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BY FAX
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Ms. Monna Lai
Assistant Legal Adviser
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Legal Service Division
Legislative Council Building
8 Jackson Road
Central,
Hong Kong

Dear Ms. Lai,

Companies (Amendment) Bill 2004 (“the Bill”)

I refer to your letter to the Administration dated 24 May, 2005 concerning your comments on the Chinese text of paragraph (i) of the proposed definition of “control contract” in section 5 of the proposed 23rd Schedule, and the proposed new section 128(2)(a) of the captioned Bill.

2. Having discussed over the telephone on 26 May, 2005, we (Lai/Lai) agreed that the Chinese text of section 5 of the proposed 23rd Schedule does not need to be further modified.

3. The Chinese text of the proposed new section 128(2)(a) is yet to be finalized. The new section reads –

“shares of an undertaking which is a body corporate shall be treated *as being held, or as not being held*, by another undertaking if they would, by virtue of section 2(4), (5), (6) and (7), be treated *as being held or*, as the case may be, *as not being held* by that other undertaking for the purpose of determining whether the first-mentioned undertaking is its subsidiary”

“如憑藉第2(4)、(5)、(6)及(7)條，某屬法人團體的企業（“前者”）的股份會為斷定該企業是否另一企業（“後者”）的附屬公司的目的，而被視為由後者持有或*並非由後者持有，則前者的股份須視為由後者持有或（視屬何情況而定）並非由後者持有”。

4. The question in issue is whether the words underlined in the above Chinese text should be placed at the position of the asterisk. In order to explain why the words underlined should be placed at the present position, I should first of all explain the structure of the English provision and the function of the expression “as the case may be” (視屬何情況而定).

5. I would invite you to consider the following views of the Administration –

(a) The provision in question states that if “by virtue of section 2(4), (5), (6) and (7) ...” shares of an undertaking would be treated as being held or, as not being held by another undertaking for certain purposes, then those shares shall be treated as such. It should be noted that there are two elements in the expression “as being held or, as not being held”. The first element is “as being held” and second one is “as not being held”. Since this expression appears twice, in order to ensure that the reader would match the like for the like, the drafter has put in “as the case may be” next to the expression that appears last.

(b) Below is the illustration of the intended matching of the like to the like –

[Scenario 1] If by virtue of section 2(4), (5), (6) and (7) ... , shares of an undertaking which is a body corporate would be treated *as being held* by another undertaking for the purpose of ..., then those shares shall be treated *as being held* by that other undertaking.

[Scenario 2] If by virtue of section 2(4), (5), (6) and (7) ... , shares of an undertaking which is a body corporate would be treated *as not being held* by another undertaking for the purpose of ..., then *in that case* (i.e. “*as the case may be*”) those shares shall be treated *as not being held* by that other undertaking.

6. The structure of the Chinese text is different from the English text. In the English text, the result (shares of an undertaking ... shall be treated as being held, or as not being held) precedes the cause (by virtue of section 2(4), (5), (6) and (7) ...), but the Chinese text reverses this order. In order to reflect the policy intent, 視屬何情況而定 should still be placed next to the expression 並非由後者持有 that appears last. In these premises, it would be appropriate to retain the wording of the Chinese text as it is.

Yours sincerely,



(Mr. Allen Lai)
Senior Government Counsel

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