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**FINANCIAL SERVICES AND
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Clerks to Bills Committee
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central, Hong Kong
(Attn: Ms Rosalind Ma)

21 October 2009

Dear Ms Ma,

**Bills Committee on Inland Revenue (Amendment)(No. 3) Bill 2009
Follow-up to meeting on 8 October 2009**

I refer to your letter dated 9 October 2009 and attach as requested –

- (a) a paper (at Annex A) setting out safeguards incorporated in comprehensive avoidance of double taxation agreements (CDTAs) in respect of the scope of information exchange and the usage of information exchanged;
- (b) a paper containing the proposed rules to be made under section 49(6) of the Inland Revenue Ordinance (Cap. 112) (at Annex B) which would be put in place domestic safeguards;
- (c) extract of the draft Departmental Interpretation and Practice Note (at Annex C), setting out the procedural safeguards that the Inland

Revenue Department must adopt in processing exchange of information requests; and

- (d) a table setting out the Administration's written responses (at Annex D) to the submissions made by various organizations.

Yours sincerely,

(Joan Hung)
for Secretary for Financial Services
and the Treasury

Annex A

Safeguards incorporated in CDTAs in respect of the scope of information exchange and the usage of information exchanged

The model text of the Organisation for Economic Cooperation and Development (OECD) 2004 version of Exchange of Information (EoI) Article (the OECD Model Article) (Enclosure) has stipulated stringent safeguards to protect an individual's right to privacy and the confidentiality of information exchanged. We would adopt the international standard as stipulated in the OECD Model Article in our CDTAs and would seek to include additional protection measures, where permissible by the standard. The OECD safeguards and our modifications are explained in the ensuing paragraphs.

Scope of information exchange

2. Under Paragraph 1 of the OECD Model Article, the relevant authority of the requesting party must satisfy the Inland Revenue Department (IRD) that the information it requests is “foreseeably relevant” for the carrying out of the CDTAs or to the administration or enforcement of its local tax laws. This is a safeguard against “fishing expeditions”.

3. Paragraph 1 of the OECD Model Article allows information exchange in respect of “taxes of every kind and description” imposed by a contracting party. However, we will seek to confine the scope of information exchange to “taxes covered by the Agreement” (i.e. income taxes as stated in Article 2 of the CDTA). Such modification is allowable under the OECD standard.

Confidentiality and usage of information exchanged

4. Paragraph 2 of the OECD Model Article provides safeguards for the confidentiality of information exchanged. It requires that –

- (a) the information exchanged shall be treated as secret information under the domestic laws of the requesting party;
- (b) the information shall be disclosed only to persons or authorities (or

their oversight) concerned with the collection or assessment of taxes, or the enforcement, prosecution or determination of appeals in relation to taxes; and

- (c) the requesting party shall only use the information provided for the purposes specified in that paragraph (i.e. for tax purposes only).

5. In adopting these safeguards in our CDTAs, we will seek to confine disclosure of information to the tax authorities but not their oversight body (as mentioned in paragraph 4(b) above), and add a provision either in the agreement or in its protocol to explicitly state that the information shall not be disclosed to any third jurisdiction. These modifications do not deviate from the OECD standard.

Circumstances where there would be no obligation to supply information

6. Paragraph 3 of the OECD Model Article stipulates that a contracting party has no obligation to –

- (a) carry out information exchange measures at variance with its domestic laws and practices;
- (b) provide information not obtainable under its domestic law; or
- (c) supply information which would disclose any trade, business and other secrets, or which would be contrary to public policy.

We will adopt these safeguards in full.

No retrospective effect

7. As governed by the commencement Article in a CDTA, all the provisions under the CDTA, including the EoI Article, shall have effect from a stipulated date as agreed. Accordingly, we will decline any request from our treaty partners to give retrospective effect of the EoI arrangement.

No automatic or spontaneous exchange

8. It is our policy to exchange information only upon request from our treaty partners in pursuance to a CDTA. We will not accept any treaty

obligation for automatic or spontaneous exchange and will seek to agree with our negotiation partners on adopting only this mode of information exchange. The agreed mode may be set out in the agreement, in its protocol, which forms part of the agreement, or in other documents of record (e.g. a Memorandum of Understanding between the two contracting parties), which although not being part of the agreement, have to be observed by both parties in carrying out the agreement. This is in line with the OECD standard as well as international practice.

Stipulating safeguards in the primary legislation

9. There were suggestions by some organizations and stakeholders that the EoI safeguards provided in the CDTAs should be stipulated in primary legislation. We do not agree that this would put Hong Kong in a stronger position in negotiating CDTAs. On the contrary, doing so would significantly weaken the Administration's position and reduce our flexibility in CDTA negotiations. It is because the OECD may from time to time revise the wording of individual safeguards for clarity or consistency. Many jurisdictions may also wish to adopt slightly different wording to meet their domestic needs. Such revised or alternative wording may not affect the real effect of the safeguards. However, if the safeguards are set out in primary legislation, we may need to amend the main ordinance every time before we can accommodate any slight change proposed by our negotiation partners. This rigidity will severely reduce our attractiveness as a treaty partner, and will affect our progress in complying with the prevailing international standard and in expanding our CDTA network. We are not aware of any jurisdiction incorporating EoI safeguards in CDTAs in their primary legislation. Our framework is in line with general international practice.

10. We consider that setting out EoI safeguards in individual CDTAs provides sufficient protection because each CDTA would need to be implemented by a subsidiary legislation to be passed by the Legislative Council (LegCo). The safeguards are already fully adopted in all the 5 CDTAs that are effective as subsidiary legislation under the same two-tier structure in our present legislative framework. The arrangement has been working well, with no complaints whatsoever from any stakeholder in the past ten years. Although the Administration is given more negotiation flexibility, it would be rather inconceivable that the Administration would deviate from our well-established precedents, go against accepted international standards or water down

publicly-pledged safeguard in our CDTA negotiations, knowing that each CDTA will be scrutinised by the LegCo and perused by tax professionals.

11. To facilitate Member's scrutiny of future subsidiary legislations for CDTAs, we will specifically list out in our submissions to LegCo the safeguards adopted in individual CDTAs.

2004 OECD MODEL

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

- (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

**Outline of the Proposed Safeguards to be covered by the
Inland Revenue (Disclosure of Information) Rules**

If the Inland Revenue (Amendment)(No. 3) Bill 2009 is enacted, the Administration will propose to make a set of rules, tentatively known as the Inland Revenue (Disclosure of Information) Rules (the Rules) under section 49(6) of the Inland Revenue Ordinance (Cap. 112) (the Ordinance) to stipulate the level of authority required to approve a request for disclosure of information (disclosure request) made under a Comprehensive Avoidance of Double Taxation Agreement (CDTA) and the notification procedure. The main provisions of the Rules are set out in the ensuing paragraphs.

Commencement

2. The Rules will come into operation on the day appointed for the commencement of the Inland Revenue (Amendment)(No. 3) Ordinance 2009.

Approval of Disclosure Requests

3. A disclosure request may be approved only by the Commissioner of Inland Revenue (the Commissioner), or any officer of the Inland Revenue Department not below the rank of chief assessor authorized in writing by the Commissioner personally.

4. The person mentioned in paragraph 3 above may approve a disclosure request only if he / she is personally satisfied that the request complies with the following criteria -

- (a) the provisions of the relevant CDTAs;
- (b) any procedures applicable to the request that may be specified in any instrument that amends or supplements the relevant arrangements; and
- (c) any other procedures that may be specified by the Commissioner.

Notification of Proposed Disclosure

5. With the exceptions set out in paragraphs 7 and 8 below, the Commissioner must, before any information is disclosed, by notice in writing given to the person who is the subject of the request, –

- (a) notify the person of the request and the nature of the information sought;
- (b) notify the person that he / she may, in writing, within 14 days after the notice is given, request a copy of the information that the Commissioner is prepared to disclose to the requesting government;
- (c) notify the person that he / she may request the Commissioner to amend the information on the grounds that –
 - i. the information does not relate to the person; or
 - ii. the information is factually incorrect,within 14 days after a copy of the information is given by the Commissioner under paragraph 5(b) above.

6. The request for correction of information in paragraph 5(c) above must be made in writing, with grounds for the request and accompanied by any supporting documentary evidence.

7. Notification is not required if the Commissioner has reasonable grounds to believe that –

- (a) all the addresses of the person known to the Commissioner are inadequate for the purpose of giving the notification; or
- (b) the notification is likely to undermine the chance of success of the investigation in relation to which the request is made.

8. If the Commissioner is under a tight time constraint to disclose the information to the requesting government and the failure of disclosing the information within the time constraint will likely frustrate the efforts of the requesting government in enforcing its tax laws, prior notification is not required but the Commissioner must notify the person at the same time when the information is disclosed. The review procedures set out in paragraphs 9 to 11 below will continue to apply in this scenario.

Request to Commissioner for Amendments

9. If the person makes a request for amendments of the information, the Commissioner may fully approve, partially approve or refuse the request. The Commissioner has to notify the person of the Commissioner's decision, with reasons of the refusal (if applicable) and a copy of the information that has been so amended (if applicable).

Request to Financial Secretary for Directions

10. Where the Commissioner partially approves or refuses a request for amendments under paragraph 9, the person may request the Financial Secretary to direct the Commissioner to make the amendments. The request has to be made in writing, within 14 days after the Commissioner's notice in paragraph 9.

11. The Financial Secretary may fully approve, partially approve or refuse the request and his decision shall be final. The Financial Secretary has to notify the person of his decision, with reasons of the refusal (if applicable) and a copy of the information that has been so amended (if applicable).

Draft

**Departmental Interpretation and Practice Notes
Implementation Details of Exchange of Information Provisions under
Comprehensive Double Taxation Agreements**

(Extract of the Part on “Administrative Guidelines”)

Approval of a Disclosure Request

Under section * of the *Inland Revenue (Disclosure of Information) Rules* (Disclosure Rules), a request for disclosure of information (disclosure request) made under an Exchange of Information Article (EoI Article) in a comprehensive agreement for the avoidance of double taxation (CDTA) may only be approved by the Commissioner personally, or an officer of the Inland Revenue Department (IRD) not below the rank of chief assessor authorized in writing by the Commissioner (authorized officer) personally. In this connection, the Commissioner has authorized the Chief Assessor (Special Duties) [CA(SD)] as an authorized officer.

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

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

The CA(SD) must review the provisions of the relevant CDTA to see whether the provisions relating to the disclosure request are fully complied with. Typically, he will review the provisions stipulated in the Exchange of Information Article, the Taxes Covered Article (Article 2) and the Protocol to the agreement (if any). For example, he will have to ensure that the information being requested is “foreseeably relevant” for carrying out the provisions of the agreement or to the administration or enforcement of the domestic laws of the requesting party, that the information concerns taxes covered by Article 2, that the obtaining of the information is not at variance with the laws and administrative practice of Hong Kong, that the information is obtainable under the laws or in the normal course of the administration of Hong Kong, and that the information would not disclose any trade or business secrets.

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

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

- (c) any procedures applicable to the request that may be specified by the Commissioner having regard to generally accepted international practice in exchanging information concerning tax***

Having regard to generally accepted international practice, especially that recommended by the Organisation for Economic Co-operation and Development (OECD), the Commissioner has specified the procedures (as per **Appendix**) with which a disclosure request must comply, insofar as such procedures are not covered by or inconsistent with any provisions or procedures that may be specified in paragraph (a) or (b) above.

Standard Response Time

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

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

Procedures specified by the Commissioner with which a Disclosure Request must comply

1. The request must be in writing and made by the competent authority of the requesting party as set out in the relevant CDTA.
2. Unless otherwise agreed between the parties, the request must be in the English language.
3. The request must contain the following information/confirmation –
 - (a) the reference to the CDTA, the legal basis of which exchanges of information for tax purposes may take place and that the request is in conformity with the provisions of the CDTA signed with the requesting party;
 - (b) the identity of the person(s) in relation to whom the information is requested (“subject person”): name, date of birth (for individuals), marital status (if relevant), address (including email or internet addresses, if known) and Hong Kong Identity Card number (for individuals), if applicable or business registration number or certificate of incorporation number in the case of a legal entity (if known);
 - (c) the information requested, its nature, the tax purpose for which the information is sought, the reasons for the request. Specify the information that may be pertinent (for example, invoices, contracts);
 - (d) the grounds for believing that the information requested is held in Hong Kong or is in the possession or control of a person in Hong Kong;
 - (e) any other relevant background information including the origin of the enquiry, the form in which the requesting party wishes to receive the information from Hong Kong;
 - (f) the taxes concerned, the taxable periods under examination (day, month, year they begin and end), and the tax periods for which information is requested (if they differ from the years examined give the reasons why);

- (g) the identity of the person(s), other than the subject person, from whom the information is to be sought (“third party”): name, address (including email or internet addresses, if known) and to the extent known, the Hong Kong Identity Card number (for individuals) or business registration number or certificate of incorporation number in the case of a legal entity, their relationship between the person(s) involved;
- (h) a statement confirming that the competent authority of the requesting party has pursued all means available in its own territory to obtain the information except those that would give rise to disproportionate difficulties;
- (i) a statement that the request is in conformity with the laws and administrative practices of the requesting party, that if the requested information was within the jurisdiction of the requesting party then the competent authority would be able to obtain the information under the laws of the requesting party or in the normal course of administrative practice and that it is in conformity with the CDTA based on which the information exchange takes place;
- (j) if the information requested involves a payment or transaction via an intermediary, provide the name, addresses and Hong Kong Identity Card number or Business Registration number (if known) of the intermediary, including, if known, the name and address of the bank branch as well as the bank account number when bank information is requested;
- (k) the stage of the procedure in the requesting party, the issues identified and whether the investigation is of a civil or administrative nature only or may also have criminal consequences. Where references are made to domestic law it is useful to provide some explanation of the law;
- (l) the urgency of the reply. State the reasons for the urgency and, if applicable, indicate the date after which the information may no longer be useful;
- (m) whether there are reasons for avoiding notification of the taxpayer under examination or investigation (e.g. if notification may endanger the investigation);

- (n) if copies of documents or bank records are requested, what type of authentication is necessary, if any; and
 - (o) if the information is likely to be used in a court proceeding and the applicable rules of evidence require the information to be in a certain form, the form should be indicated in the request.
4. The Commissioner may add, amend or remove any of the procedures herein, either generally or in any particular case, as he or she sees fit.

**Summary of views submitted by various organizations on the
Inland Revenue (Amendment) (No. 3) Bill 2009
(as of 21 October 2009)**

(I) General views on the Bill		
Organizations	Views/Concerns	Response by the Administration
SCAA BCC ICC	<p><u>Negotiations of comprehensive avoidance of double taxation agreement (CDTA)</u></p> <ul style="list-style-type: none">● The Government should strive for the best benefits of Hong Kong when entering into CDATAs, such as minimizing the withholding tax on interests, dividends etc; allowing for corresponding adjustments in the event of transfer pricing adjustments being made by the counter party and striking for a well defined "permanent establishment" to benefit Hong Kong business operating overseas.● Updated reports on CDTA negotiations should be provided to the public. The Administration should provide the Legislative Council (LegCo) with a progress report on the negotiation and signing of CDATAs.	<ul style="list-style-type: none">● Agreed. It is the Government's policy to obtain the best benefits for Hong Kong as far as possible when entering into CDATAs.● Information on scheduled negotiations and CDATAs concluded is posted on the website of the Inland Revenue Department (IRD). We will make public announcement when new CDATAs are signed and when individual CDATAs are submitted to LegCo for scrutiny.
	<p><u>Adopting the Organization for Economic Cooperation and Development (OECD) 2004 version of the Exchange of Information (EoI) article</u></p> <ul style="list-style-type: none">● The majority of organizations indicate support for Hong Kong to adopt the OECD 2004 version of EoI article.	<ul style="list-style-type: none">● Noted.

<p>HKSMEA LRI</p>	<ul style="list-style-type: none"> ● Object to the proposed amendments to adopt the OECD 2004 version of EoI article. HKSMEA opines that the existing provisions of IRO were adequate for avoidance of double taxation and deterrence of tax avoidance or tax evasion. The proposed amendments will hamper investors' confidence in Hong Kong. LRI considers that Hong Kong should not yield to international pressure by making legislative amendments to change the EoI practices that have been working smoothly in the past years. 	<ul style="list-style-type: none"> ● Double taxation impedes trade, investment and the flow of talent among economies. CDTA would increase the competitiveness of Hong Kong as an international business centre as it gives certainty to the tax liability of the investors and the traders in both economies and will normally result in reduced withholding tax rates on passive incomes such as dividends, royalties and interest. ● The current legal constraint on IRD's information gathering power has been a major obstacle to our CDTA negotiations because most economies have adopted the OECD 2004 version of EoI article. This constraint has reduced the number of our potential CDTA partners, and restricted the progress of our negotiations. To further expand our CDTA network, it is necessary to take forward the proposed legislative amendment. ● Compared with other tax jurisdictions that have once been put on the "Grey list" surveyed by the OECD Global Forum, Hong Kong lags far behind in implementing the OECD standard on EoI due to our legal constraint. Jurisdictions like Singapore, Switzerland, Austria have taken swift actions to enter into compliant agreements with other OECD countries. Hong Kong will risk being subject to international sanction or other punitive measures in light of the impending close monitoring and peer group review processes recently set up by OECD's Global Forum.
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AmCham JLCT	<ul style="list-style-type: none"> ● Some organizations call for early enactment of the Bill. This will be in the interest of Hong Kong as certain jurisdictions will impose punitive measures against Hong Kong if it cannot catch up with the latest international standard for EoI. Moreover, OECD has set a target for each jurisdiction to enter into at least 12 tax agreements which conform to the 2004 version of EoI article and Hong Kong is currently lagging behind on this issue. 	<ul style="list-style-type: none"> ● Agreed.
Bar	<ul style="list-style-type: none"> ● The Bar is concerned that the liberalization will compromise the confidentiality of taxpayers' information and thus may undermine investors' confidence in Hong Kong. The taxation system of Hong Kong is territorial-based. Moreover, the potential erosion of personal privacy lead the Bar to the view that a sufficient case has not been made out to adopt OECD 2004 version of EoI article. 	<ul style="list-style-type: none"> ● Double taxation impedes trade, investment and the flow of talent among economies. Although we have a territorial-based taxation system in Hong Kong, CDTAs help clarify jurisdictions' taxing rights and will normally result in reduced withholding tax rates on passive incomes such as dividends, royalties and interest. A wider CDTA network will increase investors' confidence in Hong Kong. ● In view of the heightened international pressure on tax havens, it is important that Hong Kong follows international EoI standard to avoid being a target of countermeasures against tax havens. ● A balance has to be struck between the protection of privacy and the interests of the community at large. We will adopt sufficient safeguards to protect the privacy of the concerned persons and the confidentiality of the information exchanged.

<p>CGCC ICC</p> <p>ICC</p>	<p><u>Application of the Bill</u></p> <ul style="list-style-type: none"> ● The Bill should not take retrospective effect upon its implementation, i.e. it should not be applicable to transactions or actions of any person before the enactment of the Bill. ● The Administration should clarify whether the seven years' limitation of action will be applicable in respect of the requirement of the Bill. 	<ul style="list-style-type: none"> ● Agreed. EoI will not take place retrospectively and will only apply to information coming into existence after the CDTAs have been signed. ● Yes, we will decline any request for records that go beyond the 7-year time limit, which is the statutory requirement for record-keeping under the IRO.
<p>CGCC HKAB KPMG</p> <p>SCAA</p>	<p><u>Resources implications</u></p> <ul style="list-style-type: none"> ● IRD should be provided with the resources to handle the additional requests for information when Hong Kong adopts the OECD 2004 version of EoI article. The Government should work out the estimated additional administrative costs to be incurred as a result of an increase in requests for EoI. ● As the adoption of the OECD 2004 version of EoI article is expected to increase the number of CDTAs and create administrative burden on Hong Kong, the requesting party should bear the administrative cost of the other party for information collection. 	<ul style="list-style-type: none"> ● According to international experience, the number of EoI requests may not be significant. We therefore do not think the proposal will bring substantial administrative burden to IRD. IRD will deploy necessary resources as appropriate. ● According to the OECD guidelines, the contracting parties may agree upon rules regarding the costs of obtaining and providing information in response to a request. We will consider such a need on a case by case basis.

(II) Safeguards to protect right to privacy and confidentiality of the information exchanged		
Organizations	Views/Concerns	Response by the Administration
HKCMA REDA	<ul style="list-style-type: none"> ● The most prudent safeguards should be put in place to ensure protection of information confidentiality and an individual's right to privacy. HKCMA considers the safeguards proposed by the Administration adequate to serve such purpose. 	<ul style="list-style-type: none"> ● Noted.
JLCT	<ul style="list-style-type: none"> ● Agrees with the safeguards proposed by the Administration in general. 	<ul style="list-style-type: none"> ● Noted.
HKAB	<ul style="list-style-type: none"> ● Hong Kong should exclude the provision under OECD 2004 version of EoI article that overrides laws relating to banking secrecy/client confidentiality. Where the inclusion is necessary for any specific CDTA, its operation should be restricted to investigation of criminal cases by the requesting party related to tax fraud. 	<ul style="list-style-type: none"> ● Under paragraph 5 of the OECD 2004 version of EoI article, a contracting party cannot refuse to disclose information because of the restrictions of its domestic bank secrecy law. Hong Kong has no bank secrecy law and so far has no problem in observing this provision. All jurisdictions which have previously made reservations to the provision, including Austria and Switzerland, have withdrawn their reservations. We will not meet the OECD standard if we exclude this provision or restrict its operation.
BCC HKICPA HKTA JLCT PWC	<ul style="list-style-type: none"> ● The safeguards in terms of the scope, use and confidentiality of the information exchanged should be clearly stipulated in the primary legislation. Some deputations consider that safeguards in terms of scope and use of information exchanged should be part of the legislation (say, as a schedule to the Inland Revenue Ordinance (IRO) (Cap. 112)) or subsidiary legislation, which should be considered concurrently with the Bill. 	<ul style="list-style-type: none"> ● Please refer to paragraphs 9 to 11 of <u>Annex A</u>.

E&Y	<ul style="list-style-type: none"> ● Providing the restriction in terms of the types of information to be exchanged in the primary legislation will go against the explicit terms of the 2004 version of EoI article and lead to inflexibility. It is also not desirable to provide for the safeguards to protect information confidentiality and privacy in the primary legislation. 	<ul style="list-style-type: none"> ● Agreed.
<p data-bbox="192 469 501 916">HKTA STEP</p> <p data-bbox="192 916 501 1209">BCC ICC</p>	<ul style="list-style-type: none"> ● Hong Kong should, like Singapore, have a non-official body (judicial or quasi-judicial) to supervise EoI requests. ● The handling of requests for information and safeguard procedures, should be subject to regular reviews (e.g. by an independent body), findings of the reviews should be made public and reported to LegCo. 	<ul style="list-style-type: none"> ● Singapore has bank secrecy act and court order is required for obtaining such restricted information. The proposed amendments under its current EoI Bill simply keep this court process for the restricted information only. The court process for information gathering does not apply to all other information for EoI purposes. ● As Hong Kong does not have bank secrecy law, introducing judicial sanction for collecting bank information will be seen as back-tracking on tax transparency. ● Without disclosing personal information, we may report the implementation of the EoI Article in response to LegCo's request. In any case, the handling of safeguard procedures will be monitored by the taxpayers, the business community and professional bodies concerned with immense interest. Therefore, regular reviews by an independent body would seem unnecessary.
HKTA STEP	<ul style="list-style-type: none"> ● There is a cause for concern that material held in Hong Kong that represent legal advice of persons other than Hong Kong solicitors or registered foreign lawyers may not qualify for express privilege under IRO for the purpose of collection of information for 	<ul style="list-style-type: none"> ● No existing protection of legal professional privilege will be affected by the current exercise.

ICC	<p>EoI purposes. Consideration must be given to the extension of legal professional privilege to cover international advice.</p> <ul style="list-style-type: none"> ● The Administration should confirm that contents of the OECD 2004 version of EoI article and the enactment of the Bill do not affect the legal privilege of a person in the relationship with his lawyer. 	<ul style="list-style-type: none"> ● Same as above.
CPA(A) HKAB HKICPA	<p><u>Safeguards to be incorporated in CDTAs or documents of record</u></p> <ul style="list-style-type: none"> ● In order to prevent "fishing expeditions", the information to be exchanged should cover "only information which is reasonably necessary" for use by the requesting party for the purpose of taxation. CPA(A) considers that the Inland Revenue Department (IRD) should collect information from persons concerned only if the requested information are "necessary" and "foreseeably relevant". HKAB supports restricting information requests to those "necessary" but not "foreseeably relevant" to avoid any doubts in the interpretation of the restriction. 	<ul style="list-style-type: none"> ● As a safeguard against "fishing expeditions", the relevant authority of the requesting party must satisfy IRD that the information it requests is "necessary" or "foreseeably relevant" for the carrying out of the CDTA or the administration or enforcement of its local tax laws. ● As we understand from OECD, the organisation tends to recommend jurisdictions to use the term "foreseeably relevant" instead of "necessary" as there is no clear definition on the later, and hence more controversy would arise, while the former can already provide adequate safeguards against "fishing expeditions".
ACCA BCC HKFI ICC	<ul style="list-style-type: none"> ● Decision on whether to accede to an EoI request should be made by senior directorate officers of IRD, i.e. directorate officer or above. Some deputations consider that the decision should be made by an Assistant Commissioner of IRD, instead of a directorate officer only. 	<ul style="list-style-type: none"> ● The decision-making process on whether to accede to an EoI request would be an objective one based on the information provided by the requesting party and in accordance with laid-down criteria. The level of responsibilities required and the scope of duties involved are also comparable with those other responsibilities and duties specified in the IRO that require the personal

		attention of a Chief Assessor. The appointment of an officer at the Chief Assessor rank to make such decisions is appropriate in the circumstances.
FHKI HKAB HKGC HKICPA JLCT KPMG REDA FHKI	<ul style="list-style-type: none"> ● Restriction on disclosure of the information exchanged to a third party should be expressly set out in all CDTAs. In the course of CDTA negotiations, Hong Kong should insist on an explicit clarification that the contracting party would not share the information which it may receive with another country with whom it may have information sharing obligations. HKGC suggests Hong Kong may terminate the exchange of information in case of a violation of the agreement on not sharing the information exchanged to a third party. ● The Administration should set out concrete measures to prevent abuse of the information exchanged by the requesting party. ● Only tax information related to income tax should be provided to the requesting party and the restriction should be clearly set out in the legislation. Exchange of information under CDTAs should not have retrospective effect, i.e. only tax information after the provisions of the relevant CDTA came into effect should be provided to the requesting party. 	<ul style="list-style-type: none"> ● Agreed. We will seek the explicit confirmation of our treaty partners that the information exchanged will not be disclosed to a third party, and will set out this confirmation in the CDTAs. ● We will impose relevant safeguards to protect the confidentiality of information exchanged. For example, we will include in the CDTA that the information shall be used only for the purpose specified in the request and the information shall not be disclosed to any third party. ● The IRO restricts the types of tax covered by a CDTA to income tax or any tax of a similar character. It is our policy to enter into an EoI article that only covers the types of tax covered by the corresponding CDTA. ● Agreed. EoI will not take place retrospectively, and it will not involve information coming into existence before the CDTAs are signed.

<p>JLCT TIHK</p>	<ul style="list-style-type: none"> ● Hong Kong may not be considered by the international community to have fully complied with the latest international EoI standard even with the implementation of Bill, as Hong Kong is only prepared to exchange information regarding income tax. JLCT is concerned that the reference to income taxes as "including profits tax, salaries tax and property tax" by the Administration may suggest that it is contemplating that other taxes can be brought within the framework of a CDTA. This should be clarified. 	<ul style="list-style-type: none"> ● Our policy is that only information on income taxes or any tax of a similar character imposed by the laws of our treaty partner will be exchanged. In Hong Kong, they refer to profits tax, salaries tax and property tax. But in other jurisdictions, they may include less commonly known income-based taxes. Examples include inhabitant tax (in Japan) and religious taxes (common in the Middle East countries). ● The approach to restrict the coverage of the EoI article to income taxes only is acceptable to the OECD. According to OECD's commentary on the EoI Article, tax jurisdictions are free to restrict the scope of information exchange under EoI Article to the taxes covered by the CDTA.
<p>PCPD</p>	<p><u>Domestic safeguards in subsidiary legislation</u></p> <ul style="list-style-type: none"> ● PCPD wishes to be consulted at the drafting stage of the relevant subsidiary legislation 	<ul style="list-style-type: none"> ● We will provide the framework of the subsidiary legislation to the Bills Committee.
<p>JLCT</p>	<ul style="list-style-type: none"> ● Concerns about the interpretation of "exceptional circumstance" under which IRD would not notify the person concerned the information it is going to transmit to the requesting party. JLCT considers the exception is expressed broadly and subject to potentially wide interpretation by the Hong Kong authorities. 	<ul style="list-style-type: none"> ● We will set out clearly in the subsidiary legislation what the "exceptional circumstances" are. We will provide the framework of the subsidiary legislation to the Bills Committee.
<p>ACCA DTT HKICPA ICC</p>	<ul style="list-style-type: none"> ● The "exceptional circumstances" should be clearly defined. There is also a need to clarify the reference to where notification would "unduly delay" the effective exchange of information. The 	<ul style="list-style-type: none"> ● We will set out clearly in the subsidiary legislation what the "exceptional circumstances" are and will provide the framework of the subsidiary legislation to the Bills Committee. As these circumstances will be set out

PWC	interpretation of "exceptional circumstances" or will "unduly delay" should be provide in subsidiary legislation and an independent body, such as the Board of Review, should oversee and determine whether the circumstances are "exceptional" or will cause "undue delay".	clearly in the law and are objective in nature, we suggest that the decision can be made by IRD.
ACCA CPA(A) PWC REDA	<ul style="list-style-type: none"> ● The notification to the person concerned should be made prior to the exchange of information. The person concerned should have an opportunity to object prior to the exchange. 	<ul style="list-style-type: none"> ● Prior notification will be made to the person under normal circumstances and the person can request a copy of the information to be sent out. If IRD is under a tight time limit to disclose the information to the requesting government and the failure of disclosing the information within the time limit will likely frustrate the efforts of the requesting government in enforcing its tax laws, IRD will notify the person at the same time when the information is disclosed. The person will similarly have an opportunity to submit request for correction of the information to the Commissioner of Inland Revenue (CIR) or to the Financial Secretary (FS), if an consensus with CIR cannot be reached. In case there is a correction, we will inform the requesting party accordingly.
BCC HKTA PWC HKGC	<ul style="list-style-type: none"> ● If the person concerned is based outside Hong Kong, whether it is possible for IRD to give prior notification and provide the information that it is going to transmit to the requesting party? If not, consideration should be given to the potentially harmful consequences of Hong Kong discriminating against foreign businesses/individuals. HKGC's view that IRD should have no difficulty in contacting the person concerned, wherever they may reside, if they are holding accounts in Hong Kong. 	<ul style="list-style-type: none"> ● We will give notification to the person concerned even if he is outside Hong Kong, as long as we have a valid address.

<p>ACCA AmCham DTT ICC KPMG PWC TIHK</p> <p>ACCA CPA(A)</p>	<ul style="list-style-type: none"> ● If IRD refuses to accept a concerned person's proposed correction of information and the person seeks a review by a higher authority, an appeal panel/independent tribunal/the Board of Review (instead of the Financial Secretary as proposed by the Administration) should conduct the review. Some deputations consider that the review should not be limited to the accuracy but also the completeness of information, whether the information is within the scope of exchange under the respective CDTA and OECD 2004 version of EoI article. KPMG suggests that such review could be conducted by a District Judge as an alternative. ● A proper mechanism for objection and appeals should be available where taxpayers feel that their rights are being infringed by the exchange of information. CPA(A) opines that taxpayers should have the rights to refuse to submit information. 	<ul style="list-style-type: none"> ● We need to consider and balance all factors, including personal privacy, data confidentiality, the effective implementation of EoI, the commitment to tax transparency, and compliance with international treaty obligations. ● Under the present proposal, each EoI request will be approved by a directorate officer according to the proposed guidelines. CIR or her Deputy will check and personally sign off the reply to transmit the requested data. Unless exceptions apply, the person will be given a prior notice and he may ask for correction of any factual errors of the information to be disclosed. He may also request FS to review CIR's decision if his request for amendment is rejected. ● FS, as the oversight body under the law, will review the case impartially based on the submitted representations and other relevant information. As there are no complex legal or tax issues involved and his decision will not affect Hong Kong's revenue, FS should be in a position to make an unbiased decision. ● In any case, if a person thinks that IRD has not properly discharged its responsibility to ensure that the information requested is within the scope of the relevant CDTA or the law, he can seek challenge the Government's actions through the judicial system. ● OECD requires that a jurisdiction's internal procedures cannot unduly delay effective exchange. We may not be able to meet the standard 90-day response time set by the OECD if our review procedure takes too long.
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HKICPA	<ul style="list-style-type: none"> ● How IRD will proceed with a request for exchange of information where a decision is pending from a higher authority on a dispute regarding the accuracy of information. 	<ul style="list-style-type: none"> ● IRD will not send out the information until a final decision has been made.
HKICPA JLCT KPMG PWC STEP	<p><u>Procedural safeguards</u></p> <ul style="list-style-type: none"> ● Procedural safeguard should be incorporated in the primary legislation, preferably as a schedule to IRO, or in the subsidiary legislation, rather than in the form of a Departmental Interpretation and Practice Note (DIPN), which is not legally binding. PWC nevertheless considers that IRD should still issue a DIPN to provide practical guidelines on procedural matters, which should have thorough consultation with the taxpaying community before issuance. 	<ul style="list-style-type: none"> ● The DIPN does not provide additional safeguards. It simply sets out the procedures that IRD would follow to implement those safeguards stipulated in CDTAs and in the rules. We will provide a copy of the draft DIPN to the Bills Committee.

ICC	<ul style="list-style-type: none"> ● IRD will set out in the DIPN procedural safeguards that the requesting party should "confirm that it has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties". IRD should illustrate what are these "disproportionate difficulties". 	<ul style="list-style-type: none"> ● It will be for the requesting party to set out the disproportionate difficulties it would encounter. According to OECD, example may include, obtaining information from one supplier in the requested party may lead to the same information as seeking information from a large number of buyers in the applicant party.
ACCA BCC HKTA ICC JLCT LSHK PWC	<p><u>Public consultation on subsidiary legislation and DIPN</u></p> <ul style="list-style-type: none"> ● The Administration should provide the draft subsidiary legislation and DIPN, concurrently with Bill, for public review and comment. 	<ul style="list-style-type: none"> ● Agreed. We will provide the framework of the draft subsidiary legislation and a copy of the draft DIPN to the Bills Committee.
(III) Proposal to amend section 49 of IRO on double taxation arrangements (clause 3)		
Organizations	Views/Concerns	Response by the Administration
ICC	<ul style="list-style-type: none"> ● The Bill seems to provide the Government with more powers than what the OECD 2004 EoI article requires. The proposed section 49(1A) seems to override other ordinances. If the provisions in any other ordinances are inconsistent with the OECD 2004 EoI article, they should be separately amended. 	<ul style="list-style-type: none"> ● The phrase "despite anything in any enactment" in the proposed section 49(1A) is to ensure that as far as the current law and any subsequent legislation may be concerned, they would not inadvertently override the subsidiary legislation that implement the CDTA. For example, a CDTA allocates taxing rights between the two treaty partners. A company that would otherwise be subject to tax at a certain rate in Hong Kong under Hong Kong laws may be entitled to a lower rate (or not taxed at all) because of a piece of subsidiary legislation that implements a CDTA. In such a case, that piece of subsidiary legislation would take precedent.

<p>E&Y</p> <p>JLCT</p> <p>KPMG</p>	<ul style="list-style-type: none"> ● The word "expedient" in section 49(1A) should be replaced by "in the best interests of Hong Kong" to address concerns expressed by some quarters of the community that the Administration may sign a CDTA for the sake of expediency. ● The proposed section 49(1A) largely duplicates the existing section 49(1). It will be simpler to add the proposed subsection (b) to section 49(1) only. ● Consideration should be given to drafting consistency in using the word "despite" in the proposed section 49(1A)(a) but "notwithstanding" in the existing section 49(1). ● The proposed addition of section 49(1A) renders section 49(1) otiose. It is suggested that section 49 be amended by substituting the proposed section 49(1A) for section 49(1). 	<ul style="list-style-type: none"> ● The word "expedient" means "advantageous" and does not imply, whether in the existing s.49(1) or the new s.49(1A), that the decision of CE in C to give effect to a CDTA may be for the sake of expediency. ● A number of CDTAs have already been given effect by the Chief Executive in Council's orders made under the existing section 49(1). We consider that it will be clearer if we retain the existing section 49(1) for the existing CDTAs, and add a self-contained subsection to section 49 for CDTAs to be entered into after the enactment of the Bill. ● The words "notwithstanding" and "despite" have the same meaning in the context. As a matter of plain language, "notwithstanding" is now considered to be archaic, and "despite" is preferred over "notwithstanding". ● A number of CDTAs have already been given effect by the Chief Executive in Council's orders made under the existing section 49(1). We consider that it will be clearer if we retain the existing section 49(1) for the existing CDTAs, and add a self-contained subsection to section 49 for CDTAs to be entered into after the enactment of the Bill.
<p>HKICPA</p>	<ul style="list-style-type: none"> ● The proposed section 49(1A) should be made expressly subject to any qualification that may be incorporated in particular CDTAs, or rules under IRO, instead of couched in the proposed open-ended and unqualified terms. 	<ul style="list-style-type: none"> ● Where the Chief Executive in Council makes an order under the proposed section 49(1A) in respect of a CDTA, that CDTA will have effect subject to any qualification that may be incorporated in it, and the rules to be made by the Chief Executive in Council

	<ul style="list-style-type: none"> ● The term "charged" rather than "imposed" should be used in the proposed section 49(1A). ● Proposes to use "concerning tax charged by that territory" instead of "concerning tax of that territory" in the proposed section 49(1A)(b). 	<p>under section 49(6) will apply in relation to that CDTA.</p> <ul style="list-style-type: none"> ● We note that, in the Ordinance, "imposed" is generally used in relation to a kind of tax while "charged" is generally used in relation to an amount of tax. In the proposed section 49(1A), we prefer to retain the use of "imposed", which is also used in the 2004 version of EoI article. ● We consider that the use of "tax of a territory" (and "tax of that territory") in the Bill is concise and clear.
HKGC	<ul style="list-style-type: none"> ● The proposed section 49(1A)(b) is too vague and will empower the Government to revise the terms for exchange of information without necessarily consulting the public. 	<ul style="list-style-type: none"> ● Individual CDTAs will be implemented as subsidiary legislation subject to scrutiny of LegCo. We will set out clearly, in our future submissions on individual CDTAs to LegCo a list of safeguards incorporated.
(IV) Proposal to enable IRD to exercise the same power under section 51(4) of IRO to collect information concerning tax of a foreign territory for the purpose of EoI under a CDTA (clause 5)		
Organizations	Views/Concerns	Response by the Administration
ICC	<ul style="list-style-type: none"> ● In relation to the proposed section 51(4AA), the Administration should clarify if the information IRD collated for or transmitted to the requesting party will also be used in the administration of tax within Hong Kong's tax regime. 	<ul style="list-style-type: none"> ● Currently, IRD is empowered under the IRO to collect any information in regard to any matter which may affect any liability, etc. of any person under the IRO. IRD may use the information collected for the purpose of EoI and/ or for domestic tax purposes as appropriate. This will be set out in any notice issued by IRD requesting for information.
PCPD	<ul style="list-style-type: none"> ● The proposed section 51(4AA) is broadly phrased in that "full information" in regard to the matter may be collected without restrictions on the scope. It is appropriate to make explicit in the proposed section 	<ul style="list-style-type: none"> ● For the purposes of assessment and collection of tax, as well as prevention of tax avoidance and evasion, the Commissioner has customarily been given the power to obtain full information concerning the taxpayers from

	51(4AA) that "only information which is reasonably necessary" should be collected.	<p>all relevant parties. The proposed section 51(4AA) is merely an extension of such power to facilitate the collection of information for exchange purposes. It is not appropriate to make any changes to the wordings of the proposed section as suggested.</p> <ul style="list-style-type: none"> ● The approving officer for EoI request of IRD must first be satisfied that the information requested is "necessary" or "foreseeably relevant" before IRD will accede to the request and collect the required information.
(V) Proposal to amend the Personal Data (Privacy) Ordinance (Cap. 486) (PDO) to provide that "tax" includes a foreign tax covered by an EoI article under a CDTA (Clause 9)		
Organizations	Views/Concerns	Response by the Administration
PCPD	<ul style="list-style-type: none"> ● IRD must exercise caution in invoking the exemption for disclosure or transmission of personal data under section 58(2) of PDO. The personal data to be transmitted to overseas tax authorities should be limited to the extent necessary for fulfillment of the purpose of assessment and collection of tax of a territory under CDTA arrangements and that non-disclosure of the personal data would likely prejudice the purpose. 	<ul style="list-style-type: none"> ● Agreed.
HKICPA	<ul style="list-style-type: none"> ● Proposes to use "tax charged by" instead of "any tax of" in the proposed section 58(1A). 	<ul style="list-style-type: none"> ● We consider that the use of "tax of a territory" (and "tax of that territory") in the Bill is concise and clear.

Abbreviations for Organizations :

ACCA	Association of Chartered Certified Accountants of Hong Kong
AmCham	The American Chamber of Commerce in Hong Kong
Bar	Hong Kong Bar Association
BCC	The British Chamber of Commerce in Hong Kong
CGCC	The Chinese General Chamber of Commerce
CPA(A)	CPA Australia Limited
DTT	Deloitte Touche Tohmatsu
E&Y	Ernst & Young Tax Services Limited
FHKI	Federation of Hong Kong Industries
HKAB	The Hong Kong Association of Banks
HKCMA	The Chinese Manufacturers' Association of Hong Kong
HKFI	The Hong Kong Federation of Insurers
HKGC	Hong Kong General Chamber of Commerce
HKICPA	Hong Kong Institute of Certified Public Accountants
HKSMEA	Hong Kong Small and Medium Enterprises Association
HKTA	Hong Kong Trustees' Association Ltd.
ICC	International Chamber of Commerce – Hong Kong, China
JLCT	Joint Liaison Committee on Taxation (constituent members include the American Chamber of Commerce, the Hong Kong General Chamber of Commerce, Hong Kong Institute of Certified Public Accountants, the International Fiscal Association (Hong Kong Branch), the Law Society of Hong Kong, and the Taxation Institute of Hong Kong)
KPMG	KPMG Tax Limited
LRI	The Lion Rock Institute
LSHK	The Law Society of Hong Kong
PCPD	Office of the Privacy Commissioner for Personal Data, Hong Kong
PWC	PricewaterhouseCoopers Limited
REDA	The Real Estate Developers Association of Hong Kong
SCAA	The Society of Chinese Accountants & Auditors
STEP	Society of Trust and Estate Practitioners, Hong Kong Limited
TIHK	The Taxation Institute of Hong Kong