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BY FAX
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Dear Mr LAI,

Communications Authority Bill (the Bill)

To assist our scrutiny of the legal and drafting aspects of the Bill, we should be grateful if you would clarify the following matters:

Clause 4 – Functions of the Communications Authority

Paragraph 3(e) of the LegCo Brief states that the "*Communications Authority (CA) will promote the long term development of the communications market and uphold the freedom of speech guaranteed under Article 27 of the Basic Law and the relevant provisions of the Hong Kong Bill of Rights Ordinance (Cap. 383)*". This is not, however, reflected in the Bill as currently drafted. Please consider including this mission statement as CA's additional functions under clause 4 or, alternatively, as CA's regulatory objectives under a separate clause of the Bill: see, for example, section 4 of the Securities and Futures Ordinance (Cap. 571).

Clause 5 – Incidental powers

Since clause 5 will give CA all the incidental powers that are reasonably necessary for the performance of its functions, please consider whether section 9(2) of the Broadcasting (Miscellaneous Provisions) Ordinance (Cap. 391) is redundant and should be repealed.

Clauses 8 and 9 – Members of the Communications Authority

- (a) Under clause 8(1), CA will comprise three different types of members: non-official members appointed by the Chief Executive (CE), a public officer appointed by CE, and the Director-General of Communications (DGC). However, subclauses (6) to (8), which seek to empower CE to

appoint a replacement to fill a vacancy or during a member's temporary absence or incapacity, seem to apply to members appointed under subclause (1)(a) (i.e. non-official members) only. Please clarify whether CE is intended to have similar appointment powers where an official member appointed under sub-clause (1)(b) resigns, is absent or incapacitated, or his or her office becomes vacant under subclause (4). If so, all references to "subsection (1)(a)" in subclauses (6) to (8) should be changed to "subsection (1)". In this connection, please see section 4(5) to (7) of Cap. 391 which applies to any official or non-official member of the Broadcasting Authority (BA).

- (b) Under clause 8 of the Bill, a non-official member must be ordinarily resident in Hong Kong, and CE may declare the office of a member to be vacant if the member ceases to be ordinarily resident in Hong Kong. Please clarify how a member is considered to be, or to have ceased to be, ordinarily resident in Hong Kong. Is it necessary to include a deeming provision similar to section 4(8) of Cap. 391 which provides that a person is regarded as ordinarily resident in Hong Kong if he is resident in Hong Kong for not less than 180 days in any calendar year, or 300 days in any 2 consecutive calendar years?
- (c) In clause 8 of the Bill, what factors, if any, must CE take into account in appointing members, the chairperson and the vice-chairperson of CA? In clause 9(2), what are the circumstances in which CE may revoke the appointment of the chairperson or vice-chairperson? Will the Administration consider stipulating these factors and circumstances in the Bill?

Clause 11 – Transaction of business by circulation of papers

Clause 11(3)(b) provides that if a resolution to be signed by a majority of the members of CA is in the form of more than one document, each such document must be in the same form and signed by one or more members. Is it necessary to provide that each such document must also have substantially the same contents and record the complete text of the resolution sought to be passed?

Clause 13 – Disclosure of interests

- (a) Clause 13(4) provides that if a member has disclosed a pecuniary or personal interest in relation to a matter being dealt with by way of circulation of papers, that member's signature (if any) is not to be counted for the purpose of validating a written resolution unless the chairperson directs otherwise. Subclause (5) provides that if the member making such disclosure is the chairperson, "*the power under subsection (4) is to be exercised by the vice-chairperson*". Since subclause (4) does not expressly grant the chairperson any power, it is

not clear precisely what power subclause (5) refers to. To avoid doubt, please consider recasting subclause (5) as follows:

"If the member making a disclosure under subsection (3) is the chairperson of the Authority, his or her signature (if any) is not to be counted for the purpose of section 11(2) unless the vice-chairperson of the Authority directs otherwise."

- (b) Under subclause (6), a matter in respect of which both the chairperson and the vice-chairperson have made a disclosure may not be dealt with by circulation of papers. However, subclause (7) provides that non-compliance with clause 13 does not affect the validity of any proceeding of CA. Please advise whether a written resolution signed by a majority of the members of CA (one of whom is DGC) purportedly in compliance with clause 11(2) is intended to be valid and effectual if:
- (i) the chairperson and vice-chairperson's signatures are counted; or
 - (ii) their signatures are not counted.

Clause 14 – Director-General

Clause 14(1) provides that DGC is to implement the decisions of CA or any committee referred to in clause 17(1)(a) in the performance of CA's functions. Clause 14(4) further provides that DGC (or his or her representative) must, among other duties, *"report on the implementation of its decisions"* (i.e. CA's decisions). Please clarify whether DGC is also required under subclause (4) to report on the implementation of the decisions of a committee referred to in clause 17(1)(a).

Clause 19 – Payments

Clause 19 provides that all sums of money (except those specified in clause 19(3) to (5)) payable, owing or paid to CA must be credited to the OFCA trading fund. However, paragraph 7 of the LegCo Brief proposes that upon the disbandment of the Television and Entertainment Licensing Authority (TELA), OFCA will take over TELA's broadcasting functions which will be covered by the fund, and TELA's non-broadcasting functions (e.g. control of obscene and indecent articles, film censorship and newspaper registration) which will be funded by the general revenue. Please clarify:

- (a) whether OFCA is to manage both the trading fund for its broadcasting functions and a general revenue head for its non-broadcasting functions, and if so, how; and
- (b) how, if at all, OFCA's proposed control of obscene and indecent articles will impact on the future operation of the Obscene Articles Tribunal.

Clause 20 – Transfer of custody of records etc.

- (a) Clause 20(4) permits any data, records, documents or copies transferred under subclause (1), (2)(a) or (3) to be further transferred to CA or OFCA. Is there any reason for not providing for the further transfer of data etc transferred to a Government department (e.g. the Home Affairs Department which will take up TELA's functions relating to entertainment licences) under subclause (2)(b)?
- (b) Subclause (5) provides that all the rights and obligations of the transferor in relation to any data etc transferred under clause 20 will also be transferred to the transferee. Subclause (7) further provides that the Privacy Commissioner may exercise in respect of the transferee certain powers in respect of a transferor's breach or alleged breach of Cap. 486 or the data protection principles. If a transfer of original data to a department (the 1st department) is followed by a further transfer of a copy of those data to another department (the 2nd department) under subclause (3), which department is the "transferee" for the purposes of subclauses (5) and (7)? Will the 1st department or the 2nd department be vested with all the rights and obligations (including liabilities under Cap. 486) of the former authority or department subsisting immediately before the commencement date?
- (c) Subclause (8) refers to the transfer and vesting of "the undertakings" (承諾) of the former authorities or former departments. What exactly are those "*undertakings*"? Are they the "*data, records, documents, copies*" and the "*rights and obligations*" transferred under clause 20? Is it necessary to define "undertakings" for the sake of clarity?

Clause 21 – Prohibition against disclosure of confidential information

- (a) Clause 21(2)(d) exempts from the prohibition against disclosure of confidential information the giving or disclosure of information for the purpose of seeking advice from, or giving advice by, counsel or a solicitor "*or other professional adviser acting or proposing to act in a professional capacity*". As "professional" is not defined, please clarify how to determine whether a person is a "*professional adviser*" and whether such person is "*acting or proposing to act in a professional capacity*". How is a "*professional adviser*" different from an "*adviser*" referred to in clause 21(1)(c)?
- (b) Clause 21(2)(k) exempts "*communications to*" CA or OFCA. The Chinese text refers to "與管理局或通訊辦的通訊", which is broad enough to cover communications to *and from* CA or OFCA. Is the exemption intended also to include communications *from* CA or OFCA?

- (c) Clause 21(2)(1) further exempts the giving or disclosure "*by a public officer in the belief that the act was required or authorized*" etc. Must the requisite belief be reasonable in order for the exemption to apply? If yes, is it necessary to make this clear in subclause (2)(1)? It appears that subclause (2)(1), as drafted, could apply even if the belief is unreasonable so long as it was genuinely held by the public officer.
- (d) Similarly, clause 21(4)(a) provides for a statutory defence if the defendant can show that he "*believed that there was lawful authority for [him] to give or disclose the information*". Must the requisite belief be reasonable in order for the defence to be established if a defendant is charged? If yes, is it necessary to make this clear in subclause (4)(a)?

Clause 22 – Amendment to Telecommunications Ordinance

The proposed amendment to section 33 of the Telecommunications Ordinance (Cap. 106) seeks to prevent anyone other than CE from initiating an investigation relating to the compliance with an order made by CE under section 33(1)(b) for the interception of a class of messages. Please explain the rationale for introducing this amendment.

Clause 23 – Provisions relating to the Office of the Communications Authority Trading Fund

- (a) Clause 23(2) of the Bill seeks to add a Schedule 3 to the resolution made and passed by the Legislative Council (Council) under sections 3, 4 and 6 of the Trading Funds Ordinance (Cap. 430) on 10 May 1995. Under paragraph 7 of the proposed Schedule 3, Cap. 430 will continue to apply to the fund and the proposed Schedule 3 "*as if [that Schedule] were added by a resolution*" made under Cap. 430. Cap. 430 requires a trading fund to be established and varied by a resolution of the Council. According to paragraph 61 of the Administration's consultation paper on the proposed establishment of CA dated 3 March 2006, the proposed amalgamation of OFTA and the Broadcasting Division of TELA to form OFCA as a trading fund would require a Legislative Council Resolution to amend the scope of the OFTA trading fund. Please consider whether it is necessary to vary the terms of the fund as proposed by clause 23 of the Bill by way of a resolution of the Council.
- (b) Please clarify whether the name "OFFICE OF THE TELECOMMUNICATIONS AUTHORITY TRADING FUND" as appears in the title of the existing resolution (Cap. 430 sub. leg. D) will need to be revised as a result of the proposed amendments.

Radio Television Hong Kong

In relation to the Charter to be signed by the Administration to govern the future relationship between BA and RTHK, how will the passage of the Bill and the establishment of CA affect the execution and/or contents of the proposed Charter?

Chinese text

Clause 2 – Interpretation

In the definition of "OFCA", the Chinese text renders "the Office of the Communications Authority" as "通訊事務管理局辦公室". However, in relation to the trading fund to be renamed under clause 23, the Chinese text renders "the Office of the Communications Authority Trading Fund" as "通訊事務管理局營運基金". Without the characters "辦公室", the latter Chinese rendition literally translates as "the Communications Authority Trading Fund". Please consider adding "辦公室" to the name of the trading fund to correspond to the words "the Office of".

Clause 16 – Committees

In the context of *a committee* appointed under clause 16(1), the Chinese text uses "委出" to denote "appoint". The same rendition also appears in clauses 13(1), 14(5), 16(2), 16(3), 17(1)(a), 17(3)(b), 21(1)(a) and (b), 21(5)(c)(iii) and (v). For *a person* appointed as a committee member under clause 16(2), "委任" is used instead. In clauses 2 and 24(1) which refer to the Broadcast Complaints Committee appointed under section 10 of Cap. 391, "委任" is also used. Please consider changing all references to "委出" to "委任" to achieve consistency.

Our comments on the consequential amendments are set out at **Annex**.

Your early reply in both Chinese and English will be greatly appreciated. Please also send an electronic copy of your reply to yfchoi@legco.gov.hk.

Yours sincerely,



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Schedule – Telecommunications Regulations (Cap. 106 sub. Leg. A)

Sections 39 to 41, 44 and 45 of the Schedule to the Bill (especially the proposed repeal of Schedules 1, 2 and 3 to the Regulations) appear to be technical amendments unrelated to the establishment of CA. Please explain how and why these amendments are related and consequential amendments.

Schedule – Broadcasting (Miscellaneous Provisions) Ordinance (Cap. 391)

- (a) Why is the minimum size of the complaints committee to be appointed under section 10 reduced from 5 to 3 members?
- (b) To invoke the investigative powers under the proposed section 22, CA must be satisfied that the investigation is necessary for the proper performance of any of its functions "*under this Ordinance*". Are "*functions under this Ordinance*" limited to those created by Cap. 391 (e.g. those imposed by section 9(1)(c) to (f)), or do they extend to functions imposed by other Ordinances but mentioned in Cap. 391 (e.g. those imposed by Cap. 562 and Part IIIA of Cap. 106 but referred to in section 9(1)(a) and (b))? If the latter (and broader) interpretation is intended, please consider amending "*under this Ordinance*" to "*mentioned in this Ordinance*".
- (c) Why is it proposed that financial penalties hitherto payable to (and recoverable by) BA under sections 24 and 25 will be paid to the Government instead of CA?

Schedule – Amusement Game Centres (Appeal Board) Regulation (Cap. 435 sub. leg. A)

Since "appointed public officer" (獲委公職人員) will have been defined by section 2 of Cap. 435 and the defined term will be used in other sections of the Regulation, please consider using the abbreviation "the appointed public officer" (獲委公職人員), rather than "the public officer" (有關公職人員), in notes 1 to 3 of Form 1 of the Schedule.

Schedule – Legislative Council Ordinance (Cap. 542)

A textual amendment is proposed to section 20Z(1)(l) to include in the information technology functional constituency (FC) holders of one or more specified classes of licences granted by CA under Cap. 106. A new subsection (3) is also sought to be added to ensure that the FC also includes holders of licences granted by the Telecommunications Authority (TA) prior to the commencement of the Bill upon its enactment, and for that purpose, reference is made to clause 25(6) of the Bill which is a savings provision in relation to any "*form, document, instrument or act that has*

been issued, made or done by a former authority" (including TA). In this regard, clause 25(15) of the Bill, which is a similar savings provision in relation to licences etc granted under Cap.114, Cap. 148, Cap. 392 and Cap. 435, specifically refers to any "*licence, permit or certificate granted, issued or renewed*". Please consider whether the generic phrase "*form, document, instrument or act*" is specific enough to cover the types of licences referred to in section 20Z(1)(l) of Cap. 542.

Schedule – Broadcasting Ordinance (Cap. 562)

- (a) Section 24(1), as amended, will allow CA to issue directions (including those relating to technical standards) in writing to a licensee. Subsection (3), as amended, requires such directions (except those relating to technical standards) "*to be published in the Gazette or in such other manner*" as CA thinks fit. Why are directions relating to technical standards exempted from the publication requirement under the proposed subsection (3)? Is it because technical standards will be prescribed by CA under section 32D of Cap. 106?
- (b) Section 27(1)(a) is sought to be amended to introduce a qualification that information or data etc must be treated as confidential only if it is furnished or produced "*for any purpose connected with the performance of any function under this Ordinance*". Please explain the rationale behind this qualification which does not appear in the existing section 27(1)(a) of Cap. 562.
- (c) Why is it proposed that financial penalties hitherto payable to (and recoverable by) BA under section 29 will be paid to the Government instead of CA?