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來函檔號 YOUR REF.: LS/B/28/16-17

29 September 2017

Legal Service Division  
Legislative Council Secretariat  
1 Legislative Council Road  
Central, Hong Kong  
(Attn: Ms Joyce Chan)

Dear Ms Chan,

**Companies (Amendment) Bill 2017**

I refer to your letter dated 21 July seeking clarification on the captioned Bill. The Administration's responses are set out in **Annex** for your information.

Yours sincerely,



( Ms Eureka Cheung )  
for Secretary for Financial Services and the Treasury

c.c.

Clerk to Bills Committee (Attn: Ms Connie Szeto)  
Registrar of Companies (Attn: Ms Ada Chung)  
Secretary for Justice (Attn: Dr Stefan Lo,  
Ms Frances Hui,  
Mr Vincent Wai)

**The Administration's responses on questions raised in the  
Assistant Legal Adviser's letter dated 21 July**

**Clause 4 – new sections 653P, 653Q and 653R**

- (1) Hong Kong, as a member of the Financial Action Task Force (“FATF”), is obliged to implement Recommendation 24 of FATF (“R24”) under which a number of anti-money laundering requirements have been made. The FATF requires that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities, and that jurisdictions should require companies to take reasonable measures to obtain and hold up-to-date information on the companies’ beneficial ownership. To pursue the legitimate aim of combatting money laundering and terrorist financing by implementing R24, the Bill seeks to amend the Companies Ordinance by imposing obligations on companies to take reasonable steps including the **proposed notice requirements** to find out the identity of any individual or legal entity that has significant control over the company.
- (2) The proposed notice requirements under the new sections 653Q(2)(b) and 653R(1)(b) only require an addressee to:
  - (a) state whether or not the addressee knows the identity of another person who is a significant controller of the company;
  - (b) provide the specified particulars of such person<sup>1</sup> that are known to the addressee; and
  - (c) state whether or not the particulars are provided with that person’s knowledge.

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<sup>1</sup> Under section 653O(1)(b), if the person is a natural person, the specified particulars do not include the number of an identity card or the number and issuing country of a passport held by such person.

- (3) There are situations where a company may have no idea who the beneficial owners are without making enquiries with third parties and it is reasonable that a company finds out the identities of possible beneficial owners through third parties in such cases. Under section 653Q(2)(b)(ii)(B) and section 653R(1)(b)(ii), the notice addressee is required to state whether or not the particulars of the significant controller are provided with that controller's knowledge. In relation to the information on a registrable person that is supplied by a notice addressee without the knowledge of the registrable person, the company must not enter the registrable person's particulars in the significant controllers register ("SCR") until all the required particulars have been provided or confirmed by the registrable person under section 653J.
- (4) In light of the abovementioned, the proposed notice requirements **pursue a legitimate aim** of combatting money laundering and terrorist financing by obtaining information on the company's beneficial owners and are **rationally connected to**, and are **no more than is necessary to accomplish** that legitimate aim.
- (5) The relevant FATF recommendation aims at ensuring that criminals cannot finance illicit activities or launder proceeds of crimes through misuse of companies, particularly those under complex ownership and control structures. It is important for Hong Kong to fulfill its international obligations as expected under the FATF recommendation so as to maintain the reputation of Hong Kong as an international financial centre and a safe and clean place to do business. Taking into account the proposal that the SCR will only be open to access by law enforcement officers in the performance of specified functions, we consider that a **reasonable balance** has been struck between the need to combat money laundering and terrorist financing on the one hand, and the protection of individual privacy on the other.
- (6) On confidentiality, section 653ZB provides that in complying with a notice given under the new Division 2A, a person is not required to

provide any information to the company that the person would on grounds of legal professional privilege be entitled to refuse to give or provide in legal proceedings.<sup>2</sup> Other than that, an addressee would be required to comply with the proposed notice requirements even if compliance may be allegedly in breach of, for example, a confidentiality agreement.

**Clause 4 – new sections 653X, 653Y and 653Z**

- (7) Section 653X provides that an applicable company must on demand by a law enforcement officer make its SCR available for inspection at the place at which the SCR is kept. Upon entering the place where the SCR is kept, he or she could only inspect the SCR and nothing else. He or she does not have power under the Bill to inspect any other documents kept by the company nor power under the Bill to search the place or other premises of the company for evidence of an offence. There cannot be “fishing expedition” of any kind other than information on the SCR.
- (8) Sections 653Y and 653Z empower the Court to make orders enabling a law enforcement officer to inspect and make a copy of a SCR. Under section 653Y(3)(b), the court order may specify the duration and manner of inspection. Under section 653Z(3), the court order (relating to making copies of the SCR) may specify the time, duration and manner of inspection, including the circumstances in which and the extent to which the copying of information is permitted in the course of inspection. These provisions will enable a law enforcement officer to apply for an order in more specific terms in some situations, for example, as against an un-cooperative company which may try evasive tactics when faced with an order in general terms. These provisions thereby facilitate the law enforcement officer in gaining timely access to the SCR for inspection and/or copying purposes.

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<sup>2</sup> There are similar arrangements in handling information of legal professional privilege in other Hong Kong legislation, eg. under s.13M(7) of the Telecommunications Ordinance, Cap. 106, a person shall not under this section be required to furnish any material relating to items subject to legal privilege.

- (9) As provided in section 653X(1), the power to inspect and make copies of the SCR is only exercisable for the purpose of the officer's performance under the law of Hong Kong of a specified function. A law enforcement officer is only empowered to enter the place at which the SCR is kept, not any other place or premises of the company. After the officer has entered into the place, he or she could only inspect the SCR, not any other documents kept by the company. The law enforcement officer's power is therefore very limited in scope.
- (10) The keeping of the SCR is subject to statutory regulation. Under section 653M, a company must keep its SCR at the company's registered office or a prescribed place. The law enforcement officer may only enter the place at which the company's SCR is kept and inspect the SCR at any reasonable time. The officer also does not have a power under the Bill to break into the premises if entry is refused.
- (11) Given that the power of the law enforcement officers is rationally connected to, and is no more than necessary to accomplish the legitimate aim as mentioned in paragraphs. (1) & (4), and that the SCR is only open to access by law enforcement officers (instead of the general public), we consider that the four-step proportionality test as laid down by the Court of Final Appeal is met.

#### **Clause 4 – new section 653ZA**

- (12) The expression "frivolous or vexatious" is well defined in case law. A proceeding is frivolous when it is incapable of reasoned argument, without foundation or cannot possibly succeed. A proceeding is vexatious when it is oppressive or lacks bona fides. The expression includes proceedings which are an abuse of process (*Sealegend Holdings Ltd v China Taiping Insurance (HK) Co Ltd* (unreported, 2014; HCAJ 95/2012; judgment 24 October 2014, *per* Au-Yeung J). See also *Hong Kong Civil Procedure 2017 (Hong Kong White Book)*, Sweet & Maxwell, at 18/19/7). The meaning of "frivolous or vexatious" as used in section 653ZA is intended to be the same as that construed by the civil courts in Hong Kong.

- (13) The standard of proof is that the addressee has to establish the defence under section 653ZA(2) on the balance of probabilities. The intention is that in order to avail oneself of the statutory defence, it is for the addressee to prove on the balance of probabilities that the requirement made under section 653Q, 653R or 653U was frivolous or vexatious.
- (14) The statutory defence under section 653ZA(2) is introduced to deal with the possibilities that a company may issue notices to persons for frivolous or vexatious purposes, e.g. to harass the notice recipient rather than seeking the information on beneficial ownership in good faith.
- (15) When a company gives a notice under section 653P or 653T asking the addressee to comply with the requirements under section 653Q, 653R or 653U (as the case may be), the company is discharging its obligations prescribed by law and there is no question of *ultra vires*. If a company sends notices to persons for frivolous or vexatious purposes, the addressee may object and rely on the statutory defence under section 653ZA(2). Or else, if the notice is not validly given under section 653P or 653T or a requirement in the notice does not comply with section 653Q, 653R or 653U (as the case may be), then the requirement is not made under those sections and the addressee would not be under any obligation under those sections or section 653ZA to comply with the requirement.