

Response to Further Comments
made by the Hong Kong Society of Accountants

Part 1 - Supplementary Points

Use of the terms "audit" and "auditor"

- We note the comments on the use of the word "audit" in Clause 37 of the Electronic Transactions Bill. We shall propose Committee Stage Amendments to amend Clause 37(1) and (2) to remove the reference to "audit". Instead, we shall make reference to a report prepared for the purpose of assessing whether the recognised certification authority has complied with the provisions of the Bill applicable to a recognised certification authority and the code of practice for recognised certification authorities to be issued by the Director of Information Technology Services.
- We shall make similar changes when we revise the code of practice for recognised certification authorities in the light of the comments received in the public consultation exercise.

Scope of the report under Clause 19 and "audit" under Clause 37

- We note the comments made on the code of practice for recognised certification authorities in respect of the scope of the report required to be furnished by an applicant to become a recognised certification authority and the person required to prepare such a report. We shall revise the code to address these matters in the light of the comments received in the public consultation exercise.
- We shall propose a Committee Stage Amendment to amend Clause 19(3)(b) of the Bill to the effect that an applicant must furnish a report which assesses the capability of the applicant to comply. We shall also revise the code of practice for recognised certification authorities accordingly in the light of comments made by the HKSA.

Clause 20: Overlapping requirement of the Ordinance and the Code of Practice

- We note the comments in respect of overlap and repetition between the Bill and the draft code of practice. We shall revise the draft code to address these matters in the light of the comments received in the public consultation but we do not consider that changes to the Bill are necessary.

Security protection requirements

- We note the comments on the definition of "trustworthy system" and shall propose a Committee Stage Amendment to replace "generally accepted security procedures" by "generally accepted security principles".
- The current definition of "trustworthy system" already allows new security protection arrangements, as and when they are developed, to be taken into account when the assessment is to be made on whether a trustworthy system is used.

Taxation implications

- We note the comments on the potential tax implications of electronic commerce. The current source-based taxation system in Hong Kong is capable of taxing the profits of electronic commerce transactions that arise in Hong Kong. Under the Inland Revenue Ordinance (Cap. 112), it is the substance of the business transactions which determines the liability to profits tax. This applies equally well to transactions conducted by conventional or electronic means.
- The determination of whether a place of business has the closest relationship to the underlying transaction is essentially a matter of fact to be decided having regard to the circumstances of the case.

Part 2 - Response to the Administration's comments on HKSA's submission

General considerations

- We note the further comments made on Clause 15 of the Bill. Clause 15 is essential in addressing situations where under certain rules of law, in addition to the requirement to provide, present or retain information or to provide signature, there are other requirements which may not be electronically met by the transacting parties. In such cases, Clause 15 of the Bill preserves the status quo and the original legislative intent of these rules of law and clarifies that Clauses 5, 6, 7 or 8 of the Bill does not apply to these rules of law. Without the operation of Clause 15, there will be uncertainty as to whether Clauses 5, 6, 7 or 8 of the Bill should apply in such circumstances.
- We have advised that we shall propose a Committee Stage Amendment to Clause 16 of the Bill to address the point made by the Bar Association and Horvath & Giles and clarify that the clause is not intended to preclude an offeror from prescribing the mode of communicating acceptance.

More detailed points

Interpretation

Definition of "trustworthy system"

- We note the comments that further guidance should be given to the test of reasonableness under the definition of "trustworthy system". The Director of Information Technology Services will consider issuing general guidelines for such purposes.
- We note the comments that the drafting of different clauses of the Bill had made reference to different legislation elsewhere. We consider it very useful to draw the experience of legislative work carried out in different places in drafting the Electronic Transactions Bill. This enables us to put together a set of arrangements that most suit local circumstances having regard to best practices elsewhere. We do not agree that the making of

reference to different legislation has affected the overall consistency and integrity of the Bill.

Clause 7

- We note the comments on Clause 7 of the Bill. We have cited the examples of legislation on electronic transactions elsewhere which adopt similar provisions as ours. We have not come across other legislation which have adopted more specific provisions. We consider it prudent to adopt the current version for the time being and review the situation when suitable standards emerge with the development of electronic commerce, and use these standards as guidance. However, our view remains that such detailed standards should not be stipulated in the law.

Clause 11

- It is the intention that we will make the order under Clause 11 of the Bill to deal only with the submission of electronic information under various rules of law to Government bodies. It is not appropriate for Government to stipulate the format and procedure if the rule of law concerns the submission of information by one party to another party and both are non-Government bodies. We have advised that we shall propose a Committee Stage Amendment to provide that in such cases, it is for the two parties concerned to decide by agreement as to whether the information should be provided electronically.
- We note the point raised on consultation with interested parties. When we seek the advice of individual bureaux and departments on the format and procedure which should be adopted for the receipt of electronic information under various rules of law that fall within their purview, we shall ask the bureaux and departments to consult the relevant parties within their contacts which are likely to be affected by the setting of format and procedure for electronic submission under these rules of law as appropriate.

Clause 18

- We note the comments on the reference to "designating an information system" in Clause 18 of the Bill. We do not consider that there would be confusion between "an information system" and "an element in an information system" as the current definition of "information system" under Clause 2 of the Bill clearly does not cover "an element of an information system".
- We shall propose a Committee Stage Amendment to replace "comes to the attention of" by "comes to the knowledge of" in Clause 18(2)(a)(ii) of the Bill.

Clause 19

- We have explained in our earlier response why we consider a voluntary recognition scheme preferable to a mandatory licensing scheme.
- On Clause 19(3)(b), we have noted HKSA's comments and shall improve on the code of practice in this regard in the light of comments received during the public consultation.
- We shall propose a Committee Stage Amendment to confine the use of the waiver in Clause 19(4) of the Bill in respect of requirements for application as a recognised certification authority only to situations which facilitates cross-recognition of certification authorities between Hong Kong and other places.

Clause 29

- Being a Government department, the Hongkong Post, in carrying out its functions as a recognised certification authority, will comply with the requirements of the Electronic Transactions Bill that relate to recognised certification authorities (except Part VII concerning recognition of certification authorities and certificates by the Director) and the code of practice to be issued by the Director of Information Technology Services for recognised certification authorities. We do not anticipate that it will act in a way that is contrary to public interest.

Clauses 35 and 38 - 39

- We will take account of the views of the Hong Kong Society of Accountants when we revise the code in the light of comments received in the public consultation exercise.

Clause 41(2)(a)

- We note the comment on Clause 41(2)(a), the construction of which is commonly found in other secrecy provisions in existing legislation. The objective of these provisions is to address the practical need to disclose information for the purposes of performing or assisting in the performance of a function under or for the purposes of the concerned legislation. We do not consider the provision broad and vague.