

**Bills Committee on Inland Revenue (Amendment)(No. 3) Bill 2009
Follow-up to meeting on 12 November 2009**

Item (1)(a) Sample Articles of a Comprehensive Avoidance of Double Taxation Agreement (“CDTA”)

We will basically adopt the Organisation for Economic Cooperation and Development Model Tax Convention (“OECD model”) in our CDTA negotiations. To illustrate how the safeguard provisions would be incorporated, the Exchange of Information (“EoI”) Article and the relevant part of the Protocol of a CDTA we are using in negotiating with a treaty partner are attached at Annex A. We will use this sample text as the basis for our future CDTA negotiations. Upon signing of these agreements, we will highlight any deviation from the text when we submit the CDTAs for Legislative Council’s (“LegCo”) scrutiny as we seek to implement them through subsidiary legislation.

Items(1)(b), Full Version of the Draft Departmental Interpretation and (2)(a)&(b) Practice Note (“DIPN”) and the Test and Information on Relevancy

2. After careful consideration, we have taken on board Members’ views of setting out the information that should be provided in an EoI request in our subsidiary legislation. As such, the DIPN would provide examples and information on other implementation details. The full version of the draft DIPN is attached at Annex B. Taking into account Member’s views, we have expanded Section V to set out the principle that the test of relevancy should be based on the information provided by the requesting party in the EoI request and that the EoI request must contain information on the relevance of the information to the purpose of the request.

Item (1)(c) Response to Members’ Requests for Setting Out the Safeguards in the Legislation

3. The Administration’s consolidated response to Members’ request for setting out the safeguards in the primary or subsidiary legislation is set out at Annex C.

Item (3) Non-disclosure of Trade, Business and Other Secrets

4. Sub-paragraph 3(c) of the OECD model article on EoI provides that a contracting party is not obliged “to supply information which would disclose any trade, business, industrial, commercial or profession secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).” According to OECD, a trade or business secret is generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorized use of which may lead to serious damage. Financial information, including books and records, does not by its nature constitute a trade, business or other secret. Examples of a trade, business or other secret include certain purchase records which may reveal the proprietary formula used in the manufacture of a product or information about a pending patent application being made by the taxpayer in question, or a secret trade process or formula owned by or in the custody of the taxpayer.

Item (4) Time Allowed to Submit Amendments to Information

5. Under the current proposal, the Inland Revenue Department (“IRD”) would, before any information is disclosed, notify the subject person of the EoI request. The person may, within 14 days after the notice is given, request a copy of the information that IRD is prepared to disclose to the requesting government. Within a further 14 days after a copy of the information is given, the person may request the Commissioner of Inland Revenue (“CIR”) to make factual correction to the information. If an agreement with the CIR cannot be reached, the person may, within 14 days, request the Financial Secretary (“FS”) to review CIR’s decision.

6. Having considered Members’ view, we agree to extend the time allowed for the person to submit proposed amendments to CIR from 14 days to 21 days. IRD would also send out the first notice as soon as practicable upon its decision to proceed with the EoI request.

Item (5) Review Body

7. Under the current proposal, FS, as the oversight body under the law, will review submissions on factual accuracy of the information. On the other hand, if a person thinks that IRD has not properly discharged its

responsibility to ensure that the information requested is within the scope of the relevant CDTA or the law, he can challenge the Government's actions through the judicial system. As set out in our reply dated 10 November 2009, apart from requesting the FS to review the factual correctness of the information, the person concerned may also challenge in the court the IRD's disclosure of information or collection of information if his case is brought to the court by IRD under section 51(4B) of the Inland Revenue Ordinance (Cap. 112).

8. We consider it more appropriate and consistent to leave reviews on legal issues to the judiciary. We agree to report to the Panel on Financial Affairs on the effectiveness of the proposed notification and appeal system within 18 months after implementation.

Item (6) "Whistle-blowing" under the Anti-money Laundering (AML) Regime

9. The information exchanged under the EoI arrangement shall only be used for tax matters and shall be not be disclosed to other authorities in other disciplines, including anti-money laundering investigations. The EoI arrangement and the AML are different regimes and the notification under the EoI arrangement should have no conflict with the AML regime.

Extracts of Hong Kong's Sample CDTA Text**ARTICLE 25****EXCHANGE OF INFORMATION**

1. The competent authorities of the Contracting Parties shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting Parties, or of their political subdivisions or local or territorial authorities, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1¹.
2. Any information received under paragraph 1 by a Contracting Party shall be treated as secret in the same manner as information obtained under the domestic laws of that Party and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting Party the obligation:
 - a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting Party;
 - b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting Party;

¹ Article 1: "PERSONS COVERED: This Agreement shall apply to persons who are residents of one or both of the Contracting Parties."

- c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).
4. If information is requested by a Contracting Party in accordance with this Article, the other Contracting Party shall use its information gathering measures to obtain the requested information, even though that other Party may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting Party to decline to supply information solely because it has no domestic interest in such information.
5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting Party to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

*

*

*

*

PROTOCOL

At the time of signing of the Agreement between the Government of Country A and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion, the two Governments have agreed on the following provisions which shall form an integral part of the Agreement.

1-9.

10. It is understood that Article 25 does not create obligations as regards automatic or spontaneous exchanges of information between the Contracting Parties. In respect of the same Article, it is also understood that information requested shall not be disclosed to a third jurisdiction. In the case of the Hong Kong Special Administrative Region, the judicial decisions in which information may be disclosed include the decisions of the Board of Review.

*

*

*

*

DRAFT

DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES

No. xx

**Exchange of Information under
Comprehensive Double Taxation Agreements**

CONTENT

	Paragraph
Introduction	1
OECD standards of transparency and effective exchange of information	2
Hong Kong’s policy on information exchange	5
Legal bases for exchange of information abroad	
The 2009 Amendment Ordinance	6
Exchange of information and the secrecy provisions	8
Inland Revenue (Disclosure of Information) Rules	9
Legal effect of a CDTA	11
Obligation to exchange information under CDTA	12
Safeguards provided under the CDTA	
Model exchange of information article	14
Exchange of information upon request only	15
Scope of exchange of information	18
Jurisdictional limitation (persons covered)	21
Tax secrecy and privacy for personal data	23
Use of information for tax purposes only	25
Confidentiality of information exchanged	27
No disclosure to oversight authorities	29
No disclosure to third jurisdictions	30

No retrospective effect	31
No obligation to carry out measures at variance with domestic laws and practices	32
No obligation to provide information not obtainable under domestic law	33
Other limitations to exchange of information	35
Disclosure Rules under s.49(6) of the IRO	
Approving a request for disclosure of tax information	43
Notification and correction of errors	44
Review mechanism	48
Administrative guidelines on processing of disclosure requests	50
Approval of a disclosure request	51
Administrative matters requiring attention of Approving Officer	56
Standard response time	59
Despatch of requested information	61
<u>Enclosure A</u> OECD Model Tax Convention – Article on Exchange of Information	

I. Introduction

1. This Departmental Interpretation and Practice Note (“DIPN”) sets out the practice of the Inland Revenue Department (“IRD”) on the processing and exchange of tax information (“EoI”) upon requests received from treaty partners, following the enactment of the Inland Revenue (Amendment) (No. 3) Ordinance 2010 (“IR(A)O”) and the Inland Revenue (Disclosure of Information) Rules (“the Disclosure Rules”). It explains the safeguards available to taxpayers and the procedural guidelines to be followed by officers of the IRD.

A. *OECD standards of transparency and effective exchange of information*¹

2. As an international financial centre and a fast developing economy, Hong Kong has been very supportive of efforts by the international community to promote transparency in tax administration. As early as in 2005, we openly endorsed the Organisation for Economic Co-operation and Development (“OECD”)’s Principles of Transparency and Effective Exchange of Information at the OECD Global Forum on Taxation held in Melbourne.

3. The standards of transparency and effective exchange of information set by the OECD require, in essence -

- (i) existence of mechanisms for exchange of information upon request;
- (ii) exchange of information for purposes of domestic tax law in both criminal and civil matters;
- (iii) ***no restriction of information exchange caused by*** application of dual criminality principle or ***domestic tax interest requirement***;
- (iv) respect for safeguards and limitations;
- (v) strict confidentiality rules for information exchanged; and
- (vi) availability of reliable information (in particular bank, ownership, identity and accounting information) and ***powers to obtain and provide such information*** in response to a specific request.

4. Hong Kong will seek to abide by these standards. We have no problem

1 The “lack of effective exchange of information” was identified as one of the key criteria in the 1998 OECD Report “Harmful Tax Competition: An Emerging Global Issue” in determining harmful tax practices.

with the exchange of information upon request. We have no bank secrecy law in Hong Kong. We fully respect taxpayers' rights and have laws for protecting the confidentiality of information exchanged and received by us. However, we had a problem with items 3(iii) and (vi) above before the enactment of the IR(A)O since the Inland Revenue Ordinance ("the IRO") only permits the IRD to collect tax information for the purpose of enforcing the IRO. In other words, the IRD was then not permitted to collect tax information which it had no domestic tax interest nor to exchange such information with another jurisdiction. In February 2009, the Financial Secretary announced in the 2009-10 Budget that the Government would put forward legislative proposals to align our exchange of information arrangements with the international standard. In * 2010, the IR(A)O was enacted and the Disclosure Rules took effect on * 2010.

B. Hong Kong's policy on information exchange

5. Hong Kong maintains the policy of negotiating Comprehensive Double Taxation Agreements ("CDTAs") and pursuing the effective exchange of tax information only within the ambit of a CDTA. We will not enter into standalone agreement on exchange of information on tax matters² with other jurisdictions. The existing statute under the IRO does not cater for such standalone tax information exchange agreements ("TIEAs"). The provisions of the IR(A)O are also crafted in such a way that they are only applicable to "arrangements ... made with the government of any territory outside Hong Kong with a view to affording relief from double taxation in relation to income tax..." [see new section 49(1A) of the IRO].

II. Legal bases for exchange of information abroad

A. The IR(A)O

6. The whole purpose of the IR(A)O is to enable the IRD to collect and disclose a taxpayer's information in response to requests made by our treaty partners for their own tax purposes. Section 49(1A) of the IRO clarifies that if a CDTA made with a foreign territory contains a provision that requires disclosure of information concerning tax of that territory [i.e. an EoI article],

² Refers to the model agreement on exchange of information on tax matters, developed by the OECD Global Forum Working Group on Effective Exchange of Information and released in April 2002.

the CDTA shall have effect in relation to any tax of that territory that is the subject of that provision. Section 51(4AA) enables the Assessor to exercise the same power under section 51(4) of the IRO to collect information concerning tax of a foreign territory for the purpose of EoI under a CDTA. Section 51B(1AA) enables a magistrate to exercise the same power under section 51B of IRO to issue search warrants for information concerning tax of a foreign territory for the purpose of EoI under a CDTA.

7. By way of sanctions, section 80(2D) provides that a person commits an offence if he, without reasonable excuse, gives any incorrect information in relation to any matter that affects his or another person's liability to a foreign tax covered by an EoI article under a CDTA. There is also a consequential amendment to section 58(1)(c) of the Personal Data (Privacy) Ordinance (Cap. 486) to provide that the word "tax" includes a foreign tax covered by an EoI article under a CDTA.

B. Exchange of information and the secrecy provisions

8. Section 4 of the IRO provides that except in the performance of his duties under the Ordinance, an officer of the IRD shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any taxpayer coming to his knowledge. Subsection (6) of section 49 provides that where any arrangements have effect by virtue of this section [including those having effect under section 49(1) before the enactment of the IR(A)O and those having effect thereafter under section 49(1A)], the obligation as to secrecy imposed by section 4 shall not prevent the disclosure to any authorized officer of the government with which the arrangements are made of such information as is required to be disclosed under the arrangements. Therefore, disclosure of information to treaty partners under and in accordance with the relevant EoI provisions in properly effective CDTAs does not contravene the secrecy provisions under the IRO.

C. Inland Revenue (Disclosure of Information) Rules

9. These Rules are made under section 49(6) of the IRO for carrying out the provisions of any CDTAs having effect under section 49 of the IRO. They are intended to provide the taxpayers with a set of fair procedures to protect their confidentiality and privacy rights. The Rules have come into operation on *, the day appointed for the commencement of the IR(A)O.

10. Details of the Rules and the Procedural Guidelines in relation thereto are discussed in paragraphs 43 to 61 below.

D. Legal Effect of a CDTA

11. Under section 49(1) of the IRO, if the Chief Executive in Council by order declares that arrangements specified in the order have been made with the Government of any territory outside Hong Kong with a view to affording relief from double taxation in relation to income tax and any tax of a similar character imposed by the laws of that territory, and that it is expedient that those arrangements should have effect, the arrangements shall have effect in relation to tax under the Ordinance notwithstanding anything in any enactment. The order made by the Chief Executive in Council is a piece of subsidiary legislation which is subject to negative vetting by the Legislative Council. A similar arrangement applies to orders made under section 49(1A) after the commencement of the IR(A)O. Therefore, CDTAs having effect under section 49 shall have the full force and effect of the laws of Hong Kong.

E. Obligation to exchange information under CDTA

12. The obligation to exchange information is provided by the Article on EoI insofar as the taxation under the domestic laws concerned is not contrary to the CDTA itself. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of Hong Kong if such conduct occurred in Hong Kong.

13. Hong Kong has an obligation to exchange information in accordance with the provision of a CDTA. Despite such obligation and the various requirements under the international standards, we will include the most prudent safeguards acceptable under the OECD model to protect an individual's right to privacy and confidentiality of the information exchanged. Details of the safeguards adopted by us are explained in the following paragraphs.

III. Safeguards provided under the CDTA

Model EoI Article

14. We basically adopt the OECD Model EoI Article [see **Enclosure A**] save for some modifications as permitted by the OECD standard to reflect our own formulation in the light of our EoI policy and to provide further safeguards on privacy and confidentiality to personal data.

A. *Exchange of information upon request only*

15. The OECD Model EoI Article provides for broad information exchange but it does not limit nor commit the contracting parties as to the forms or manner in which information exchange can take place. The provisions of the OECD Model allow information to be exchanged in three different ways: (i) upon request; (ii) automatically or (iii) spontaneously or any combination of the above three modes. The manner in which the exchange of information is to be effected will be decided upon during the treaty negotiation.

16. Hong Kong's policy on the exchange of information is restricted to exchange upon request, and we will not agree to engage in automatic³ or spontaneous exchanges⁴. We will only supply information, including bank information, upon specific and bona-fide requests received from the competent authority of a treaty partner in justifiable cases.

17. We will explain our policy in this respect to our potential treaty partners and will seek to record the matter in the CDTA, the associated Protocol, the agreed minutes or other records in writing.

³ *Automatic exchange of information.* Information which is exchanged automatically is typically information comprising many individual cases of the same type, usually consisting of details of income arising from the source country, e.g. interest, dividends, royalties, pensions etc. This information is obtained on a routine basis (generally through reporting of the payments by the payer) by the sending country and is thus available for transmission to its treaty partners.

⁴ *Spontaneous exchange of information.* Information is exchanged spontaneously when one of the contracting parties, having obtained information in the course of administering its own tax laws which it believes will be of interest to one of its treaty partners for tax purposes passes on this information without the latter having asked for it.

B. Scope of exchange of information

(a) Standard of “foreseeably relevant”

18. The main rule concerning the exchange of information is contained in the first paragraph of the EoI Article of the OECD Model Tax Convention and it will be adopted by Hong Kong in our treaties with other tax jurisdictions. Under this rule, the competent authorities of the contracting parties shall exchange such information as is foreseeably relevant to secure the correct application of the provisions of the CDTA or of the domestic laws of the contracting parties concerning taxes covered by the CDTA.

19. The standard of the OECD Model in referring to information that may be relevant is intended to facilitate the exchange of tax information but at the same time the contracting parties are not allowed to engage in “fishing expeditions,” i.e. speculative requests for information that have no apparent nexus to an open inquiry or investigation or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. Items * and * of the Schedule in the Disclosure Rules specifically set forth the information that a requesting party should provide to demonstrate that the requested information is “foreseeably relevant”.

(b) Restricted to taxes covered by CDTAs

20. The OECD Model EoI Article provides that information exchange is not limited by Article 2 [i.e. the Taxes Covered Article]. Thus, information to be exchanged can relate to taxes of every kind and description chargeable under the domestic laws of the treaty partners. So, in essence, the EoI Article (not Article 2 which defines the types of taxes covered by the CDTA) determines the types of taxes for which information can be exchanged. Nevertheless, jurisdictions are free to restrict the scope of information exchange to the taxes covered by the CDTA. Hong Kong only authorizes the exchange of information and the use of information exchanged in relation to the administration and enforcement of taxes covered by the CDTA. In the EoI Article under our model CDTA, we have deleted the reference that the EoI Article is not restricted by Article 2.

C. Jurisdictional limitation (persons covered)

21. Exchange of information is not limited to information relating to the affairs of residents of the contracting parties or either of them. Often, the tax administration of one of the contracting parties will have an interest in receiving information on activities carried on in the other contracting party by a particular person resident in a third jurisdiction because the tax liability of the latter as a non-resident taxpayer is at issue. There are also circumstances under which a person of a third jurisdiction is interposed in the chain of information flow. For these reasons, the standard EoI Article invariably stipulates that the exchange of information is not restricted by Article 1 [which defines the persons covered by the CDTA].

22. However, there is no obligation to provide information on third-country residents that is neither held by the competent authority of the requested jurisdiction nor is in the possession or control of persons within its territorial jurisdiction.

D. Tax secrecy and privacy for personal data

23. The OECD standard in these respects, adopted in full by Hong Kong, requires that information be kept confidential, and that information should be treated “as secret in the same manner as information obtained under domestic law.” Tax secrecy refers to the provisions under domestic law that ensure that information relating to a taxpayer and his affairs remains confidential and is protected from unauthorised disclosure.

24. It is fundamental for the co-operation in matters of information exchange that such confidential information continues to enjoy a similar level of protection when it is exchanged with other countries. For this reason any information supplied by a contracting party must be treated as confidential. Confidentiality is preserved by the exchange of information instrument and the applicable domestic law in the requesting party.

E. Use of information for tax purposes only

25. The information exchanged may not be used for purposes other than those for which it has been exchanged. The information pursuant to the CDTA cannot be used for non-tax purposes. For instance, fiscal information obtained pursuant to a CDTA must not be used for the prosecution of

non-fiscal crimes. If the information appears to be of value to the requesting party for another purpose, it must resort to means specifically designed for that purpose, for example, through mutual legal assistance.

26. We will provide in the CDTA that any information received under a disclosure request by a requesting party shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in the EoI Article. Such persons or authorities shall use the information only for such purposes.

F. Confidentiality of information exchanged

27. Apart from the tax secrecy and the restriction on the use of information exchanged, any information received by a Contracting Party under the CDTAs shall be treated as confidential and may be disclosed only to persons or tax authorities of the requesting jurisdiction. They may disclose the information in public court proceedings or in judicial decisions. However, the information may not be disclosed to any other person or entity or authority or any other jurisdiction. These are the safeguards provided under the CDTAs. The confidentiality rules apply to all types of information, including both information provided in a request and information disclosed in response to a request.

28. Some jurisdictions may request that the CDTA provides for sharing of tax information by tax authorities with other law enforcement authorities and judicial authorities on matters such as money laundering, corruption or terrorism financing. The OECD Model EoI Article does not create an obligation upon Hong Kong to do so and it is not Hong Kong's policy to accede to such request to permit the sharing of information for any non-tax related purposes as specified in the EoI Article under our model CDTA.

G. No disclosure to oversight authorities

29. Whilst the OECD Model EoI Article permits disclosure of information exchanged to the oversight authority of the requesting party, Hong Kong's policy is more restrictive in this respect. Unless there are legitimate reasons from the requesting part (e.g. administrative or governmental structure of the treaty partners permits or requires the oversight authorities to have access to tax

information), we do not permit disclosure to oversight authorities. Oversight authorities are authorities that supervise the tax administration and enforcement authorities as part of the general administration of the government of the contracting parties. For example, in the case of Hong Kong, the information exchanged would not be disclosed to the Financial Services and the Treasury Bureau.

H. No disclosure to third jurisdictions

30. To ensure the strictest confidentiality, we will seek to provide in the CDTA that information shall not be disclosed to any third jurisdiction for any purpose⁵.

I. No retrospective effect

31. All the provisions under a CDTA, including the EoI Article, shall have effect only after the agreement enters into force. Any exchange of information will only be possible after the relevant provisions have effect (“effective date”). The effective date, as agreed with the treaty partners, is stipulated under the Article on Entry into Force which governs the commencement of the articles. We would not disclose any information relating to any tax period prior to the effective date. Our policy is reflected in the Disclosure Rules accordingly⁶.

J. No obligation to carry out measures at variance with domestic laws and practices

32. We are not obligated to carry out administrative measures at variance with our laws and administrative practice. The underlying rationale is that a contracting party should be required to do no more, but also no less, than it would if its own taxation were at stake. Thus, where the information in possession of the competent authority is not sufficient to reply to a request, a contracting party should take all reasonable information gathering measures as it would take for its own tax purposes.

⁵ In some CDTAs entered into by Hong Kong, it is stated in the EoI article that information shall not be disclosed to any third jurisdiction without the consent of the originating party. The effect of this type of provisions is the same; we do not envisage any circumstances under which we would give consent for such disclosure.

⁶ See section * of the Disclosure Rules.

K. No obligation to provide information not obtainable under domestic law

33. We will state in the CDTA with our treaty partners that either party is free to decline to provide information if the information cannot be obtained under its domestic law or cannot be obtained in the normal course of administration.

34. We have removed our domestic tax interest requirement in our recent enactment and we do not have any bank secrecy laws. As these restrictions do not apply in Hong Kong, they cannot be relied on as a basis for declining to provide information by our treaty parties. Furthermore, a request cannot be declined because the information is held by a nominee or a person acting in an agency or fiduciary capacity or because it relates to an ownership interest.

L. Other limitations to exchange of information

35. The OECD Model explicitly states that the legal obligation to supply information is lifted in a limited number of situations. These exceptions will be adopted in full in the EoI Article in our CDTA with other tax jurisdictions. In the rare cases where the exceptions apply, the contracting parties are not obligated to provide information. We will act within the framework of the agreement and will not provide the information where there is no obligation to do so.

(a) Reciprocity

36. Under the concept of reciprocity in relation to exchange of information, Hong Kong, when collecting information for our treaty partner, is obliged only to obtain and provide such information that that party could itself obtain under its own laws in similar circumstances. We will provide in the CDTA that a requested party is not obliged to supply information that the requesting party itself could not obtain in the normal course of administration.

37. The underlying idea of the concept of reciprocity is that a contracting party should not be able to take advantage of the information system of the other contracting party if it is wider than its own system. We may refuse to provide information where the requesting party is precluded by law from obtaining or providing information or where the requesting party's

administrative practices (e.g., failure to provide sufficient administrative resources) result in a lack of reciprocity.

38. The competent authority of the requested party will require the requesting party to provide a statement confirming that the reciprocity condition is met (refer to item * in the * Schedule to the Disclosure Rules).

(b) Public policy

39. “Public policy” generally refers to the vital interests of a country, for instance where information requested relates to a state secret. This limitation rarely arises in practice.

(c) Trade, business and other secrets

40. We will make clear with our treaty partners that we have no obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Whether any piece of information amounts to a “trade or business secret” should not be interpreted in too wide a sense. According to OECD guidelines, a trade or business secret is generally understood to mean facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorized use of which may lead to serious damage. Financial information, including books and records, does not by its nature constitute a trade, business or other secret.

41. The competent authority will determine whether or not to pass on sensitive information. Ordinary tax secrecy protects trade and business secrecy in all countries alike, when these come into the hands of the tax authorities. It is not expected that tax authorities would demand access to trade and business secrets in the first place, as their information seeking powers generally permit the collection of “tax” information only. In any event, a taxpayer in Hong Kong can dispute the supply of any information claimed to be trade or business secrets, or initiate legal actions to challenge the IRD’s actions in collecting such information. The issue will ultimately be decided by the courts.

(d) Legal professional privilege

42. The general law on legal professional privilege will be maintained under the new EoI regime. A contracting party may decline to provide information in cases where the information constitutes a confidential communication between a client and an attorney, solicitor or other admitted legal representative. However, what constitutes a confidential communication should be applied for genuine purposes. For example, no privilege should attach to documents or records delivered to an attorney, solicitor or other admitted legal representative in an attempt to protect such documents or records from disclosure.

IV. Disclosure Rules⁷ under section 49(6) of the Inland Revenue Ordinance

A. Approving a request for disclosure of tax information

43. The Disclosure Rules provide that a disclosure request⁸ may be approved only by an authorized directorate officer in the IRD personally. The Rules set out the criteria to be applied in making the decision. The approving officer has to ensure that the disclosure request complies with certain provisions and procedures. See paragraphs 51 to 58 below for details.

B. Notification and correction of errors

44. Unless exceptional circumstance exists, the Commissioner must, prior to the disclosure of any information in response to a disclosure request, notify the person to whom the information requested is related in writing about the disclosure.

45. The exceptions are (i) that all the addresses of the person known to the Commissioner are undeliverable; (ii) that prior notification is likely to undermine the chance of success of the investigation in relation to which the request is made; or (iii) prior notification is likely to delay the disclosure of the information to the requesting government and thus frustrate the efforts of the requesting government in enforcing the tax laws of its territory. Nevertheless, the Commissioner is still required, in the last-mentioned situation, to notify the

⁷ This part is prepared based on the proposed Disclosure Rules.

⁸ This is defined as a request for exchange of information made by a territory outside Hong Kong under arrangements made with the government of that territory having effect under section 49(1) or 49(1A) of the Inland Revenue Ordinance.

person at the time when information relating to the person is disclosed in response to a disclosure request.

46. The person may request the Commissioner for a copy of the information to be exchanged and may request the Commissioner to amend any part of the information. The grounds for a request for amendments are (i) that the information does not relate to him; or (ii) that the information or part thereof is factually incorrect. The Rules also set out the procedures to be observed in making such requests. The person making the request shall, within the time specified, furnish such documentary evidence as may be sufficient to support his case and what the correct information should be. The Commissioner may, on the basis of the factual evidence available, accede to the request for amendment in full or partially or refuse the request. A Commissioner's decision, the reasons therefor together with a copy of the amended information, if any, will then be given to the person.

47. The same rules for requesting a copy of information or for making amendments also apply in circumstances where notice is served at the time of the disclosure of information [i.e. situation (iii) in paragraph 45 above]. In that case, the Commissioner will still be required to inform the competent authority of the requesting party of any amendments made subsequently.

C. Review Mechanism

48. The Disclosure Rules further provide that if the Commissioner refuses the request of the person who is the subject of a disclosure request to amend any part of the information that the Commissioner is prepared to disclose in response to the disclosure request, that person may, by giving a notice in writing within the specified time, request the Financial Secretary to review the Commissioner's decision and to direct the Commissioner to make the amendments.

49. The Rules also set out the procedures to be observed if that person requests the Financial Secretary to make the direction. Likewise, the Financial Secretary may approve, either in full or partially, or refuse the request. A written decision together with the reasons therefor will be given to the person. The decision of the Financial Secretary is final.

V. Administrative Guidelines on Processing of Disclosure Requests

50. The paragraphs below set out the relevant provisions of the Disclosure Rules on the approval of disclosure requests in Hong Kong and how these are dealt with in practice within the IRD. They also set out some administrative matters requiring the attention of the approving officer, the standard time within which a response would be made, and the authority for dispatching the requested information.

A. *Approval of a Disclosure Request*

51. Under section * of the Disclosure Rules, a disclosure request made under an EoI Article in a CDTA may only be approved by the Commissioner personally, or an officer of the IRD not below the rank of chief assessor authorized in writing by the Commissioner (“authorized officer”) personally. In this connection, the Commissioner has authorized Chief Assessor (Special Duties) (“CA(SD)”) as an authorized officer.

52. Under section * of the Disclosure Rules, the authorized officer must be personally satisfied that the disclosure request complies with the following provisions or procedures before he may approve the request –

(a) the provisions of the relevant arrangements that are applicable to the request

53. CA(SD) must review the provisions of the relevant CDTA to see whether the provisions relating to the disclosure request are fully complied with. Typically, he will review the provisions stipulated in the Exchange of Information Article, the Taxes Covered Article and the Protocol to the agreement (if any). For example, he will have to ensure that the information being requested is “foreseeably relevant” for carrying out the provisions of the agreement or to the administration or enforcement of the domestic laws of the requesting party, that the information concerns taxes fall within the Taxes Covered Article, that the obtaining of the information is not at variance with the laws and administrative practice of Hong Kong, that the information is obtainable under the laws or in the normal course of the administration of Hong Kong, that the information would not disclose any trade or business secrets, and the other grounds for declining the request are not applicable [refer to the relevant documents for the precise wordings of each requirement/condition].

Note that the test of “foreseeably relevant” should be decided based on the strength of the information supplied in the disclosure request only.

(b) any procedures applicable to the request that may be specified in any instrument that amends or supplements the relevant arrangement

54. Very often, treaty parties may enter into protocols, memoranda of understanding, agreed minutes of meetings, or exchanges of correspondence subsequent to the signing of the relevant agreement, which prescribe the procedures applicable to a request for disclosure of information. CA(SD) must have due regard to any such procedures when approving a disclosure request.

(c) the particulars prescribed in the Schedule to the Disclosure Rules

55. CA(SD) has to ensure that the disclosure request must set out the particulars prescribed in the Schedule to the Disclosure Rules. As a general rule, if the request does not satisfy the “foreseeably relevant” requirement, or cannot properly identify the target person, or does not specify the specific information required, the request will not be entertained. The decision of CA(SD) will be reviewed when the requested information is about to be sent to the requesting party [see paragraph 61 below].

B. Administrative Matters Requiring Attention of Approving Officer

(a) Form of a disclosure request, the issuing authority and language

56. A disclosure request must be made in writing and made by the competent authority of the requesting party as set out in the relevant CDTA under which the request is made. Unless otherwise agreed between the parties, the request must be in the English language.

(b) Cases where no prior notification is requested

57. In case a requesting party requires the IRD not to give notification on the ground that doing so would likely undermine the chance of success of its investigation, the requesting party should substantiate its claim. For example, the requesting party has to provide information and reasons to explain why it believes that the subject person would destroy or deface records, whether

similar offences were committed in the past, or whether the subject person is the target of a covert criminal investigation. CA(SD) would have to be satisfied that sufficient information is available to reasonably justify such requests.

58. In case of an urgent request where prior notification would frustrate the timely enforcement of the requesting party's tax laws, CA(SD) must be satisfied that the urgency is genuine, for example, the information is required before a certain date because there is an imminent statutory time limit of raising the relevant tax assessment. However, this is not to be abused if the "urgency" is simply a result of deliberate or undue delay in making a request.

C. Standard Response Time

59. The standard response time set by the OECD is 90 days after the receipt of a disclosure request.

60. The time required to obtain tax information in pursuance of a disclosure request depends on whether the information is available in the tax files of the IRD or the information has to be obtained from the taxpayer or any other parties. The IRD will try to comply with the standard response time as far as possible. If we are unable to provide the information within the 90-days period, we would inform the requesting competent authority and explain the reasons for not being able to do so.

D. Despatch of Requested Information

61. Under a typical EoI Article, the obligations for complying with the article are imposed on the competent authorities of the contracting parties, who are the ones required to sign off the replies to the requesting parties. The term "competent authority" is invariably defined, in the case of Hong Kong, as "the Commissioner of Inland Revenue or his authorised representative". In this connection, the Commissioner authorises her two Deputy Commissioners as authorised representatives. Therefore, the ultimate responsibility for complying with the EoI Article rests with the Commissioner, or the two Deputy Commissioners personally. They will personally ensure that disclosure requests received are in order and that the information to be exchanged is proper in all respects before issuing the replies in their names.

OECD Model Tax Convention

“Article on Exchange of Information¹”

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.
2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:
 - a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
 - b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
 - c) to supply information which would disclose any trade, business,

¹ This model Article was promulgated by the OECD in 2004, and is printed in the 2005 Edition of the OECD Model Tax Convention as Article 26. The text is reproduced in identical terms in the 2008 Edition of the OECD Model Tax Convention, also as Article 26. This is OECD’s latest model article on EoI.

industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.
5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009

**Consolidated response to members' requests for
setting out the safeguards to protect right to privacy and confidentiality of information exchanged in the primary or
subsidiary legislation**

Members' requests	Administration's response
<p>1. EoI safeguards to be provided in CDTAs should be stipulated in the primary legislation to ensure that the fundamental safeguards would not be compromised in the course of treaty negotiations. Reference should be made to the arrangement of the Singapore legislation in this regard.</p>	<ul style="list-style-type: none">● We remain of the view that it would not be necessary or desirable to stipulate in the primary legislation EoI safeguards that will be provided in individual CDTAs because each CDTA will be implemented as a piece of subsidiary legislation to be passed by the LegCo.● Stipulating these safeguards in the primary legislation would significantly constrain the Administration's flexibility in CDTA negotiations.● As indicated in our reply to the Bills Committee on 3 November 2009, our research shows that major jurisdictions, such as Australia, Canada, Japan, Singapore, Malaysia, New Zealand, Switzerland, U.K. and U.S. do not stipulate these safeguards in their primary legislations.● To facilitate Member's scrutiny of future subsidiary legislations for CDTAs, we will set out clearly in our submissions to LegCo the safeguards adopted in individual

Members' requests	Administration's response
	<p>CDTAs and any deviation from Hong Kong's sample text (see item (1)(a) in our main reply).</p> <ul style="list-style-type: none">● To address Members' concern, we would set out the information that should be provided in an EoI request, along the lines of the Eighth Schedule of the Singapore legislation in our subsidiary legislation (see item 3 below).● The Secretary for Financial Services and the Treasury will also reaffirm in his speech for the resumption of second reading debate our policy that the safeguards in the model text of Organisation for Economic Cooperation and Development 2004 version of EoI article would be adopted.
<p>2. In relation to members' concern that EoI arrangement under CDTAs should have no retrospective effect, i.e. the Administration would not entertain any request for information relating to a period before the effective date of the respective CDTAs, the Administration was requested to consider incorporating a provision to set out clearly the above policy in the primary legislation or in the rules to be made under section 49(6) of the Inland Revenue Ordinance (Cap. 112).</p>	<ul style="list-style-type: none">● Having considered Members' views, we agree to add a provision in the proposed Inland Revenue (Disclosure of Information) Rules to set out the policy of no retrospective effect.
<p>3. In relation to members' concern about the assessment on the relevance of the information requested, the Administration was requested to set out clearly in the primary or subsidiary</p>	<ul style="list-style-type: none">● Having considered Members' views, we agree to model on the Eighth Schedule to the Singapore legislation and add similar provisions in the proposed Inland Revenue

Members' requests	Administration's response
<p>legislation, instead of only in the DIPN, that the request must contain information on the relevance of the information to the purpose of the request. Reference should be made to paragraph 4 of the Eighth Schedule to the Singapore legislation in this regard.</p>	<p>(Disclosure of Information) Rules. Any future change to the Inland Revenue (Disclosure of Information) Rules will be subject to the scrutiny of LegCo.</p>
<p>4. The Administration was requested to consider members' request of providing for the safeguards in relation to the processing of EoI request by the Inland Revenue Department in the primary or the subsidiary legislation, instead of the DIPN. Reference should be made to the Singapore legislation in this regard. If the procedural safeguards would not be provided in the legislation, the Administration should undertake to consult the Panel on Financial Affairs and the stakeholders before making any amendments to the DIPN in the future.</p>	<ul style="list-style-type: none">● As the information that should be provided in an EoI request is set out in the Rules, a DIPN would provide examples and illustrations on the operation and implementation of these provisions.