

April 11, 2023



Mr Christopher Hui, GBS, JP
Secretary for Financial Services and the Treasury
Division 6, Financial Services Branch
Financial Services and the Treasury Bureau
15/F, Queensway Government Offices
66 Queensway, Hong Kong

**The American Chamber
of Commerce in Hong Kong**

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Hong Kong

Public Consultation on Regulation of Crowdfunding Activities

Dear Secretary Hui,

The American Chamber of Commerce in Hong Kong (“AmCham”) appreciates the HKSAR Government’s plan in reviewing the current regulation of crowdfunding activities to enhance their transparency and accountability. As the largest international chamber in Hong Kong with a mission to maintain Hong Kong’s stature as an international business center, AmCham strongly urges the government to consider the comments from our members, as set out in this letter, on the negative impacts on the local economy by the legislation stated in the Public Consultation on Regulation of Crowdfunding Activities (the “**Consultation**”).

1. Scope and Implementation

The Consultation proposes in Section 2.2 that a person must make an application to the Crowdfunding Affairs Office (“CAO”) “*before conducting a crowdfunding activity that raises funds from individuals or entities of Hong Kong, or individuals or entities located in Hong Kong,*” which is defined as “*an activity that ... appeals publicly for funds from any Hong Kong permanent residents, or individuals located in Hong Kong; or any body corporates incorporated or registered in Hong Kong, or located in Hong Kong; or any organisations having place of business in Hong Kong or located in Hong Kong, regardless of whether they are body corporates, for a declared purpose, whether or not the crowdfunding activity is conducted in Hong Kong.*” This requirement **is too broad in scope and could be operationally complex for the government to implement in practice**. Taking a broad interpretation, it could mean that fundraisers outside of Hong Kong who are raising funds online (which is accessible by anyone with Internet access) could fall within the requirement, even though they are not specifically targeting Hong Kong individuals or entities.

For certain business models, such as crowdfunding platforms and their financial services providers such as banks and payment companies, they will face a high level of compliance burden. Given the potential extraterritorial broad reach of the proposed law, multi-national companies with presence in Hong Kong will have to invest to expand their existing compliance measures to conduct global tracking.

AmCham members respectfully ask for the Financial Services and the Treasury Bureau's view on how compliance will be achieved in practice by all concerned parties, whether the proposed regulation of crowdfunding activities is meant to be extraterritorial in scope, and how broadly the requirements are intended to be understood. We would also like to inquire around the proposed timeline for implementation, whether there will be a grace period for compliance, and whether there will be additional implementing rules and/or guidance issued.

2. The Hong Kong Presence Requirements

Under Section 2.24, the Consultation proposes that it “should be a requirement for funds collected in this way in Hong Kong to be paid into a designated account with a local bank”. AmCham members would like to understand the intention for how this would apply to international campaigns that collect funds from sources both within and outside of Hong Kong. It is unclear if this requirement will only apply to campaigns that happen solely in Hong Kong. Such measures will most likely cause significant operational burdens for all parties involved in the fundraising, which will lead to substantially higher costs for set up and compliance, and slower transaction speed. Further, it is suggested in Section 2.19 to establish a registration system for crowdfunding platforms to provide, amongst other things, the function that at least one person with a physical address in Hong Kong as the representative of the platform in Hong Kong. Given the borderless nature of the digital economy, the measure will add another hurdle for overseas companies to participate in the Hong Kong market, and could lead to the exclusion of Hong Kong as a market for crowdfunding activities.

3. Donor criminal liability

Holding donors criminally liable may be excessive given the host of other measures included in the Consultation, and will have the negative effect of chilling the entire sector by disincentivizing citizens from donating at all.

In summary, our members feel that the proposed regulation is imposing an onerous responsibility on fundraisers, crowdfunding platforms, service providers and donors. Many of these companies and platforms support technological advances and businesses in Hong Kong, contributing to its design, technology, digital and gaming economy. One of the leading crowdfunding platforms estimated that, using the methodology described in a study conducted by University of Pennsylvania professor Ethan Mollick,¹ US\$596 million / HK\$4.68 billion in local economic impact was generated by Hong Kong-affiliated creators in the last four years.

Yet, over-regulation of the crowdfunding space will lower the level of competitiveness of the city and pose the risk of driving funds and innovation to other markets such as Singapore; some members are concerned that they may have to consider moving their operations to another jurisdiction which has a friendlier regulatory environment. In that regard, the measures could discourage early stage businesses in need of funding from locating in Hong Kong. This would directly contradict the government's concerted efforts to attract entrepreneurs and cultivate the city's start-up ecosystem. Members believe Hong Kong already has in place sufficient laws covering different types of fundraising activities. They also believe that Hong Kong can reasonably rely on appropriate amendments to the existing regulations to address the regulatory gaps in area, such as online fundraising, so as to avoid the abovementioned risks and still derive benefits from the innovation, talents and business the city offers. Whilst we understand that the government wants to enhance the regulatory framework, many members considers that the harms will far outweigh the potential benefits as stated in the Consultation. Should the government decide to proceed further, AmCham would appreciate another round of consultation on the details of the draft of the legislation.

¹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808000

We look forward to the opportunity to discuss with you and your office in detail as our members prepare to comply with final regulations. For enquiries, your office may contact Ms. Queenie Tsui, Director of Communications & Government Affairs at qtsui@amcham.org.hk.

Best regards,

Geoffrey C Siebengartner
Chairman

Dr. Eden Woon
President

Encl. Annex: Specific Questions & Comments by Table

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Section	Comments/Questions
<p>1.2 ...As for customary financial activities that are within the remit of financial regulators, the existing laws and regulations continue to apply and it is not the purpose of the present exercise to impose of any additional considerations or requirements to these activities.</p>	<ol style="list-style-type: none"> 1. Given the potential extraterritorial broad reach of the proposed legislation, are multi-national companies (e.g. global banks) with presence in Hong Kong required to start tracking global activities? 2. Even though compliance requirements under the proposed law appear to apply directly only to fundraisers, service providers to fundraisers may also need to step up their information gathering, provision, fund tracking, know-your-customer efforts, etc. which may go beyond what they are currently required to perform under existing requirements. 3. Will there be guidance or clarification from the relevant regulators on the expected cooperation or compliance from the industries?
<p>1.15 Reward/pre-sale crowdfunding is adopted by people starting a business or engaging in an innovative project. Under this model, fundraisers will give the prototypes of their products or services to fund contributors, who will provide the funds required before the products go into production. In other words, fund contributors provide the above people with the capital required for developing a specific product. Currently, we do not have specific regulatory measures over these activities.</p>	<ol style="list-style-type: none"> 1. Reward-based crowdfunding is unique among crowdfunding business models because safeguards are built into the model that help prevent abuse such that Hong Kong can reasonably rely on existing regulations already in place to avoid any potential harm and still derive benefits from the innovation and business it offers.
<p>2.11 We suggest that in determining a crowdfunding application, the CAO should take into account the proportionality principle and the risk management factor of public interest...</p> <p>2.12 For fundraisers who would like to apply for holding a crowdfunding activity, but have previously committed misconduct or offences like fraud... the CAO will consider imposing additional conditions...</p> <p>2.13... The major factors to be considered when giving approval include whether the crowdfunding activity is conducted according to appropriate and sound procedures, whether the individuals involved are</p>	<ol style="list-style-type: none"> 1. What is the appeal mechanism for individual or entity who is aggrieved by the decision of the CAO?

<p>reliable, and the risks of the activity giving rise to illegal conducts or endangering public interests, public safety and national security, etc...</p>	
<p>2.14 We suggest that the CAO be authorised to publish guidelines that apply to general crowdfunding activities and to impose additional requirements for some activities ... For example... the CAO may mandate fundraisers funds above a specific amount to require fund contributors to make donations in their real name, and to required crowdfunding activities which have reached certain scale to have their financial document audited by accounting professionals... In addition, fundraisers whose applications are approved should be obliged to obtain information on the identities of persons donating funds where any crowdfunding platforms, financial institutions or payment service providers they cooperate with.</p>	<ol style="list-style-type: none"> 1. The requirements, such as audit of financial documents and donations in real name, can be potential onerous to all parties involved. 2. How are crowdfunding platforms, financial institutions and payment service providers expected to cooperate with the fundraisers on the requirements in Section 2.14? As commented on Section 1.2 above, they may have to step up their compliance measures in Hong Kong as well as other jurisdictions.
<p>2.19 ... We suggest that we should consider whether to establish a registration system for crowdfunding platforms to register with the CAO if they accept crowdfunding activities which raise funds from individuals of or in Hong Kong, irrespective of whether they are domiciled in and outside Hong Kong. We expect the registration system to perform the following functions –</p> <p>... (b) at least one person with a physical address in Hong Kong will be designated as the representative of the company, organisation or individual operating the platform in Hong Kong...</p> <p>2.20 As the operations of online crowdfunding platforms vary greatly, and many are set up outside Hong Kong, we need to evaluate carefully the coverage and operational practicality in</p>	<ol style="list-style-type: none"> 1. How will the registration system apply to international crowdfunding platforms that have presence only outside Hong Kong? 2. What is the intention for the requirement of at least one person with a physical address in Hong Kong as the representative of an international crowdfunding platform? What are the roles and duties of the representatives? 3. What is the legal consequence of the failure to register? 4. With all of the localisation requirement is it the government’s de facto intention to have all of the relevant parties set up a presence in Hong Kong – subject to local tax and Companies Registry compliance requirement?

<p>considering establishing a registration system.</p>	
<p>2.2 We propose that in-principle a person must make an application to the CAO before conducting a crowdfunding activity that raises funds from individuals or entities of Hong Kong, or individuals or entities located in Hong Kong. A crowdfunding activity raising funds from individuals or entities of Hong Kong, or individuals or entities located in Hong Kong refers to an activity that, in respect of the publicity used or the actual operation, appeals publicly for funds from any Hong Kong permanent residents, or individuals located in Hong Kong; or any body corporates incorporated or registered in Hong Kong, or located in Hong Kong; or any organisations having place of business in Hong Kong or located in Hong Kong, regardless of whether they are body corporates, for a declared purpose, whether or not the crowdfunding activity is conducted in Hong Kong. The crowdfunding activity may be publicised offline (e.g. by distributing leaflets or making announcements on newspaper) or online (e.g. by using a crowdfunding platform, social media or a bulk sending function to publish an electronic message). The location of publicizing such activities can be any places, including Hong Kong or other places; and with declared purposes that are related to Hong Kong 3 or not, including charitable causes, or for other purposes with or without returns in any form.</p>	<ol style="list-style-type: none"> 1. How does the Financial Services and Treasury Bureau anticipate crowdfunding platforms complying with the expansive requirement to submit an application for every crowdfunding activity? Will crowdfunding platforms be obligated to ensure that every campaign on their platform with a Hong Kong nexus is compliant with the new law? 2. It is not certain whether the crowdfunding platform or the fundraiser is the one to apply for prior approval for each fundraising activity. 3. What is the definition of “individuals or entities of Hong Kong”? Do “Hong Kong permanent residents” include permanent residents who are not located/residing in Hong Kong? Does the scope of the proposed law capture crowdfunding activities which do not actively solicit from Hong Kong persons or entities but only incidentally receive donations from Hong Kong persons or entities for purposes which may not be related to Hong Kong? 4. Please clarify the term “with declared purposes that are related to Hong Kong”. The scope is wide and vague. It may catch projects with the theme which are global in nature and include Hong Kong as one of the items under the projects. 5. Will service providers, such as banks and payment services providers, be expected to check compliance at this level of granularity? Please see our comments for Section 1.2 above. 6. What is the overall proposed timeline for implementation? 7. Will there be a grace period for compliance? 8. When will additional implementing rules and/or guidance be issued?
<p>2.21 In principle, a person has to apply to the CAO and obtain prior approval for conducting a crowdfunding activity that raises funds from individuals or entities of Hong Kong, or individuals or entities located in Hong Kong. Correspondingly, we will take law enforcement action against crowdfunding activities that fail to comply with the above</p>	<ol style="list-style-type: none"> 1. What are the detailed elements of the criminal offence to hold donors liable? 2. Holding donors criminally liable may not be required given there are other measures included in the Consultation and existing laws. The proposed criminal liability against donors will have the negative effect of chilling the entire sector by disincentivizing citizens from donating at all. 3. Whilst we note that consumer protection is important, it can be achieved by other means, such as education

<p>requirements. To tackle the irregularities and other possible crowdfunding activities that may affect the interests of Hong Kong, we must give the law enforcement agencies adequate power to regulate the various aspects of crowdfunding, including fundraisers, contributors, crowdfunding platforms and media, as well as the financial institutions involved.</p>	<p>and civic participation, to enhance public awareness and existing legislations.</p>
<p>2.23 We suggest that relevant law enforcement agencies may take the following action against unlawful crowdfunding activities – [...] (c) take prosecution against the person responsible for the activity.</p> <p>Footnote 7: [...] At the same time, it is proposed subjecting individuals making fund contributions to unlawful crowdfunding activities to criminal liability.</p>	<ol style="list-style-type: none"> 1. Is criminal liability necessary given the host of other measures included in the proposed law and existing laws? 2. It is not clear in the Consultation the penal or legal implications on third party service providers who facilitate donations which are not compliant with the proposed law
<p>2.24 As crowdfunding necessarily involves the pooling and transfer of funds, we propose that it should be a requirement for funds collected in this way in Hong Kong to be paid into a designated account with a local bank.</p>	<ol style="list-style-type: none"> 1. We would like to understand the intention for how this would apply to international campaigns that collect funds from sources both within and outside of Hong Kong. 2. Will this requirement only apply to campaigns that exclusively happen in Hong Kong? 3. Would it be expected that an international campaign would segregate money collected from persons in Hong Kong away from money collected from international sources?
<p>2.26 In addition, we notice that some crowdfunding platforms accept funds through emerging payment services, for example through merchant acquirers. In order to effectively regulate different risks entailed in crowdfunding activities, we will pay attention to the development of the use of emerging payment services in crowdfunding, and review whether additional regulatory measures are required, in particular with regard to merchant acquirers.</p>	<ol style="list-style-type: none"> 1. What is the definition of “merchant acquirors”? It is noted that not all payment services providers engaged by fundraisers are “merchant acquirors”. Will the proposed law include payment gateways, payment aggregators, etc? 2. What is the timeline for such proposed regulations? 3. What is the main purpose of proposing such regulations? 4. How will these regulations interact with Hong Kong’s existing financial services and payments regulations?
<p>2.7 The major responsibilities of the proposed CAO are as follows:</p> <p>(a) receiving all the applications submitted for conducting</p>	<ol style="list-style-type: none"> 1. When seeking views of relevant government departments and law enforcement agencies, would these be within Hong Kong or extend beyond Hong Kong if the individual or organization also have a foreign nexus?

<p>crowdfunding activities through a designated government platform; (b) referring the applications to relevant regulatory authorities and government departments by the types of crowdfunding activities; (c) processing crowdfunding applications not covered by existing legislation; (d) co-ordinating the approval process of a crowdfunding application, including seeking views of relevant government departments and law enforcement agencies; (e) acting as the central authority to register approved crowdfunding activities and building a database for easy public inspection; (f) issuing guidelines on the conduct of crowdfunding activities to ensure that the personal information and funds involved in crowdfunding are properly handled; and (g) collecting the completion records of crowdfunding activities and publishing these records for public inspection as appropriate.</p>	<ol style="list-style-type: none"> 2. To provide applicants with more certainty, will there be a specified time period within which the CAO will process applications, especially where there are multiple regulatory authorities / department involved? 3. If one of the aims of regulating is to provide reasonable protection to participants of crowdfunding activities, is there a mechanism for investors/donors to make complaints to, for example, the CAO? What recourse would they have under the legislation?
<p>Others</p>	<ol style="list-style-type: none"> 1. Will there be another round of consultation of the draft of the legislation?