

## FSTB Consults on Expanding Hong Kong Crowdfunding Regulation

The Financial Services and the Treasury Bureau (FSTB) has published a [consultation paper](#)<sup>1</sup> on proposals to expand the regulation of crowdfunding activities (the **New Hong Kong Crowdfunding Regime**). It recognises that crowdfunding is an increasingly prevalent alternative means for individuals and entities to obtain funds to further their cause or business and its expansion from offline crowdfunding to online crowdfunding. Under the proposals, all fundraising activities, online or offline, that raise funds publicly from individuals or entities of Hong Kong, or individuals or entities located in Hong Kong, would require prior approval from the proposed Crowdfunding Affairs Office, regardless of their purpose or location. Fundraising activities already regulated under existing laws (e.g. equity and debt crowdfunding) will not be subject to the approval requirement. The consultation period will end on 20 March 2023.

## Hong Kong's Existing Regulation of Fundraising Activities

### Hong Kong's Regulation of Fundraising Activities in Public Places

Certain fundraising activities conducted in public places that seek to raise funds from the general public require fundraisers to obtain a permit or licence from the relevant government authority. Under the current regime:

- charitable fundraising activity permits are issued by the Director of Social Welfare;
- non-charitable fundraising activities conducted in public places fall under the remit of the Secretary for Home and Youth Affairs;
- the sale of goods in public places for fundraising purposes requires a temporary hawker's licence under the Hawker Regulation (Cap. 132A1);
- lottery fundraising activities to support charitable activities by charitable organisations or raise funds for NGOs require a lottery licence under the Gambling Ordinance (Cap.148), whether or not the activities involve the sale of lottery tickets in public places; and
- the sale of lottery tickets in public streets requires fundraisers to make separate application to the Office of the Licensing Authority.

With the exception of the regulations applicable to lottery fundraising, the regulatory measures mentioned above only apply to fundraising activities conducted in public places and do not cover activities such as placing donation boxes in schools or offices and soliciting funds to support certain people. The FSTB points out that the existing regulations have not prevented individuals raising funds from their affiliated groups in this way and using the funds other than for the purpose claimed, including for purposes which were "unlawful and jeopardised public

interests, public safety, [and] national security”;<sup>2</sup> nor do they prevent similar misappropriations from occurring via social media platforms utilising member registrations or adding individuals as “friends”.

## Hong Kong Regulation of Online Fundraising Activities

The FSTB identifies four major types of crowdfunding activities:

- equity or debt crowdfunding – fund contributors invest in a specific project or business, typically a start-up, in return for equities or debt issued by a company, or profits or income of a collective investment scheme;
- peer-to-peer (**P2P**) lending – fund contributors provide unsecured loans to individuals or projects through online platforms that match them with borrowers, on which they earn interest;
- donation-based crowdfunding – fund contributors make donations to charitable causes or non-charitable causes (such as political campaigns or activities) without receiving any specific returns; and
- reward/pre-sale crowdfunding – fund contributors provide funds to fundraisers to help them develop or produce physical goods or services and receive the goods or services in return.

Hong Kong’s current regulatory regime covers equity and debt crowdfunding and P2P lending.

In the case of equity and debt crowdfunding, unless otherwise exempted, a person must obtain authorisation from the Securities and Futures Commission (**SFC**) to issue an advertisement or document, whether online or offline, that contains an invitation to the public to acquire or sell securities, or acquire an interest in or participate in a collective investment scheme. Further, any document that offers company shares for sale to the public must comply with the contents and authorisation and registration requirements of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), unless an exemption applies (e.g. where the offer is made only to professional investors or to not more than 50 persons over a 12-month period). The conduct of activities constituting the operation of a “stock market” or “futures market”, the provision of “automated trading services” or the conduct of a “regulated activity” (as such terms are defined under the Securities and Futures Ordinance (Cap. 571) (**SFO**)) are also regulated under the SFO and require authorisation.

For P2P lending, if the making of or offer of loans to borrowers via an online lending platform constitutes the operation of a “money-lending business”, the person carrying on such business is subject to the regulation of the Money Lenders Ordinance (Cap.163) and must obtain a money lender’s licence. If a P2P online lending platform manages or pools client monies or issues securities, or where part of the loans the lenders participate in is regarded as interests in a collective investment scheme or other types of securities, the platform will also be regulated by the SFC.

Donation-based crowdfunding conducted entirely online is not subject to the existing regulations that apply to fundraising activities conducted in public places. There are currently no specific regulatory measures applicable to reward/pre-sale crowdfunding activities.

The FSTB concludes that the lack of regulation of many crowdfunding activities poses a number of risks, including:

- fund contributors and fundraisers not being able to recover funds when a crowdfunding platform ceases operations;
- the potential misuse of contributors’ and fundraisers’ financial and personal data;
- the absence of a valid contractual relationship between the fundraiser and the contributor;
- fundraisers providing inaccurate information causing losses to fund contributors;
- contributors’ funds being used for purposes other than those claimed; and
- funds being raised for illegal activities, including unlawful acts endangering national security or supporting terrorist activities.

## FSTB Proposals to Enhance Hong Kong’s Regulation of Crowdfunding Activities

### Establishment of a Crowdfunding Affairs Office

The FSTB proposes to set up a Crowdfunding Affairs Office to centrally process and coordinate regulatory and administrative matters relating to crowdfunding activities and monitor the conduct of such activities. As described further below, the FSTB is proposing that the prior consent of the Crowdfunding Affairs Office will be required to conduct a crowdfunding activity that raises funds from individuals or entities of Hong Kong, or individuals or entities located in Hong Kong, which it defines as:

*“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” (Crowdfunding Activity).*

The New Hong Kong Crowdfunding Regime would cover Crowdfunding Activity publicised offline or online (including via a crowdfunding platform, social media or a bulk sending function to publish an electronic message) within or outside of Hong Kong and irrespective of the declared purpose of the crowdfunding.

The major responsibilities of the Crowdfunding Affairs Office will include:

- (a) receiving all applications submitted for conducting crowdfunding activities;
- (b) referring applications to relevant regulatory authorities and government departments based on the types of crowdfunding activities;
- (c) processing crowdfunding applications not covered by existing legislation;
- (d) coordinating 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 establishing a database for public inspection;
- (f) issuing guidelines on the conduct of crowdfunding activities; and
- (g) collecting the completion records of crowdfunding activities and publishing these records for public inspection.

To avoid duplication of efforts, the Crowdfunding Affairs Office will coordinate with relevant government departments to streamline the process for fundraising activities that are already regulated. For example, an application relating to donation-based crowdfunding to be conducted offline in a public place could be referred to the relevant government department for processing under existing legislation. The Crowdfunding Affairs Office would be able to advise on the purposes of the activity and the applicant’s fitness to be a fundraiser and to refer that advice to the relevant government department. Applications relating to online fundraising activities or a public fundraising activity conducted in a non-public place will be processed by the Crowdfunding Affairs Office itself.

## **Application to the Crowdfunding Affairs Office to Conduct Crowdfunding Activity**

In order to conduct Crowdfunding Activity, a fundraiser must apply to, and obtain permission from, the Crowdfunding Affairs Office before it commences or publicises the activity. A Crowdfunding Activity cannot be publicised until the Crowdfunding Affairs Office grants its approval. Where a Crowdfunding Activity is commenced without applying for approval or before the Crowdfunding Affairs Office grants approval, relevant law enforcement agencies would be authorised to issue a prohibition order to cease the activity and, in appropriate circumstances, could fine or prosecute the fundraiser.

### Information Required for Crowdfunding Applications

Fundraisers will be required to submit the following information to the Crowdfunding Affairs Office:

- (a) personal data and contact details of the applicant;
- (b) information regarding the local bank account designated for the crowdfunding;
- (c) description of the crowdfunding purpose and a statement that the Crowdfunding Activity will not involve any activities that will jeopardise national security or any unlawful activities;

- (d) the estimated start and completion dates of the activity;
- (e) the target:
  - fund size;
  - beneficiaries of the crowdfunding activity; and
  - use of the funds raised (if applicable);
- (f) background information of the establishment of the fundraising organisation (if applicable) – (e.g. articles of association or registration records);
- (g) how the Crowdfunding Activity will be conducted and any crowdfunding platform involved; and
- (h) any other information as required by the Crowdfunding Affairs Office.

### Simplified Procedures for Crowdfunding Applications

Fundraisers who are “widely recognised” by the community or have both extensive crowdfunding experience and a good track record, will be able to apply under simplified procedures in specified circumstances including where:

- (a) the fundraiser has obtained permits issued by relevant government departments to conduct fundraising activities;
- (b) the fundraiser applies to conduct a Crowdfunding Activity for the second time which is similar to the one previously approved by the Crowdfunding Affairs Office which was completed without contravening any laws or regulations; and
- (c) the fundraising objective is to respond to what is reasonably believed to involve an event such as a sudden natural disaster or an accident that requires urgent charitable funds.

Nonetheless, the Crowdfunding Affairs Office would reserve the right on reasonable grounds to require fundraisers to apply under the normal procedures. The Crowdfunding Affairs Office will have the power to direct the Crowdfunding Activity to stop or to proceed only after necessary changes are made. It will also be granted corresponding powers allowing it to follow up on fundraising activities held in response to natural disasters and accidents.

### Principles for Determining Crowdfunding Applications

In determining whether to approve a crowdfunding application, the Crowdfunding Affairs Office will assess:

- the size of the fund for the Crowdfunding Activity and the number of fund contributors involved (the larger the fund size and the greater the number of fund contributors, the stricter the requirements);
- whether the purpose of the Crowdfunding Activity is proportionate to the fundraising scale;
- whether the nature of the Crowdfunding Activity will jeopardise public interests and public safety and be contrary to the interests of national security; and
- the honesty, reputation and reliability of the applicant.

However, the FSTB notes that the approval of an application will not hinge on whether the “outcome, product or innovation of the activity is successful” nor its “ability to achieve its desired effect”, rather it will depend on whether the Crowdfunding Activity is conducted according to appropriate and sound procedures, the reliability of the individuals involved and the risks of the activity giving rise to illegal conduct or endangering public interests, public safety and national security.

## **New Hong Kong Crowdfunding Regime: Excluded Fundraising Activities**

### Activities Regulated under Existing Hong Kong Legislation

The proposed New Hong Kong Crowdfunding Regime, including the requirement for prior application to the Crowdfunding Affairs Office, will not apply to commercial fundraising activities which are already regulated by Hong Kong’s financial regulators (including the SFC and the Hong Kong Monetary Authority (HKMA)) under existing legislation. It will not apply to:

- any fundraising through the issuance of equity or debt securities, P2P lending business involving collective investment schemes, or any fundraising activities which constitute regulated activities, which are regulated by the SFC under the SFO;
- banking activities (e.g. deposit-taking and the making of loans and advances (including syndicated loan arrangements)) undertaken by banks, which are regulated by the HKMA under the Banking Ordinance (Cap. 155); and
- private fundraising activities that raise funds from professional or institutional investors only.

The FSTB notes that there is currently no money lending business operating in crowdfunding mode in Hong Kong. As mentioned above, where the making of or offer of loans to borrowers amounts to operating a “money-lending business”, the person carrying on the business will need to be licensed under the Money Lenders Ordinance. The Government will review the relevant legislation in due course if crowdfunding lending business poses new unaddressed risks.

#### Activities of a Different Nature from Crowdfunding Activity

The FSTB will also exclude the following from the approval requirement:

- calls made by religious bodies to their followers for donations on religious grounds;
- recognised associations soliciting funds from members to promote the welfare and needs of respective trade members;
- buying and selling goods or services readily available in the market, even if the buying and selling is conducted online and may involve recruiting people to buy as a group; and
- commercial activities on online media and the like that involve income from subscriptions or online rewards.

Even if an activity falls under the above excluded categories, the Crowdfunding Affairs Office will have the right to direct the fundraiser to apply for approval if, having regard to the purpose of the Crowdfunding Activity and/or the background of the fundraiser, it deems it to be necessary. Further, the funds collected from the abovementioned excluded crowdfunding activities cannot be applied for any political purpose in Hong Kong.

### **Requirements for People Conducting Fundraising Activities**

The FSTB proposes that the Crowdfunding Affairs Office be authorised to publish guidelines applicable to general crowdfunding activities and to impose additional requirements for certain activities. For example, where an applicant proposes to use a bank account to collect funds from a Crowdfunding Activity, the Crowdfunding Affairs Office may require a fundraiser raising funds above a specified amount to require fund contributors to use their real names to make donations.

The Crowdfunding Affairs Office could also impose requirements for:

- a Crowdfunding Activity above a certain scale to have its financial documents audited by accounting professionals;
- an approved fundraiser to obtain information on the identities of persons donating funds from any crowdfunding platform, financial institution or payment service provider it cooperates with; and
- publication of the approval number on all documents or advertisements relating to a Crowdfunding Activity.

When applying to conduct a Crowdfunding Activity, an applicant must clearly set out the crowdfunding arrangements, including whether the Crowdfunding Activity has:

- a “fixed target amount” which means that the Crowdfunding Activity will only be launched once the target amount has been raised. If the target amount cannot be raised by the end of the crowdfunding period, the funds raised must be returned to the contributors; or
- a “non-fixed target amount” which means that the Crowdfunding Activity will proceed, although on a smaller scale, even if the amount raised is less than the target amount.

Funds raised by crowdfunding may only be used for the originally stated purpose. Fundraisers must also keep records of fund movements, disclose the use of funds raised and provide records and information relating to their crowdfunding activities to the Crowdfunding Affairs Office and relevant enforcement agencies on request.

## **Establishment of a Hong Kong Registration System for Crowdfunding Platforms**

The FSTB will consider, taking into account the varied nature of crowdfunding platforms and the fact that many platforms targeting individuals and organisations in Hong Kong are established and operated overseas, whether to establish a registration system for crowdfunding platforms. This would require crowdfunding platforms to register with the Crowdfunding Affairs Office if they accept crowdfunding activities which raise funds from individuals or organisations of or in Hong Kong, irrespective of whether they are domiciled in Hong Kong or overseas. It intends for the system to:

- provide crowdfunding participants with adequate background information of the platform operator;
- require the identification of at least one representative of the company, organisation or individual operating the platform who has a physical address in Hong Kong; and
- allow the Crowdfunding Affairs Office to correspond with the company, organisation or individual operating the platform for regulatory purposes.

If implemented, the Crowdfunding Affairs Office would release the list of registered crowdfunding platforms to enhance transparency and take into account whether activities will be carried out on a registered platform when it considers individual crowdfunding applications.

## **Unlawful Crowdfunding Activity**

An Unlawful Crowdfunding Activity is defined as a Crowdfunding Activity:

- (a) that has been publicised and conducted without applying to the Crowdfunding Affairs Office in advance;
- (b) that, after the making of an application to the Crowdfunding Affairs Office, has been publicised and conducted without a consent notice in circumstances where the simplified procedures did not apply;
- (c) that continues despite being subject to a prohibition order;
- (d) that continues despite the Crowdfunding Affairs Office's refusal of the application;
- (e) conducted in Hong Kong where the Crowdfunding Affairs Office and relevant law enforcement agencies have reasons to believe that the continued conduct of the activity will jeopardise public interests, public safety or national security, regardless of whether the Crowdfunding Affairs Office has issued a consent notice, or whether the fundraiser has applied to the Crowdfunding Affairs Office;
- (f) conducted outside Hong Kong where the relevant law enforcement agencies have reasons to believe that it will jeopardise public interests, public safety or national security in Hong Kong; and
- (g) where, without reasonable grounds, the actual use of funds raised is obviously inconsistent with the originally declared purpose of the Crowdfunding Activity.

It is proposed that the relevant law enforcement agencies would be able to take the following actions against Unlawful Crowdfunding Activity:

- (a) issue an order to stop the Crowdfunding Activity;
- (b) suspend the processing work of an application made to the Crowdfunding Affairs Office until it is reasonably satisfied that the work may resume;
- (c) prosecute the person(s) responsible for the Crowdfunding Activity. It is proposed that the Department of Justice would determine whether to prosecute on indictment or in summary proceedings having regard to the seriousness of the case. The proposals also include making unlawful crowdfunding activity of a serious nature subject to imprisonment and imposing criminal liability on individuals who fund Unlawful Crowdfunding Activity;

- (d) direct the removal of the message concerning the Crowdfunding Activity from the crowdfunding platform, social media and other communications technology media that publish the message;
- (e) direct relevant financial institutions to discontinue or stop fund movements relating to the Crowdfunding Activity and investigate persons and bank accounts involved; and
- (f) specify by notice that an activity is an Unlawful Crowdfunding Activity and issue a warning that individuals providing funds to the activity, dealing with the funds and assisting in the conduct of the activity may be prosecuted.

The Crowdfunding Affairs Office will refer incidents of non-compliance with the New Hong Kong Crowdfunding Regime to the relevant law enforcement agencies for prosecution, although, the FSTB is also considering whether the Crowdfunding Affairs Office should be given independent enforcement powers to prosecute some types of non-compliance.

## Responsibilities of Hong Kong Financial Institutions

The FSTB proposes that funds collected through Crowdfunding Activity in Hong Kong should be paid into a designated account with a local bank such that the funds will be subject to (among others) the Organized and Serious Crimes Ordinance (Cap. 455), the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) and the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615). Accordingly, banks receiving such funds will be subject to the obligations under those ordinances that relate to dealing in property that is known or suspected to be the proceeds of a crime, reporting suspicious transactions, conducting customer due diligence and record keeping. The Consultation Paper also notes that the requirements of section 5 of Schedule 3 to the Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region are applicable to funding activities involved in crowdfunding.

The FSTB will monitor the use of emerging payments services in crowdfunding (e.g. crowdfunding platforms' acceptance of funds through merchant acquirers) and consider whether further regulatory measures are needed, particularly in relation to merchant acquirers.

## Empowerment of Hong Kong Law Enforcement Agencies

The FSTB proposes to provide law enforcement agencies with powers to deal with crimes related to Crowdfunding Activity and to confer on the police powers to:

- (a) request financial institutions receiving and transferring funds to provide fund records of the Crowdfunding Activity and information of their clients in certain circumstances (including where there is suspicion of any person having committed an indictable offence);
- (b) to enter and search any place suspected to be connected with an Unlawful Crowdfunding Activity and seize relevant documents and property;
- (c) cut off or cease any electronic messages related to an Unlawful Crowdfunding Activity;
- (d) obtain relevant authorisation (e.g. the written consent of the Secretary for Security) to temporarily detain any property (including digital currency and non-fungible tokens) arising from an Unlawful Crowdfunding Activity within a specified period (e.g. 90 days); and
- (e) apply to the court to return, restrict or confiscate property arising from an Unlawful Crowdfunding Activity.

In addition, the FSTB proposes that law enforcement agencies should be:

- given statutory power to confiscate funds related to an Unlawful Crowdfunding Activity; and
- permitted to request local host or network service providers to restrict access to online crowdfunding platforms found to be obviously engaged in unlawful activities.

It also suggested that organising Unlawful Crowdfunding Activities should constitute an indictable offence to enable law enforcement agencies to prosecute persons who illegally transfer and use unlawful crowdfunding funds under section 25(1) of the Organized and Serious Crimes Ordinance (Cap. 455).

## Responding to the Consultation

Comments on the Consultation Paper's proposals should be sent to the FSTB on or before 20 March 2023.

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[1] FSTB "Public Consultation on Regulation of Crowdfunding" (December 2022)

[2] All quotations are taken from the Consultation Paper

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