

**The Administration's Responses to the Issues Raised at the Meeting of the Bills Committee on Stamp Duty (Amendment) Bill 2013 ("the Bill") held on 21 October 2013**

At the meeting held on 21 October 2013, Members raised questions on the following areas -

- (a) the Administration should provide explanation on the set of indicators that it would make reference to in determining whether the exuberant state of the property market has been stabilized and returned to normal;
  - (b) the Administration should provide a breakdown on the percentage change in respect of residential property prices according to the subdivisions on floor area as adopted by the Rating and Valuation Department;
  - (c) the Administration should provide information on its assessments and analyses in respect of the impact of the doubled ad valorem stamp duty (AVD) on the economy, free-market business operating environment, investment sentiments of multi-national corporations as well as the competitive edge and long-term economic development of Hong Kong; and
  - (d) the Administration should provide its response to the views and suggestions of The Law Society of Hong Kong, The Hong Kong Association of Banks and other professional bodies on the Bill in relation to technical and operational issues.
2. This paper sets out the Administration's responses to the above issues.

**Indicators for Reference**

3. Being mindful that wide fluctuations in property prices could have serious ramifications on the macroeconomic and financial stability, the Government has been monitoring the residential property market closely with reference to different indicators. These factors include, but are not limited to, property prices, home purchase affordability, property transactions, demand-

supply balance, and mortgage loan growth. The Government will make reference to other relevant indicators as and when appropriate. Also, given the complexity of the property market, no single indicator could fully reflect the underlying situation of the property market, and these indicators should be taken into consideration in totality. These indicators are briefly discussed below :

(a) Property prices and home purchase affordability

The trend and rate of change in property prices, and their performance against the peaks and troughs can serve as a reference to the development of the property market. To gauge whether property prices are in line with the underlying economic fundamentals, home purchase affordability (i.e. the ratio of mortgage payment for a 45-square metre flat to median income of households, excluding those living in public housing) is also taken as an indicator.

(b) Volume of property transactions

The volume of property transactions can in general indicate how active the property market is. Also, the number of short-term resale activities (confirmor transactions and resale within 24 months after assignment) and the number of transactions involving non-local buyers are used to monitor the level of speculative activities and involvement of non-local buyers in the residential property market.

(c) Demand-supply balance for residential properties

A tight demand-supply balance would bring upward pressure on property prices. In this regard, the vacancy rate for private domestic units published by the Rating and Valuation Department on an annual basis, is taken as a gauge of the market situation. Also, the medium-term supply (comprising unsold completed flats, flats already under construction but not yet sold and flats on disposed sites where construction has yet to commence) published by the Transport and Housing Bureau provides information on the number of flats that would be available in the coming few years.

(d) Mortgage loan growth and interest rate

Excessive expansion in mortgage lending would fuel the property market bubble. Low interest rate would also encourage risk-taking and speculative activities. In this connection, mortgage loan growth, mortgage rate and loan-to-value ratio for new residential mortgage serve as the credit-related indicators for monitoring the property market.

## **Trends of Residential Property Prices**

4. In general, we define the Classes A to C types of private domestic units (whose salable areas are less than 100 square meters) as the small/medium-sized market while Classes D and E (whose salable areas are above 100 square meters) as the luxury market. The trends of residential property prices in the small/medium-sized and luxury markets in recent years are shown in the charts at **Annex A**.

## **Impact of the Doubled AVD**

### *Residential Property Market*

5. Judging from the property market statistics, since the introduction of two rounds of demand-side management measures in end of last year and early this year respectively, we have observed notable results. For the first ten months in 2012, the flat prices increased significantly by 113% from the trough in 2008. After the introduction of enhanced Special Stamp Duty and Buyer's Stamp Duty in October 2012, the property market was cooled down immediately and the upward momentum was eased. Although the property market returned to overheating situation in early 2013 with the monthly average increase of 2.7% in the first two months, the property market has stabilized ever since the introduction of enhanced AVD rates across the board. Overall flat prices increased by an average 0.3% per month in the six-month period during March to September 2013. Meanwhile, the flat prices lowered by 0.3% month on month in September, ending the upward trend in the preceding four months consecutively. According to the statistics compiled by Inland Revenue Department (IRD), amongst the number of agreements for sale and purchase of residential properties involving buyers who are Hong Kong Identity Card holders, the percentage of buyers who do not own any other properties in Hong Kong at the time of transaction for April to September 2013 is 70% on average, which is above the monthly average of 51% for January to March 2013. Such

percentage is also higher than the monthly averages of 53% and 59% for 2011 and 2012 respectively. The increase in the ratio of home buyers for self-occupation is in line with our policy objective of introducing various demand-side management measures.

### *Non-residential Property Market*

6. Separately, the enhanced AVD rates measure would apply to all non-residential property acquisitions. With the introduction of the proposed measure, coupled with the advancement of stamp duty payment from the date of assignment to the date of agreement for sale and purchase, the transaction costs to speculators would increase markedly, yielding also some dampening effects on the hitherto momentum in non-residential property prices. Prices of retail, office and flatted factory space increased by an average 0.1%, 0.5% and 0.7% respectively per month during March to September 2013, a notable deceleration from the monthly average increase of 1.9%, 2.6% and 4.1% respectively in the first two months of 2013 and a remarkable reduction from the monthly average increase of 3.4%, 2% and 3.8% respectively in 2012.

### *Overall Economy*

7. The latest round of demand-side management measures aims to ensure the healthy and stable development of the property market, which is crucial to the sustainable development of Hong Kong as a whole. While the measures might cause inconvenience to local buyers who have already owned residential properties and the business and industrial enterprises which intend to purchase non-residential properties, the Government has to manage demand effectively and reduce the possible risks to financial stability arising from an exuberant property market. We are aware that local businessmen and overseas agencies have raised concerns on the soaring prices in the property market which have driven up business costs over the past few years. If the build-up of a property market bubble is left unchecked, there could be even greater impact on Hong Kong's economy in the event of bursting of the asset bubble, thus bringing even more adverse effect on the business operating environment and investment sentiments.

8. Hong Kong is an international financial centre and international investors will consider various factors before deciding to run their business in Hong Kong. These factors include business opportunities, international networks, human quality, infrastructure, legal system and operating costs etc.

According to the results of the 2013 Annual Survey of Companies in Hong Kong Representing Parent Companies Located Outside Hong Kong conducted by Census and Statistics Department and InvestHK, the total number of regional headquarters, regional offices and local offices in Hong Kong representing their parent companies outside Hong Kong increased by 2.7% from 7 250 as at June 2012 to 7 449 as at June 2013. From the available information, we do not witness an obvious decrease of Hong Kong's competitiveness in attracting foreign investment.

9. While the demand-side management measures may have affected the relevant trades in association with the property sector by different degrees, the impact has been cushioned by a vibrant domestic economy and the overall tightness in the labour market. After balancing various considerations, we believe that the launch of relevant demand-side management measures serves the best interest of the community as a whole, and facilitates long-term economic development of Hong Kong. We have to emphasize that these are exceptional measures introduced under the abnormal environment of low interest rate, abundant liquidity and tight demand-supply balance. We would consider withdrawing these measures when the property market returns to a normal state.

### **Response to Views by The Law Society of Hong Kong and Hong Kong Association of Banks and Other Professional Bodies**

10. Since the introduction of doubled AVD, the relevant policy bureaux and department have been maintaining communication and arranging meetings to exchange views on issues of concerns with stakeholders such as The Law Society of Hong Kong and estate agency trade. The professional bodies have made valuable comments and suggestions on the technical and operational aspects of the Bill and they can broadly be summarized as follows –

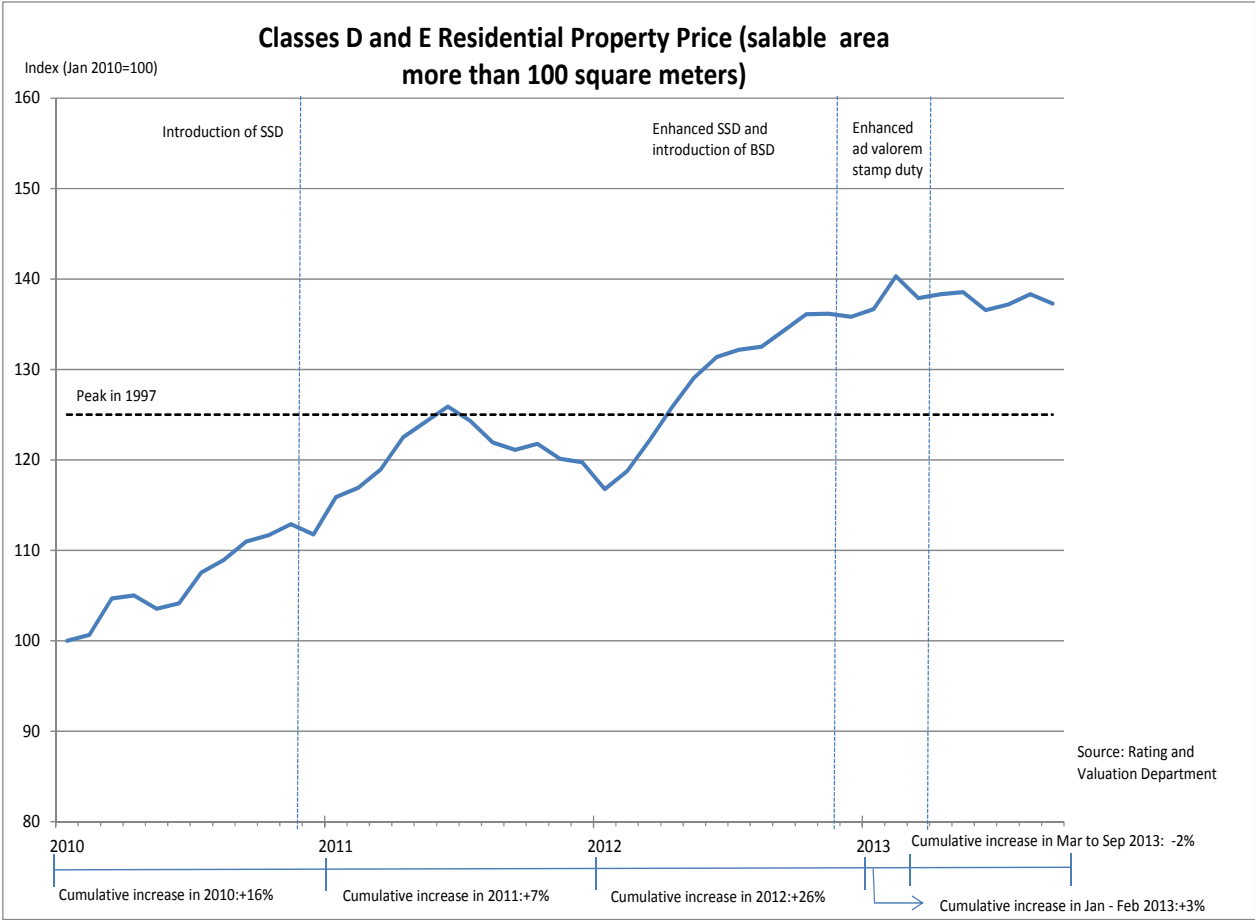
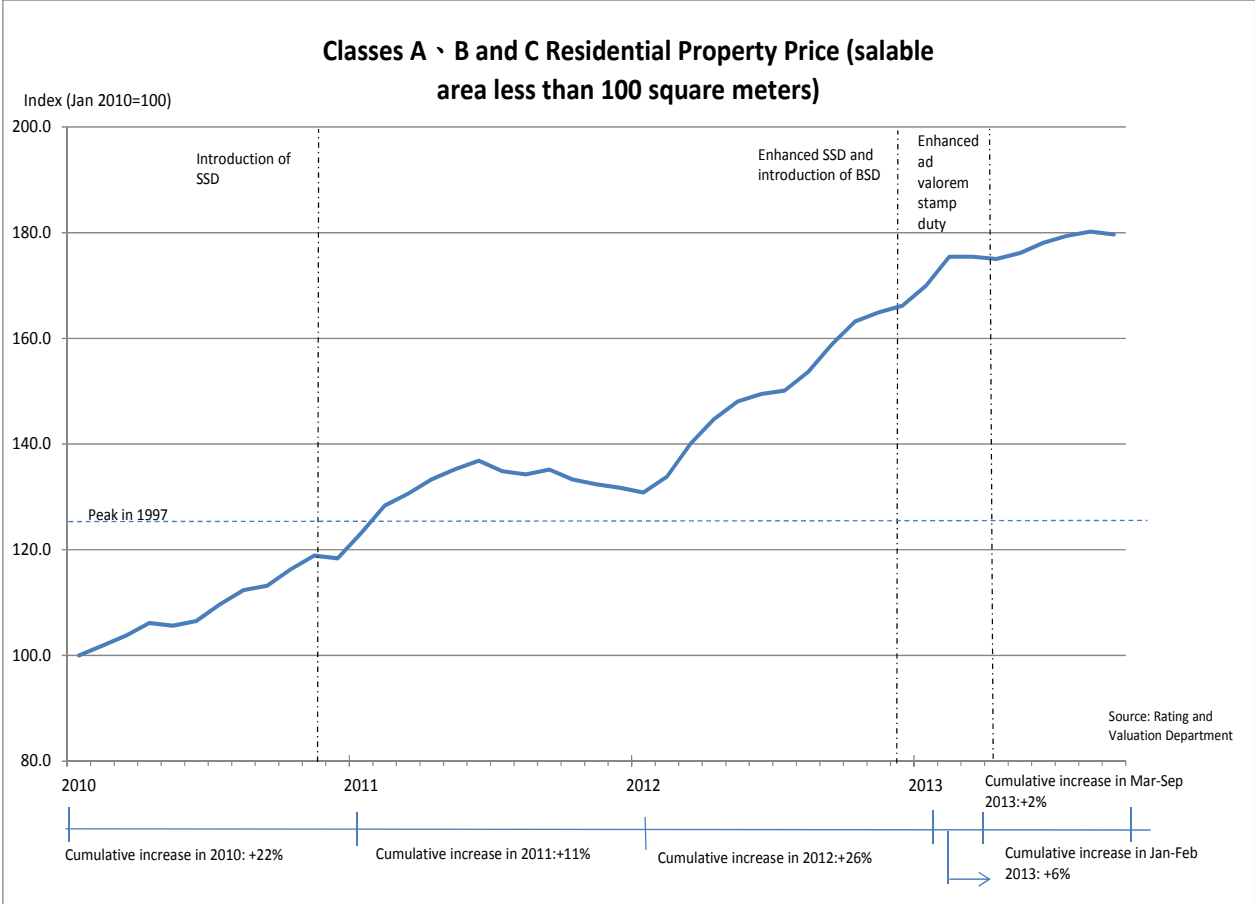
- (a) seeking clarification on the applicable rates of AVD in the case of a transaction involving the acquisition of residential and non-residential properties (e.g. a car parking space);
- (b) suggestions on improvement to the implementation of specified exemption situations (such as the refund of redevelopment project, the purchase of replacement properties because of land resumption arising from developments pursued under legislation and the requirement of

buyers of a new residential property to dispose of their only other residential property in Hong Kong, etc.);

(c) seeking clarification on certain legal obligations (such as the verification of contents in the buyer's declaration by banks or lawyers, the liability of underpaid AVD and the submission of relevant documentation in court proceedings, etc.) and

(d) seeking clarification on the interpretation of certain clauses.

11. LC Paper No. CB(1)1503/12-13(02) has set out in details the Government's responses to submissions from deputations/individuals. We now extract at **Annex B** the relevant responses to technical and operational aspects raised by professional bodies such as Hong Kong Association of Banks and The Law Society of Hong Kong for members' reference. Separately, the Government issued a letter to The Law Society of Hong Kong on 20 November 2013 and a copy of it is at **Annex C**. The Government has been maintaining communication with the stakeholders. We have contacted The Law Society of Hong Kong to set up a meeting again in early December to exchange further views on the technical and operational aspects of the Bill.



**Stamp Duty (Amendment) Bill 2013**

**An Extract of the Administration’s Responses to Submissions from The Law Society of Hong Kong, Hong Kong Association of Banks and Other Professional Bodies on the Technical and Operational Aspects of the Bill**

Comments/Issues Raised	Deputations/Individuals	The Administration’s Responses
<p>1. It is proposed that the six-month period for buyers of a new residential property to dispose of their only other residential property in Hong Kong be extended to, say 12 or 24 months.</p>	<p>The Law Society of Hong Kong</p> <p>Property Agencies Association</p> <p>Consumer Council</p> <p>Real Estate Developers Association of Hong Kong</p>	<ul style="list-style-type: none"> <li>● To cater for the situation where HKPRs may own more than one residential property in the process of replacing their old property by a new one, we have put in place a refund mechanism to handle the replacement of properties properly.</li> <li>● It is necessary to formulate a mechanism for a refund of the difference between the old and new AVD rates for buyers acquiring a new property before selling the old one, i.e. they have to pay stamp duty at the enhanced AVD rates first, and to set the timeline for the disposal of the original residential property and submission of the refund application. If the relevant period is to be extended beyond six months, buyers would be allowed to own more than one residential property for a long period of time. This will undermine the effectiveness of the demand-side management measures.</li> <li>● We will continue to listen to the views of the Bills Committee and the community on this subject matter.</li> </ul>
<p>2. It is proposed to refund the difference between the new and old AVD rates to purchasers holding their residential properties for not less than two years.</p>	<p>Real Estate Developers Association of Hong Kong</p> <p>Federation of Hong Kong Industries</p>	<ul style="list-style-type: none"> <li>● The risk of a property bubble cannot be neglected taking account of the current conditions of exceptionally low interest rates and excessive liquidity and that the external environment remains fragile, fuelled with the tight supply in the short run. To expand the exemption coverage will only weaken the effectiveness of the doubled AVD measure.</li> </ul>



<p>3. It is considered that resulting trusts or constructive trusts may be involved in an acquisition if funds are provided by persons other than the buyer. Clarification is sought on whether doubled AVD is payable for such transactions and how the Inland Revenue Department (IRD) will determine if the buyer concerned is acting on his/her own behalf.</p>	<p>The Law Society of Hong Kong  Hong Kong Association of Banks</p>	<ul style="list-style-type: none"> <li>• In an acquisition of residential property involving funds provided by persons other than the buyer, such contribution is generally provided by way of a gift, a loan or an entrustment. The buyer shall state whether he acts on his/her own behalf in the acquisition having regard to the known facts and circumstances surrounding the contribution. Where the purpose of the contribution is not clearly communicated by the contributor to the purchaser, the purchaser is advised to ascertain from or establish the true nature of such contribution with the contributor before execution of the declaration.</li> </ul>
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<p>4. Clarification is sought on the deeds of family arrangement that are used for redistribution of estate; and whether a beneficiary of an estate, who is the beneficial owner of a residential property in part instead of in whole, has to pay doubled AVD if he/she subsequently purchases a new residential property on his/her own; and the trustee or guardian, who is acting on behalf of others in acquiring new residential properties, has to pay doubled AVD.</p>	<p>The Law Society of Hong Kong</p>	<ul style="list-style-type: none"> <li>● For the purposes of the new AVD, a person “owns” a residential property if he/she is the beneficial owner of such property, or any share or interest thereof. Therefore, a person “owns” a residential property if he/she jointly owns the property with another person/other persons, or is a co-owner thereof. When he/she subsequently purchases a new residential property, he/she has to pay doubled AVD .</li> <li>● We intend to put in place a simple and clear exemption mechanism to facilitate operation. Allowing HKPRs who own other residential properties, even just in part, to enjoy exemption, is not in line with the Government’s prevailing policy of according priority to the housing needs of those HKPRs who do not own residential properties.</li> <li>● From a practical point of view, there are practical difficulties in setting a threshold of the share of ownership interest in a property as the basis for deciding whether new AVD could be exempted. In particular, it would be controversial to decide on the appropriate share of interest for the purpose.</li> <li>● For a HKPR who is a minor or a mentally incapacitated person, due to the lack of capacity to enter into legally binding agreements, he/she must in practice require another person to act on his/her own behalf. The Bill proposes that the trustee or guardian of such a minor or mentally incapacitated person should be exempted from the doubled AVD for the purpose of protecting the rights of a minor or mentally incapacitated person as a HKPR. For subsequent transfers upon change of trustees or transfers to beneficiaries, no doubled AVD is payable.</li> </ul>
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<p>5. In the case of a transaction in which a HKPR acquires a residential property with a parking space, the respective considerations are separately set out in the agreement and the buyer is not the beneficial owner of any other residential properties in Hong Kong at the time of acquisition, the Government should clarify whether the parking space acquired by way of the said transaction will be regarded as part of the residential property and be handled as a whole, thus rendering the buyer liable to AVD at the old rates only.</p>	<p>The Law Society of Hong Kong</p>	<ul style="list-style-type: none"> <li>● IRD will handle each and every transaction based on relevant facts of the case. Generally speaking, when a single agreement for sale involves both residential and non-residential units (such as parking space) and with a single amount as consideration, the whole consideration is liable to AVD, SSD and BSD (if applicable).</li> <li>● Where the residential property and the parking space in the said agreement for sale are separate and distinct properties, and their respective considerations are separately set out in the agreement, IRD, for the purposes of the Stamp Duty Ordinance, will make stamp duty assessments with regard to the classification of residential and non-residential properties accordingly, but the AVD rate applicable will be based on the total consideration of the whole transaction. Based on the proposals set out in the Bill, the HKPR buyer concerned may only be exempted from doubled AVD for the residential property in the said transaction, whereas the parking space in the same transaction shall be liable to doubled AVD at applicable rates.</li> </ul>
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<p>6. It is proposed that the refund requirement for redevelopment projects be relaxed. As long as the developer has completed the demolition works of an original building and the building plan of the redevelopment has been approved, the difference between the new and old AVD rates should be refunded.</p>	<p>Hong Kong Professionals and Senior Executives Association</p>	<ul style="list-style-type: none"> <li>● It is the Government's policy objective that the doubled AVD should not hinder redevelopment. To implement this policy objective, we have made reference to the proposed BSD regime to establish a refund mechanism which enables a person or a company acquiring residential properties for redevelopment to apply for the refund of the difference between the new and old AVD rates, subject to specified conditions being fulfilled.</li> <li>● The Government has considered Members' suggestion for relaxing the refund mechanism for redevelopment arising from discussions at the Bills Committee on Stamp Duty (Amendment) Bill 2012. Details are recapitulated as follows -</li> </ul>
<p>7. It is proposed that the refund requirement for redevelopment projects be relaxed. If a developer has acquired up to 30% of undivided shares in a residential lot on which the building is of not less than 30 years old, the difference between the new and old AVD rates should be refunded.</p>	<p>The Law Society of Hong Kong</p>	<ul style="list-style-type: none"> <li>● The two major principles held by the Government in formulating the BSD refund mechanism for redevelopment are that before the BSD paid can be refunded, (a) the developer concerned has to obtain ownership of the entire lot to be redeveloped; and (b) there is proof that the developer concerned will use the site for redevelopment purpose. The Government has, based on the two principles stated above, devised the following enhanced refund mechanism for developers to apply for refund of BSD paid after - <ul style="list-style-type: none"> <li>(a) the developer has obtained ownership of the entire lot to be redeveloped; and</li> <li>(b) the developer has satisfied any one of the following</li> </ul> </li> </ul>

		<p>conditions -</p> <p>(i) the Buildings Department has consented to the commencement of foundation works for the redevelopment project; or</p> <p>(ii) the original building(s) on the lot concerned (if any) has been demolished and the Buildings Department has approved the building plan for the redevelopment project.</p> <ul style="list-style-type: none"><li>● In the light of the scrutiny by the Legislative Council (LegCo) on the finalized amendments to the Stamp Duty (Amendment) Bill 2012, we will make corresponding amendments to the Bill for consistency in handling similar situations.</li></ul>
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<p>8. It is proposed that those who are affected by the following legislations and have to purchase replacement properties should be exempted from the doubled AVD -</p> <ul style="list-style-type: none"> <li>◆ Mass Transit Railway (Land Resumption and Related Provisions) Ordinance (Cap. 276);</li> <li>◆ Roads (Works, Use and Compensation) Ordinance (Cap. 370);</li> <li>◆ Railways Ordinance (Cap. 519);and</li> <li>◆ Demolished Buildings (Re-development of Sites) Ordinance (Cap. 337).</li> </ul>	<p>The Law Society of Hong Kong</p>	<ul style="list-style-type: none"> <li>● Having studied the same suggestion made by the Law Society of Hong Kong to the Bills Committee on Stamp Duty (Amendment) Bill 2012, the Government has agreed that some of the suggested scenarios involve similar resumption of land not of the land owner's volition and that BSD exemption should be offered for replacement purchases thus made. The Government has already stated that it would introduce relevant committee stage amendments (CSAs) to cover the following scenarios – <ul style="list-style-type: none"> <li>◆ section 4(1) of Mass Transit Railway (Land Resumption and Related Provisions) Ordinance (Cap. 276);</li> <li>◆ section 13(1) of Roads (Works, Use and Compensation) Ordinance (Cap. 370);</li> <li>◆ section 3 of Land Acquisition (Possessory Title) Ordinance (Cap. 130);</li> <li>◆ section 16 of Railways Ordinance (Cap. 519); and</li> <li>◆ section 37(2) of Land Drainage Ordinance (Cap. 446).</li> </ul> </li> <li>● In the light of LegCo's scrutiny of the above-mentioned CSAs to the Stamp Duty (Amendment) Bill 2012, we will make corresponding amendments to the Bill for consistency in handling similar situations.</li> </ul>
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<p>9. It is proposed that the Administration should consider exemption from doubled AVD for corporate entities which invest in property where all the shareholders are HKPRs acting on his/her own behalf and maintain only one class of shares.</p>	<p>The Law Society of Hong Kong</p>	<ul style="list-style-type: none"> <li>● As the Government has indicated at meetings of the Bills Committee on Stamp Duty (Amendment) Bill 2012, we should exercise caution amidst the exuberance situation and the current tight supply in the property market. Given the extremely low interest rates, excessive liquidity and tight housing supply situation, if we accept the proposal, it will send out a wrong message to the public. The market will mistakenly believe that the Government has no determination to cool down the property market and the exuberance situation in the property market may revive.</li> <li>● The Government’s policy intention is that the scope of exemption should not be widened lest the effectiveness of the doubled AVD be undermined. Therefore, residential properties purchased in the name of a company, even if it is held by HKPRs, should also be subject to the doubled AVD. This is to strike a reasonable balance between the policy objectives to cool down the property market on the one hand and to accord priority to the home-ownership needs of HKPRs on the other.</li> <li>● If we are to determine the chargeability of BSD on the basis of the HKPR status of a company’s shareholders, this will cause confusion to the fundamental legal principle currently governing companies that “a company is an entity independent of its shareholders”. Based on the same legal principle, the Government will not take into account the residential properties held by HKPRs through a company in determining whether the relevant persons can be exempted from the proposed doubled AVD. The enhanced SSD, BSD and the doubled AVD measures target at different demands in the spectrum of buyers for the primary objective of combating speculation and managing demand. Therefore, we need to adopt the same yardstick to address issues concerning stamp duties payable by companies in acquiring properties.</li> </ul>
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<p>10. It is proposed that the Administration should not seek to impose additional legal obligation on banks or lawyers to verify the buyer's declaration.</p>	<p>Hong Kong Association of Banks  The Law Society of Hong Kong</p>	<ul style="list-style-type: none"> <li>● The Administration has clarified that the solicitor acting for the purchaser or the bank processing mortgage application in the transaction has no obligation to confirm the capacity of the HKPR buyer. IRD will do so in order to determine the correct amount of duty payable on the relevant instrument. Under the existing system, the solicitors acting for both parties to the transaction have no obligation to determine whether the amount of duty payable on the instrument is adequate or whether there is underpayment of stamp duty (e.g. by virtue of stated consideration being less than the market value). Under the proposed doubled AVD regime, it is IRD's responsibility to determine if doubled AVD should be payable.</li> </ul>
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<p>11. It is proposed that where the AVD is underpaid on the basis of the declarations made by the buyer, and the buyer has subsequently been found to be ineligible, the liability to pay for the difference between the old and the enhanced AVD rates shall rest with the buyer only. This should not affect the innocent seller's right to present relevant documentation in court proceedings for purposes including to prove his/her title to the property, so as to protect future bona fide purchasers and mortgagees for dealing with the residential property.</p>	<p>Hong Kong Association of Banks</p> <p>The Law Society of Hong Kong</p>	<ul style="list-style-type: none"> <li>● At present, section 15 of the Stamp Duty Ordinance (Cap. 117) provides that instrument which is not duly stamped shall not be received in evidence in any proceedings whatsoever except criminal proceedings and civil proceedings by IRD to recover stamp duty or penalty. The Law Society of Hong Kong and the Hong Kong Association of Banks have made their submissions to the Bills Committee on Stamp Duty (Amendment) Bill 2012, setting out that as it is the property buyer's liability to pay BSD, any failure to pay BSD by such a buyer should not affect the innocent seller's right to present relevant documentation in court proceedings for purposes including to prove his/her title to the property. The Administration agrees to the suggestion, and proposes that an instrument that is chargeable with BSD but has not been duly stamped may still be received in evidence in civil proceedings before a court, provided that - <ul style="list-style-type: none"> <li>(a) the instrument is not duly stamped only in relation to BSD chargeable on the instrument;</li> <li>(b) the instrument has been registered with the Land Registry under the Land Registration Ordinance (Cap. 128); and</li> <li>(c) the instrument is produced in evidence by any person other than the buyer under the instrument.</li> </ul> </li> </ul> <p>The Administration will introduce to the Bills Committee on Stamp Duty (Amendment) Bill 2012 relevant CSAs.</p> <ul style="list-style-type: none"> <li>● We will consider appropriate adjustments to the Bill, having regard to the above-mentioned development in relation to the Stamp Duty (Amendment) Bill 2012.</li> </ul>
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<p>12. The Government should clarify if the transfer of properties made pursuant to undertakings in a decree or order of any court will be regarded as made pursuant to a decree or order of any court under the new section 29BE of the Bill and thereby chargeable at the old AVD rate.</p>	<p>The Hong Kong Conveyancing &amp; Property Law Association Limited</p>	<ul style="list-style-type: none"> <li>● If a buyer acquires properties pursuant to a decree or order of any court, the subject agreement for sale will be exempted from doubled AVD under section 29BE of the Bill. This is in accordance with the existing practice of handling SSD exemption claims made under section 29CA(11)(a). So long as a consent order in accordance with such a consent summons is issued by the court and an agreement for sale is made in pursuant to the consent order, the agreement is considered eligible for the exemption.</li> </ul>
<p>13. It is proposed that closely related persons, as stipulated in section 29AD of the Bill, should cover grandparents, grandsons, granddaughters, sons-in-law and daughters-in-law.</p>	<p>The Law Society of Hong Kong</p>	<ul style="list-style-type: none"> <li>● The Government’s prevailing policy is to accord priority to the home ownership needs of HKPRs. As such, we propose that the old AVD rates be applicable to acquisition or transfer of a residential property between closely related persons (including spouse, parents, children, brothers or sisters), irrespective of whether they are HKPRs and whether they are beneficial owners of any other residential property in Hong Kong at the time of acquisition or transfer.</li> <li>● The “closely related persons” exemption arrangement stipulated in the Bill follows the same principle of the SSD regime and the proposed BSD regime, which exempt transactions involving persons who (a) are blood-related or half blood-related, (b) have spousal relationship, or (c) have adoption or step relationship. The Administration considers that the proposed exemption arrangement strikes a balance between addressing the genuine needs of the public and safeguarding the effectiveness of the doubled AVD by avoiding loopholes for circumvention.</li> </ul>

<p>14. It is proposed that section 29AM(c) of the Bill should stipulate that the mortgagee referred to in that section must be the same mortgagee of the mortgaged property.</p>	<p>The Hong Kong Association of Banks</p> <p>The Law Society of Hong Kong</p>	<ul style="list-style-type: none"> <li>● After due consideration of the same proposal put forward by the Hong Kong Association of Banks and the Law Society of Hong Kong to the Bills Committee on Stamp Duty (Amendment) Bill 2012, the Administration agrees to introduce CSAs to amend the texts of section 29DB(8)(c) of the Stamp Duty (Amendment) Bill 2012 to make it clearer that the mortgagee referred to in that section must be the same mortgagee of the mortgaged property.</li> <li>● In the light of LegCo's scrutiny of the above-mentioned CSAs to the Stamp Duty (Amendment) Bill 2012, we will make appropriate refinements to the texts of the Bill for sake of consistency.</li> </ul>
<p>15. It is considered that the penalty for late stamping of 10 times of the AVD payable under section 9 of the Stamp Duty Ordinance (Cap. 117) is excessive.</p>	<p>The Law Society of Hong Kong</p>	<ul style="list-style-type: none"> <li>● The maximum penalty for late stamping (up to 10 times of the stamp duty payable) is the standard level of maximum penalty in the Stamp Duty Ordinance (Cap. 117) applicable to all types of duties under the stamp duty regime. It is not applicable to AVD only. We consider it prudent and reasonable to apply the established penalty system of the stamp duty regime to the late payment of the doubled AVD. We are mindful of the misleading message that we may be sending to the market if we deviate from the established penalty system specifically for the doubled AVD.</li> </ul>

<p>16. It is proposed that a sunset clause be added.</p>	<p>The Law Society of Hong Kong</p> <p>The Hong Kong Conveyancing &amp; Property Law Association Limited</p>	<ul style="list-style-type: none"> <li>● The Government does not agree that a sunset clause should be introduced for the demand-side management measures since it is impossible for us to make wild speculation on the future changes of the market conditions and the external factors and pre-determine a date on which these measures will be deemed no longer necessary. The sunset clause may only stimulate the demand later on and send a wrong message to the market. We would rather monitor the market situation closely and make adjustments to the measures in a timely manner as and when necessary. In this regard, we have proposed in the Bill that adjustments to the value bands and rates of AVD be made by means of subsidiary legislation subject to LegCo's negative vetting so that we can make flexible and timely adjustments having regard to the market conditions.</li> </ul>
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財經事務及庫務局  
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20 November 2013

Dear Mr Lee,

**Submissions on New Regime of Ad Valorem Stamp Duty**

Thank you for your letter of 2 April 2013 enclosing the Law Society of Hong Kong (the Law Society)'s submission on the doubled ad valorem stamp duty (DSD) measures to further address the overheated property market. We have had useful exchanges of views with your members at the March and June meetings, at which we clarified the policy objectives of the demand-side management measures and addressed the concerns on the operational matters that the Law Society has expressed in connection with the implementation of these measures respectively.

The Law Society has, further to the letter of April 2013, made a submission dated 2 May 2013 to the Legislative Council (the LegCo)'s Bills Committee on the Stamp Duty (Amendment) Bill 2013 (the 2013 Bill). The Administration has provided a consolidated response to the submissions received to the Bills Committee in July. We would like to set out the Administration's responses on the key issues raised by the Law Society in the following paragraphs.

**Demand-side Management Measures**

The Government has introduced Special Stamp Duty (SSD), enhanced SSD, Buyer's Stamp Duty (BSD) and DSD to manage demand in the midst of the tight housing supply situation. These measures serve to address the exuberant property market caused by the tight supply, extremely low interest rates and abundant liquidity,

to reduce the risk of a property bubble, and to prevent the property prices from deviating further from the economic fundamentals, with a view to helping the community to avoid being affected should there be any adjustment caused by a change in the interest rates or other external factors. At the same time, it is also the Government policy to accord priority to address the home ownership needs of Hong Kong permanent residents (HKPRs) in the midst of the tight supply situation.

While the Government is determined to adopt the supply-led strategy as the basis to address the housing situation at source, the Government considers that the demand-side management measures are essential to ensure the healthy and stable development of the property market and the overall macroeconomic and financial stability of Hong Kong under the current exceptional circumstances. We are fully aware that these extraordinary and targeted measures will inevitably cause pain and inconvenience to certain parties. However, after giving due consideration in various aspects, we believe that the launch of such demand-side management measures serves the best interest of the community as a whole.

### **Verification of the Status of HKPRs**

In brief, the DSD will be applicable to all property transactions except for transactions under which the buyers are HKPRs acting on their own behalf in acquisition of residential properties, and they are not beneficial owners of any other residential property in Hong Kong at the time of acquisition. We have clarified that the solicitor acting for the purchaser in the transaction has no obligation to confirm the capacity of the HKPR buyer. Under the existing and proposed DSD regimes, it is the Inland Revenue Department (IRD) which has the responsibility to determine the correct amount of stamp duty payable on the relevant instrument.

### **Residential Property and Parking Space**

We understand that there can be different scenarios and ways of handling a transaction involving the residential property and parking space. IRD will process each and every transaction based on relevant facts of the case. Generally speaking, when a single agreement for sale involves both residential and non-residential properties (such as parking space) and with a single amount as consideration, the whole consideration is liable to the stamp duty as applicable. Where the residential property and the parking space in the agreement for sale are separate and distinct properties, and their respective considerations are separately set out in the agreement, IRD will make stamp duty assessments with regard to the classification of residential and non-residential properties accordingly. The stamp duty rate applicable will be based on the total consideration of the whole transaction<sup>1</sup>.

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<sup>1</sup> As the purchases of the residential property and the parking space from the same vendor under a single agreement for sale can be regarded as forming part of a larger transaction or a series of transactions, the stamp duty rate applicable will be based on the total consideration of the two purchases, not the rates applicable to the respective considerations of the residential property and the parking space.

## **Closely Related Persons**

In accordance with the policy to accord priority to the home ownership needs of HKPRs, DSD will not be applicable to acquisition or transfer of a residential property between closely related persons (including spouse, parents, children, brothers or sisters), provided that the purchasers or transferees are acting on their own behalf, irrespective of whether they are HKPRs and whether they are beneficial owners of any other residential property in Hong Kong at the time of acquisition or transfer. Such "closely related persons" arrangement follows the same principle of the SSD regime and the proposed BSD regime, which exempt transactions involving persons who (a) are blood-related or half blood-related, (b) have spousal relationship, or (c) have adoption or step relationship. The Government considers that the proposed exemption arrangement strikes a balance between addressing the genuine needs of the public and safeguarding the effectiveness of DSD by avoiding loopholes for circumvention.

## **Mortgagee**

After due consideration of the same proposal put forward by the Law Society to the Bills Committee on Stamp Duty (Amendment) Bill 2012 (the 2012 Bill), the Government has agreed to propose Committee Stage Amendments (CSAs) to amend the texts of section 29DB(8)(c) of the 2012 Bill to make clear that the mortgagee referred to in that section must be the same mortgagee of the mortgaged property. In the light of LegCo's scrutiny of those proposed CSAs to the 2012 Bill, we will consider proposing appropriate CSAs to the 2013 Bill for sake of consistency.

The 2013 Bill recognizes the mortgagee which is the "financial institution" as defined in section 2 of the Inland Revenue Ordinance (IRO) which means, amongst others, an authorized institution within the meaning of section 2 of the Banking Ordinance (BO). Under section 2 of the BO, "authorized institution" means "a bank", "a restricted licence bank" (RLB) or "a deposit-taking company". A bank and a RLB mean a company which holds a valid banking licence and restricted banking licence granted under section 16 of the BO respectively. An authorized institution can be incorporated in or outside Hong Kong. Pursuant to the Hong Kong Monetary Authority's Guide to Authorization, an overseas applicant seeking a banking licence or a restricted licence bank presence in Hong Kong can enter in the form of a branch or a locally incorporated subsidiary. An overseas bank which is authorized to carry on banking business / business of taking deposits in Hong Kong shall fall within the definition of "authorized institution" under the BO and therefore a "financial institution" under the IRO.

The 2013 Bill allows an agreement for sale or conveyance on sale that is made pursuant to a decree or order of any court, or a conveyance on sale that is a decree or order of any court by which the property concerned is transferred to the transferee or vested in the transferee, to be chargeable with ad valorem duty at old rates. Hence, if a mortgagee of staff loan acquires the mortgaged property pursuant to a court order

(including a foreclosure order) upon default on the repayment of loan by the staff, the relevant instrument will be chargeable with the ad valorem duty at old rates.

## **Estate**

For the purposes of DSD, a person “owns” a residential property if he or she is the beneficial owner of whole or part of the property. Therefore, a person “owns” a residential property if he or she jointly owns the property with one or more other persons, or is a co-owner of the property. This applies to the situations in which a person acquires a residential property pursuant to a will or under the law of intestacy by way of an assent or renunciation pursuant to a deed of family arrangement. When the person subsequently purchases a new residential property, he or she has to pay DSD. A person who holds a residential property as trustee or personal representative not involving any beneficiary interest of the residential property will not be liable for DSD.

We intend to put in place a simple and clear exemption mechanism to facilitate operation. Allowing HKPRs who own other residential properties, even just in part, to enjoy exemption, is not in line with the Government’s prevailing policy of according priority to the housing needs of those HKPRs who do not own any residential properties. From a practical point of view, there are difficulties in setting a threshold of the share of ownership interest in a property as the basis for deciding whether DSD could be exempted. In particular, it would be controversial to decide on the appropriate share of interest for the purpose.

## **Purchase of Replacement Properties**

Having studied the same suggestion made by the Law Society to the Bills Committee on 2012 Bill, the Government has agreed that some of the suggested scenarios involve similar resumption of land not of the land owner’s volition and that BSD exemption should be offered for replacement purchases thus made. The additional scenarios to be covered include those who are affected by Mass Transit Railway (Land Resumption and Related Provisions) Ordinance, Roads (Works, Use and Compensation) Ordinance, Land Acquisition (Possessory Title) Ordinance, Railways Ordinance and Land Drainage Ordinance.

The Government has agreed to propose CSAs to cover the identified scenarios. Depending on the LegCo Bills Committee’s scrutiny of those proposed CSAs to the 2012 Bill, we intend to propose corresponding CSAs to the 2013 Bill for consistency in handling similar situations.



### **Arrangements for owners having acquired a new residential property before disposing of the original one**

In order to cater for the replacement need of HKPRs and having regard to the fact that HKPRs may own more than one residential property during the process of purchasing a new property for replacement of the existing one, we have purposely drawn up a refund mechanism to properly handle cases of replacement of properties.

The proposed refund mechanism fulfills the Government's policy objective with due regard to the practicalities of changing properties and overseas practice. The justifications are -

- (a) The policy objective of the demand-side management measures is to accord priority to the home ownership needs of HKPRs (including those who may hold two residential properties for a short period of time during the process of replacement of their properties) given the tight housing supply. We consider it necessary to require a residential property owner having acquired another residential property to sell the original one within a specified timeframe. This is to prevent a property owner from acquiring another residential property under the guise of replacement and delaying disposal of his original one, which in effect result in the person holding more than one residential property for a considerable long period of time, inconsistent with the Government's policy objective;
- (b) According to the preliminary findings based on IRD's database of stamping agreements for sale and purchase, between 2011 and 2012, roughly half of buyers who held Hong Kong Identity Card and sold their other residential properties after acquiring residential properties, had their disposal transactions done within six months from acquisition. Besides, a residential property owner having acquired another residential property, in general, will not hold the original one for a long period of time for cash flow considerations. We understand that some banks in the market are providing bridging loans for customers replacing their properties so that they can complete the mortgage procedures for their newly-acquired residential properties. The repayment period of such bridging loans usually spans six months; and
- (c) We have taken into account overseas practices in formulating the relevant arrangement. Specifically, under Singapore's refund mechanism, a married couple (with a Singapore citizen spouse) can get refund of "Additional Buyer's Stamp Duty" paid on their second residential property provided that they enter into an agreement for sale for their first residential property within six months from the date of acquiring the second one.

Overall speaking, the current “six-month period” allowed in the refund mechanism strikes a balance between addressing the needs of HKPRs to replace their properties and safeguarding the effectiveness of the demand-side management measures.

### **Redevelopment Projects**

It is the Government’s policy objective that DSD should not hinder redevelopment. To implement this policy objective, we have made reference to the proposed BSD regime to establish a refund mechanism which enables a person or a company acquiring residential properties for redevelopment to apply for the refund of the difference between the new and old ad valorem stamp duty rates, subject to specified conditions being fulfilled.

The Government has considered the suggestion for relaxing the refund mechanism for redevelopment arising from discussions at the Bills Committee on 2012 Bill. The two major principles held by the Government in formulating the BSD refund mechanism for redevelopment are that before the BSD paid can be refunded, (a) the developer concerned has to obtain ownership of the entire lot to be redeveloped; and (b) there is proof that the developer concerned will use the site for redevelopment purpose. The Government has, based on the aforesaid two principles, devised the following enhanced refund mechanism for developers to apply for refund of BSD paid after -

- (a) the developer has obtained ownership of the entire lot to be redeveloped; and
- (b) the developer has satisfied any one of the following conditions -
  - (i) the Buildings Department has consented to the commencement of foundation works for the redevelopment project; or
  - (ii) the original building(s) on the lot concerned (if any) has been demolished and the Buildings Department has approved the building plan for the redevelopment project.

The original “six-year period” within which the developer has to produce the first occupation permit would no longer be required and the refund of BSD may be advanced by between four to five years under the enhanced refund mechanism. Depending on the scrutiny by LegCo on the proposed CSAs to the 2012 Bill, we intend to propose corresponding CSAs to the 2013 Bill in handling similar situations.

### **Companies Owned by HKPRs**

Granting exemption to companies owned by HKPRs is contrary to our policy objective to accord priority to HKPRs in order to address their home ownership

needs. Due to excessive liquidity worldwide, many major international cities, including Hong Kong, are facing the risk of a property market bubble. Until the property market returns to a normal state, the Government must put in place effective demand-side management measures to curb market exuberance and to safeguard the healthy and stable development of the property market.

As the Administration has repeatedly pointed out in the context of the 2012 Bill, if we are to determine the chargeability of BSD on the basis of the HKPR status of a company's shareholders, this will cause confusion to the fundamental legal principle currently governing companies that "a company is an entity independent of its shareholders". Based on the same legal principle, the Government will not take into account the residential properties held by HKPRs through a company in determining whether the relevant persons can be exempted from DSD. The enhanced SSD, BSD and DSD measures target at different demands in the spectrum of buyers for the primary objective of combating speculation and managing demand. Therefore, we need to adopt the same yardstick to address issues concerning stamp duties payable by companies in acquiring properties.

In Hong Kong, it is commonly known that the cost of setting up a company is low and the procedures involved are simple. Besides, to acquire the ownership and control of assets held by a company (including residential properties) through changing the shares and ownership of the company holding such assets is a very common commercial activity in Hong Kong. The crux of the problem is that there are numerous means to transfer company shares and ownership. Under the current regime, the validity of the transfer of the ownership in the company would not be affected even if such transactions are not registered with the Companies Registry and the instruments involved (which may need to be stamped) are not presented to IRD for stamping.

In other words, if HKPR-owned companies were exempted from the DSD, people outside Hong Kong could easily make use of various means which would be hard to be uncovered or traced to acquire the beneficial interest of the shares of the company and gain control of the company in a concealed way.<sup>2</sup> This would in effect allow that person outside Hong Kong to gain control of the residential property owned by the company, and at the same time evade the applicable stamp duty.

A person from outside Hong Kong may also, through arrangements and ways that are hard to be traced, acquire the control of the HKPR company concerned behind the scene, and in turn assume the effective ownership of the residential properties held by the company, thus successfully evading the applicable stamp duty. As we have repeatedly pointed out, fundamental changes to the existing simple yet effective taxation and company regimes will be required if we are to plug these

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<sup>2</sup> For example, through a company with only one HKPR as its shareholder and director who is asked to sign a blank instrument of transfer and surrender all seals of the company to the person from outside Hong Kong.

loopholes<sup>3</sup>. Furthermore, even if the present taxation and company regimes were changed, there is still no guarantee that the IRD could uncover the non-compliance cases. The effort required would be disproportionate when seen against the implementation of an extraordinary measure such as DSD.

### **Admissibility of an Instrument in Civil Proceedings**

The Government agrees to the Law Society's suggestion to the Bills Committee on 2012 Bill that as it is the property buyer's liability to pay BSD, any failure to pay BSD by such a buyer should not affect the innocent seller's right to present relevant documentation in court proceedings for purposes including to prove his/her title to the property. The Government proposes that an instrument that is chargeable with BSD but has not been duly stamped may still be received in evidence in civil proceedings before a court, provided that -

- (a) the buyer under the instrument has made a misrepresentation that he/she was a HKPR or was acting on his/her own behalf;
- (b) the instrument has been registered with the Land Registry under the Land Registration Ordinance; and
- (c) the instrument is produced in evidence by any person other than the buyer in order to prove the person's title to the property concerned or is produced by the vendor to enforce the instrument.

The Government has agreed to propose the relevant CSAs to the 2012 Bill. In the context of the 2013 Bill, we propose that the liability to pay for the underpaid AVD on the basis of the statutory declarations made by the purchasers/transferees (who have subsequently been found to be non-HKPRs or found to be the beneficial owners of other residential properties in Hong Kong at the material time) shall rest with the purchasers/transferees only. In other words, the sellers and subsequently buyers would not be liable for the underpaid AVD. Depending on the scrutiny by the LegCo on those proposed CSAs to the 2012 Bill, we will propose necessary CSAs to the Bill as appropriate.

### **Looking Ahead**

We are most grateful for the Law Society's active participation and constructive comments. We look forward to the Law Society's continued contributions and support to the early passage of the two Amendment Bills. We and IRD colleagues will be pleased to meet with the Law Society again in early December to exchange

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<sup>3</sup> Such as making fundamental changes to the Company Ordinance and the Stamp Duty Ordinance by requiring that the Company Registry and the IRD should be informed of all actions that involve changes in company controlling stake. This will result in actual changes to the operation of all companies.

views on the technical and operational details where necessary. In addition, we will be glad to attend the seminar to be arranged by the Hong Kong Academy of Law to enhance the participants' understanding and handling of matters in relation to these measures upon their passage by the LegCo.

Yours sincerely,



( LAU Wai-ming )  
for Secretary for Financial Services  
and the Treasury

C.C.  
Commissioner of Inland Revenue

(Attn: Mr TAM Tai-pang)