed by the customer and the business relationship. It is therefore up to the AI to consider whether it is appropriate to make use of the records of a beneficial owner available in the public domain ²⁷ , request its customer to provide documents or information in relation to the beneficial owner’s identity obtained from a reliable and independent source, or corroborate the customer’s undertaking or declaration with publicly available information. In exceptionally low ML/TF risk situation (e.g. charitable trust), it may be reasonable for the AI to 26 For the avoidance of doubt, if a connected party also satisfies the definition of a customer, a beneficial owner of the customer or a person purporting to act on behalf of the customer, the AI has to identify and verify the identity of that person with reference to relevant requirements set out in this Guideline. 27 In some jurisdictions, corporations are required to maintain registers of their beneficial owners (e.g.	<p>We welcome this change.</p> <p>We would however recommend the HKMA to remove the highlighted part (i.e., “and confirmation that they are known to the customer”). Whilst we welcome the flexibility provided by the HKMA, when firms adopt client’s provided BO info, presumably the client should know clearly of their BO’s identity and the AI should also have reasonable understanding on the relationship to be built. We therefore submit that such confirmation should not be necessary. If the HKMA would like to keep the confirmation, we hope the HKMA can confirm in what form that confirmation should be provided (e.g., an email confirmation?).</p>

	<p>the significant controllers register maintained in accordance with the Companies Ordinance of Hong Kong). An AI may refer to such registers to assist in identifying the beneficial owners of its customers. Where a register of the beneficial owners is not made publicly available, the AI may obtain the record directly from its customers. 25 confirm the beneficial owner's identity based on the information provided by the customer (including trustee(s) whose identities have been verified). This could include information provided by the customer as to the beneficial owner's identity, and confirmation that they are known to the customer.</p>	
6.	<p>4.4.4 If the ownership structure of a customer involves different types of legal persons or legal arrangements (footnote 28), in determining who the beneficial owner is, an AI should pay attention to who has ultimate ownership or control over the customer, or who constitutes the controlling mind and management of the customer.</p> <p>Footnote 28: Similar to a corporation, a trust or other similar legal arrangement can also be part of an intermediate layer in an ownership structure, and should be dealt with in similar manner to a corporation being part of an intermediate layer.</p>	<p>We submit that in line with the current HKMA FAQs, a trustee that is a licensed/regulated entity should be carved out of the requirement to identify natural person BOs and we submit that SDD should be allowed for such licensed/regulated trustees.</p>
7.	<p>4.4.10 The AMLO defines the beneficial owner, in relation to a trust as: (a) a beneficiary or a class of beneficiaries of the trust entitled to a vested interest in the trust property, whether the interest is in possession or in remainder or reversion and whether it is defeasible or not;</p> <p>4.4.12 For a beneficiary of a trust designated by characteristics or by class, an AI should obtain sufficient information (footnote 30) concerning the beneficiary to satisfy the AI that it will be able to establish the identity of the beneficiary at</p>	<p>We respectfully submit that there is a conflict between section 4.4.10 (which talks about entitlement) and section 4.4.12 (which talks about the beneficiary at the time of payout or when the beneficiary intends to exercise the vested rights). We hope that the HKMA can clarify this.</p> <p>We would also like to highlight that significant difficulties may arise for charitable trusts with long lists of beneficiaries now that the 25% threshold has been removed, this includes obtaining the identification information and</p>

	<p>the time of payout or when the beneficiary intends to exercise vested rights.</p> <p>Footnote 30: For example, an AI may ascertain and name the scope of the class of beneficiaries (e.g. children of a named individual)</p>	<p>conducting ongoing name screening. For this type of customer with a long list of beneficiaries, we propose that it be acceptable to obtain a confirmation from the customer that the beneficial owner's identity is known to the customer and that they agree to provide identification details upon request.</p>
8.	<p>4.4.15 Bearer shares refer to negotiable instruments that accord ownership in a legal person to the person who possesses the physical bearer share certificate, and any other similar instruments without traceability.</p>	<p>We suggest that the HKMA provides more clarity and other examples of <i>other similar instruments without traceability</i> (in addition to bearer shares).</p>
9.	<p>4.9.5 Examples of potentially higher risk factors³⁶ include: (iii) companies that have nominee shareholders, nominee directors, bearer shares or bearer share warrants;</p>	<p>Nominee directors such as lawyers and accountants are common and are not per definition high risk. We would be grateful if the HKMA can clarify the scenarios of concern so that (iii) can be further calibrated.</p>
10.	<p>Following an RBA, an AI may decide not to apply or continue to apply the EDD measures set out in paragraph 4.9.10 to a customer who is or whose beneficial owner is a former non-Hong Kong PEP. Such decision can only be made with the approval of the AI's senior management and on the basis that the PEP no longer presents a high risk of ML/TF. To determine whether a former non-Hong Kong PEP no longer presents a high risk of ML/TF, the AI should conduct an appropriate assessment (footnote 43) on the ML/TF risk associated with the PEP status taking into account various risk factors, including but not limited to:</p> <ul style="list-style-type: none"> (a) the level of (informal) influence that the individual could still exercise; (b) the seniority of the position that the individual held as the PEP; and (c) whether the individual's previous and current function are linked in any way (e.g. formally by appointment of the PEP's successor, or informally by the fact that the PEP continues to deal with the same substantive matters). 	<p>It is our interpretation that the senior management approval requirement applies to scenario where an existing PEP customer/BO is assessed to be a former PEP and no longer subject to EDD per 4.9.10. When an FI is onboarding a new customer/BO that is assessed to be a former PEP and EDD is never applied, is senior management approval be required to onboard such a customer/BO without EDD?</p> <p>Also, we suggest that a risk-based approach is acceptable in obtaining such senior management approval.</p> <p>We also assume that SDD for a former PEP is not mandatory and that an AI can choose to continue to apply EDD. We would be grateful if HKMA can confirm our understanding of the same.</p> <p>4.9.21 "EDD measures for PEPs" suggests "AIs should adopt RBA in determining the extent of EDD measures per 4.9.10...". But the condition of those 3 EDD measures in 4.9.10 is "and", i.e.. AI should apply all 3 EDD measures but not that AIs can apply</p>

Following an RBA (footnote 41), if a Hong Kong PEP or an international organisation PEP is no longer entrusted with a prominent (public) function, an AI may decide not to apply or continue to apply the EDD measures set out in paragraph 4.9.10 in a high risk business relationship with a customer who is or whose beneficial owner is a former Hong Kong or international organisation PEP. **Such decision can only be made with the approval of the AI's senior management and on the basis that the PEP no longer presents a high risk of ML/TF.** To determine whether a former Hong Kong or international organisation PEP no longer presents a high risk of ML/TF, the AI should conduct an appropriate assessment^[4] on the ML/TF risk associated with the PEP status taking into account various risk factors, including but not limited to:

- (a) the level of (informal) influence that the individual could still exercise;
- (b) the seniority of the position that the individual held as the PEP; and
- (c) whether the individual's previous and current function are linked in any way (e.g. formally by appointment of the PEP's successor, or informally by the fact that the PEP continues to deal with the same substantive matters).

Footnote 41 The handling of a former Hong Kong or international organisation PEP should be based on an assessment of risk and not merely on prescribed time limits.

Footnote 43 For the avoidance of doubt, if an AI does not apply EDD measures to a former Hong Kong or international organisation PEP but without conducting an appropriate risk assessment, the AI will be considered by the HKMA as contravening section 15(a) or 15(b) of Schedule 2, where appropriate. Hence, records of the relevant risk assessment

selectively as in "or". Can HKMA clarify what does the "extent of EDD measures" mean in this context? The "extent" in each of a, b and c in 4.9.10?

	should be retained by the AI as proof of compliance with section 15(a) or 15(b) of Schedule 2.	
11.	s.15, Sch. 2 4.9.3 An AI should obtain approval from its senior management to establish or continue a business relationship that presents a high ML/TF risk, or continue an existing business relationship where the relationship is subsequently assessed to present a high ML/TF risk.	We would like HKMA's clarification on whether FIs are only required to obtain senior management approval for high-risk accounts during on-boarding and when the risk profile has increased to high risk post on-boarding during review or when trigger events happen.