Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2009
Summary of further views submitted by various organizations on safeguards to protect individuals' right to privacy and confidentiality of information
(as of 30 November 2009)

(I) General views on approach of adopting the Organization for Economic Cooperation and Development ("OECD") 2004 version of the Exchange of Information ("EoI") article		
Organizations	**Views/Concerns**	**Response by the Administration**
	Statutory backing	
BCC	● The detailed safeguards should be included in the primary legislation.	● We remain of the view that it would not be necessary or desirable to stipulate in the primary legislation EoI safeguards that will be provided in individual CDTAs because each CDTA will be implemented as a piece of subsidiary legislation to be passed by the LegCo.
LSHK	● It is fundamentally unsatisfactory that the legal provisions to allow for the implementation of EoI arrangements under comprehensive avoidance of double taxation agreements ("CDTAs") be dealt with through a piecemeal approach, i.e. in three separate documents (the Bill, the proposed Inland Revenue (Disclosure of Information) Rules ("IRR") and the Departmental Interpretation and Practice Note ("DIPN")). Reference should be made to the Singapore legislation to incorporate all the relevant provisions in the Bill. LSHK's proposed modifications to IRR, which should be incorporated into the Bill, are set out under **item (III)** below.	● Stipulating these safeguards in the primary legislation would significantly constrain the Administration's flexibility in CDTA negotiations. ● As indicated in our reply to the Bills Committee on 3 November 2009, our research shows that major jurisdictions, such as Australia, Canada, Japan, Singapore, Malaysia, New Zealand, Switzerland, U.K. and U.S. do not stipulate these safeguards in their primary legislations. ● To facilitate Members' scrutiny of future subsidiary legislations for CDTAs, we will set out clearly in our submissions to LegCo the safeguards adopted in individual CDTAs and any deviation from Hong Kong's sample text attached to our letter dated 23 November 2009. ● We agree to make reference to section 105D(2) of, and the Eighth Schedule to Singapore's Income Tax (Amendment) (Exchange of Information) Bill 2009 and

		add similar provisions in the proposed IRR. Any future change to the IRR will be subject to the scrutiny of LegCo. ● As stipulating the safeguards in the IRR or the Bill would provide the same level of protection, we consider that it is more consistent to set out the details for the carrying out of the CDTAs under the IRR.
STEP	● Hong Kong is not on OECD's grey list. It therefore does not need to rush into 12 OECD 2004 Model CDTAs by March 2010. The Bill should not come into effect before the proposed IRR and DIPN are in place.	● Although Hong Kong is not on OECD's grey list, we are still subject to the OECD's monitoring and peer review process. Jurisdictions like Singapore, Switzerland and Austria have taken swift actions to enter into compliant agreements with other OECD countries. Hong Kong lags far behind in implementing the OECD standard on EoI due to our legal constraint. It is important that Hong Kong follows international EoI standard as soon as possible to avoid being a target of counter-measures against tax havens. ● It is our intention to have the IRR and DIPN in place when the Bill comes into effect.
HKBA	<u>Oversight of compliance with proposed safeguards</u> ● Consideration should be given to providing independent oversight and scrutiny of compliance with the safeguards. For example, the Privacy Commissioner for Personal Data may conduct privacy audits, say on an annual basis with publication of its findings.	● We agree to report to LegCo on the effectiveness of the proposed notification and appeal system within 18 months after implementation. In any case, the handling of safeguard procedures will be monitored by the taxpayers, the business community and professional bodies concerned with immense interest.
HKICPA KPMG PWC	<u>No retrospective effect</u> ● EoI provisions in CDTAs should not have retrospective effect. KPMG's view that the Administration should make this clear by including an	● Having considered Members' views, we agree to add a provision in the proposed IRR to set out the policy of no retrospective effect.

	appropriate provision in the CDTA and specifying the intention in the DIPN. HKICPA's view that the intention should preferably be made clear in provisions of IRR or DIPN. At least, the Secretary for Financial Services and the Treasury ("SFST") should state this during the resumption of the Second Reading debate of the Bill. PWC's view that the Administration should seek to agree with the treaty partners the interpretation of "no retrospective effect" and incorporate the agreed interpretation in a protocol or memorandum of understanding for avoidance of doubt.	
HKAB	● Request for information prior to or post the CDTA period should not be entertained.	
DTT PWC	● The Administration should set out in DIPN that The Inland Revenue Department ("IRD") will decline any request for records that go beyond the seven-year statutory time limit for record keeping under the Inland Revenue Ordinance (Cap. 112) ("IRO").	● Agreed. This is in line with our intention.
(II) Safeguards to be incorporated in the CDTAs or documents of record		
Organizations	**Views/Concerns**	**Response by the Administration**
	<u>General</u>	
STEP	● The Administration should confirm its full compliance with the policies on foreseeability, confidentiality, non-retroactivity and adherence to domestic law and policies when submitting the CDTA for the Legislative Council ("LegCo")'s scrutiny.	● Agreed. This is in line with our intention.
PWC	● The safeguards set out in paragraph 9 of the LegCo Brief should be incorporated into a protocol which forms part of the CDTA, instead of other instruments.	● The safeguards set out in paragraphs 9(b) to (g) of the LegCo brief are provided in the EoI article of the OECD Model Tax Convention and will be included in individual CDTAs to be implemented as subsidiary legislation.

		● The OECD Model Tax Convention, however, does not restrict the forms of information exchange. Therefore, the safeguard under paragraph 9(a) of the LegCo brief (i.e. no automatic information exchange) would be stipulated either in a protocol which forms part of the CDTA (and hence part of the subsidiary legislation) or in other documents of records (e.g. Memorandum of Understanding between the two contracting parties) to be observed by both parties in carrying out the CDTA.
	<u>Scope of information exchange</u>	
HKICPA	● Important safeguards on scope of information exchange, such as those against automatic or spontaneous information exchange, should be contained in the subsidiary legislation, or the CDTAs or the protocol forming part of the CDTAs, instead of merely "documents of record" of which the legal standing is unclear.	● Please refer to reply to PWC under **item (II) – Genera**l above.
	● The term "relevant" rather than foreseeably relevant" should be used as to restrict the scope of information exchange to guard against "fishing expeditions".	● The term “foreseeably relevant” is adopted by the OECD Model Tax Convention and is widely accepted as the prevailing international standard. We consider that this internationally adopted term provides adequate safeguards against “fishing expeditions”. It is unlikely that other terms would be acceptable to our treaty partners.
HKAB	● Exchange of information should be restricted to what is "necessary", instead of "foreseeably relevant".	
HKICPA PCPD	● The intention to restrict the scope of EoI to basically income taxes should be stated in IRR or DIPN. HKICPA opines that this may be confirmed by SFST in the resumption of the Second Reading debate of the Bill.	● 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 accept an EoI article that only pertains to the types of tax covered by the corresponding CDTA. SFST will confirm this policy in the resumption of the Second Reading debate of the Bill.
PCPD	● A requesting party should be required to state how the information requested is related to the stage of	● Agreed. This is in line with our intention.

	procedure, issue and investigation and what prejudice would likely be resulted from non-disclosure of the requested information.	
	<u>Usage of information exchanged</u>	
PCPD	● The CDTAs should include provisions to ensure the contracting parties would have sufficient safeguards against misuse or sharing of information, regardless of the contracting parties' domestic information disclosure laws allowing access to information.	● Agreed. Paragraph 2 of EoI article of the OECD Model text requires that "any information received under paragraph 1 by a Contracting Party shall be treated as secret in the same manner as information obtained under the domestic laws of that Party". During CDTA negotiations, we will always ascertain from treaty partners their laws on protection of confidential tax information. The EoI article further requires that the information should not be disclosed to persons or authorities not mentioned in the paragraph, regardless of domestic information disclosure laws that allow greater access to governmental documents.
DTT	● Information collected should be restricted from access by any other party for purpose other than the stated purpose of the EoI request, i.e. IRD should be prohibited from using the information for domestic tax purpose. This restriction should be set out in the DIPN.	● Currently, IRD is empowered under the IRO to collect any information in regard to any matter which may affect the tax liability 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 the notice issued by IRD requesting for information.
PWC	● The information provided to the requesting party should only be used for the purpose of investigating the tax matters of the subject person, and not any other person. The requesting party should initiate a separate disclosure request in respect of that other person, if needed. The restriction on the use of information should be included in a protocol to the CDTA.	● Agreed. This is in line with international practice and our intention. In case information of a third party is revealed by the information disclosed relating to a taxpayer, we will state clearly in the reply to the requesting jurisdiction that the information should only be used on the taxpayer concerned.

(III) Domestic safeguards to be provided in the Inland Revenue (Disclosure of Information) Rules		
Organizations	**Views/Concerns**	**Response by the Administration**
	<u>General</u>	
PCPD	● PCPD wishes to be further consulted on the drafting of IRR.	● We will provide the framework of the revised draft IRR to the Bills Committee. After the Bill is enacted, the IRR will be submitted to LegCo for approval.
CPA(A)	● Welcomes the proposed domestic safeguards, in particular, the proposed notification system.	● Noted.
BCC	● The draft provisions do not preclude automatic exchange of information.	● Please refer to reply to PWC under **item (II) – General** above.
	<u>Approval of disclosure requests</u>	
HKAB	● Legal procedures involving an independent judicial panel should be introduced for the assessment of the validity of EoI requests, similar to the arrangement of some other OECD members, as follows: (a) The taxpayer and third parties concerned (e.g. banks and financial institutions) be notified of the information requests; and (b) IRD should apply to an independent judiciary panel (e.g. the Board of Review or the High Court) for a production order to access the requested information, and the taxpayer and third parties concerned may apply to discharge or vary the court order.	● As Hong Kong does not have bank secrecy law or restrictions on the collection of information from third party under the IRO, requiring a production order from the courts for collecting bank information or information from third party for EoI purpose will be seen as back-tracking on tax transparency. Hong Kong will run the risk of being regarded as non-compliance with the international standard in any Peer Review if we were to do so.
ACCA LSHK	● A disclosure request should only be approved by a higher authority, i.e. the Commissioner or an Assistant Commissioner of IRD. LSHK's view that the Chief Assessor may be designated to consider and make a recommendation on the request. The procedures that a disclosure request must comply should be set out in a Schedule to the Bill, as in the Singapore legislation,	● The decision-making process on whether to accede to an EoI request would be 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

	and not in the DIPN.	Assessor. Furthermore, the information will need to be personally signed off by the Commissioner of Inland Revenue ("CIR") or the Deputy Commissioners of Inland Revenue who are designated as the Competent Authority in our CDTAs. We agree to make reference to section 105D(2) of, and the Eighth Schedule to Singapore's Income Tax (Amendment) (Exchange of Information) Bill 2009 and add similar provisions in the proposed IRR to set out the information to be provided by the requesting party. The legal effect of stipulating the requirements in the IRR or the Bill is the same.
STEP	● To promote clarity and transparency, information to be provided by the requesting party to justify the EoI request should be specified in the primary legislation, i.e. IRO.	
	● A court order for disclosure of confidential bank and trust information is necessary to protect Hong Kong's sovereignty and the taxpayers' rights.	● As Hong Kong does not have bank secrecy law, introducing judicial sanction for collecting bank information for EoI purpose only will be seen as back-tracking on tax transparency.
	<u>Notification of proposed disclosure</u>	
KPMG	● Supports the proposed notification system, which means that Hong Kong is adopting the best practice to protect taxpayers' right.	● Noted.
DTT	● When the taxpayer concerned is notified of the information request and the nature of information sought, the "original request document" from the requesting party should also be forwarded to the taxpayer so that he can assess whether the information is relevant or not.	● As the original request document may contain confidential information possessed by the requesting party, we will only provide a summary of the request to the person concerned. OECD's confidentiality rules also apply to information provided in a request.
HKAB HKICPA PCPD	● IRD should provide the information to be disclosed to the taxpayer concurrently with the initial notification.	● As the information to be disclosed contains confidential personal information, we will need to correctly identify and locate the person concerned by the initial notification before supplying him with a copy of the information.

HKAB	● The Administration should clarify whether the notification requirement would apply to information exchange under CDTAs between Hong Kong and the Mainland.	● The notification requirement will apply to information exchanges under all of our CDTAs.
LSHK BCC	● The person concerned should be allowed 28 days or one month, instead of 14 days, to request a copy of the information to be disclosed or for amendment of the information.	● We agree to extend the time allowed for the person to submit amendments to CIR from 14 days to 21 days. IRD would also send out the first notice as soon as practicable upon IRD's decision to act on the EoI request from a requesting jurisdiction.
LSHK	● The person concerned should be entitled to object to such disclosure on any other grounds in addition to "the information does not relate to the person" or "the information is factually incorrect".	● 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. ● 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 challenge the Government's actions through the judicial system.
	● To provide along the lines of Part XXB of the Singapore legislation, for the Commissioner of IRD to apply for a court order before any information subject to legal privilege can be disclosed.	● The protection of legal professional privilege is already provided under section 51(4A) of the IRO.
STEP	● IRD's obligations to inform the taxpayers concerned of the intended disclosure of information should be spelt out in more certain and less conditional terms. If court approval is required for disclosure of confidential information, the court should have discretion to inform the taxpayers concerned and the requesting party of IRD's application for disclosure of information and the court's decision.	● OECD requires that a jurisdiction's notification procedures should not be applied in a manner that would frustrate the efforts of the requesting party or prevent or unduly delay effective EoI. The present wording on exceptions to notification / prior-notifications under the IRR has been drafted tightly with a view to providing more certainty while satisfying OECD's requirements.

	<u>Circumstances where notification or prior notification will be not given</u>	
LSHK	● Reference should be made to section 105E(4) of the Singapore legislation to modify the provisions on circumstances where notification or prior notification will not be given.	● Please refer to reply to STEP under **item (III) – Notification of proposed disclosure** above. Our view is that the provisions on circumstances where notification or prior notification will not be given in the IRR are drafted more tightly that the Singapore legislation.
PCPD	● Recommends that notification be given to the person's last known address, in the event that all the addresses known to IRD are inadequate for the purpose of giving notification. This is a commonly adopted practice in many legislations and rules.	● In practice, IRD would try to obtain the address of the person as far as possible. However, if the address is known to IRD as being inadequate for delivery purpose (e.g. obsolete or wrong address), the notice would not be sent out because such notice contains sensitive information of the recipient.
PWC	● The exception where no notification is required if it "is likely to undermine the chance of success of the investigation" should be confined to specific cases where the requesting party has indicated such likelihood and IRD is satisfied with the view.	● Agreed. This is in line with our intention.
DTT PCPD	● The requesting party should be required to explain and satisfy IRD how prior notification would prejudice the investigation and the grounds to substantiate such belief.	● Agreed. This is in line with our intention.
DTT HKAB	● "Tight time constraint" should not be the reasonable and justifiable ground for not giving prior notification to a taxpayer. In case of tight time constraint and/or failure to disclose the information requested will likely frustrate the tax purpose, IRD should provide the information to the taxpayer concerned at the same time of notification, otherwise the application for review procedure will not make sense. DTT suggests that the circumstances of not giving prior notification due to tight time constraint be deleted.	● Please refer to reply to STEP in under **item (III) – Notification of proposed disclosure** above. ● Under the scenario of “tight time constraint”, the person will be notified concurrently when IRD reply to the requesting party. The requesting jurisdiction would also need to satisfy IRD that there is not any deliberate or undue delay in making a request.

		● Agreed. This is in line with our intention.
ACCA HKICPA DTT KPMG	● The circumstances where notification or prior notification will not be given should be clearly defined in the DIPN, with specific examples given. ACCA's view that guidelines should be included in the DIPN to determine what constitutes" undermine the chance of success of the investigation".	
	<u>Requests for amendment of information</u>	
ACCA BCC DTT HKAB HKICPA KPMG	● The taxpayer concerned should be given a longer period, instead of only 14 days as proposed, to verify the accuracy of the information and make amendments to the information to be exchanged. Some deputations propose that 21 to 30 days should be allowed to verify the information. DTT proposes that a further extension of time, say 60 days, should be given for the taxpayer to request for amendment of the information. HKAB suggests that the taxpayer should be allowed to apply to IRD for extension of the time for verifying and amending the information.	● We agree to extend the time allowed for the person to submit amendments to CIR from 14 days to 21 days. IRD would also send out the first notice as soon as practicable upon its decision to act on the EoI request.
ACCA PWC	● Requests for amendment of information should not be limited to cases where the information is not related to the person or the information is incorrect. Amendment of information should be allowed on grounds that the information is incomplete excessive, or is not within the scope of information covered by the relevant CDTA.	● Please refer to reply to LSHK under **item (III) – Notification of proposed disclosure** above.
PCPD	● The term "factually incorrect" in paragraph 5(c) of the proposed IRR on amendment of information should be revised to make it consistent with the letter and spirit of the Personal Date (Privacy) Ordinance (Cap. 486) that "inaccurate" in relation to personal data means the data is "incorrect, misleading, incomplete	● In reaching her decision on whether to approve submissions on factual amendments, CIR would consider all relevant reasons, including whether the data is incorrect, misleading, incomplete, or obsolete.

	or obsolete." ● If amendments are made to information, IRD should notify and provide the amended information to the requesting party.	● Agreed. This is in line with our intention.
	<u>Review of and objections to the decision of IRD</u>	
BCC	● The review should be considered by an independent party, such as an ombudsman, instead of the Financial Secretary ("FS").	● As presently provided in the IRR, FS will has a legal obligation to consider 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, it is appropriate for FS to be the review authority to consider factual issues. ● 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 would like to bring up other legal issues, he can challenge the Government's actions through the judicial system. ● OECD requires that a jurisdiction's internal procedures cannot unduly delay effective exchange. The establishment of additional layers of appeal channel and new tribunals will significantly increase the time needed and the complexity of processing an EoI request. We also need to meet the standard 90-day response time requirement set by the OECD. We believe that our proposal has struck the right balance of these factors. ● Only a few OECD countries have in place notification or appeal mechanisms. France, Canada, Australia and New Zealand are among those that do not have any notification or appeal mechanism.
ACCA HKAB	● The taxpayer should have the right to object to an independent body against IRD's decision to disclose the information requested, in addition to seeking a review of IRD's decision on his request for amendment. ACCA's view that an appeal mechanism is necessary and this should include a further review conducted by an independent tribunal.	
LSHK	● Change the period of 14 days for making the request to FS for review of IRD's decision to 28 days or one month. Give a right of appeal to the court against a decision of FS.	
DTT KPMG	● An independent tribunal, similar to the Board of Review, should be set up to resolve all disputes regarding collection of information to be disclosed. KPMG reiterates its view that it would be more appropriate for the review to be made by a District Judge.	

		● According to international experience, the number of EoI requests would unlikely be large. The number of review cases is unlikely to be substantial to justify a full-fledge independent tribunal. ● As we have agreed to extend the time allowed for the person to submit amendments to CIR from 14 days to 21 days and IRD would also send out the first notice as soon as practicable upon IRD's decision to act on an EoI request. we consider the 14 days for making the request to FS adequate.
DTT	● Information should only be transmitted to the requesting party after all disputes on exchange of information have been fully resolved and amendments made as appropriate. This should be spelt out in IRR for avoidance of doubt.	● The practice is in line with our current intention and has been implied in the IRR.
PWC	● IRD should explain in sufficient details in the DIPN how request for amendments and request for review of IRD's decision would be handled, as well as how it would inform the requesting party of the amendments made in respect of cases where no prior notification are given to the taxpayers concerned.	● The procedures will be set out in the IRR and supplemented by the DIPN.
	● The Administration's undertaking that "IRD will not send out the information until a final decision has been made" in cases where a decision is pending from a higher authority should be specified in the DIPN or IRR. The Administration should also clarify the meaning of "final decision".	● The practice is in line with our current intention and has been implied in the IRR. This will be set out in the DIPN.

(IV) Procedural safeguards to be set out in the Departmental Interpretation and Practice Note		
Organizations	**Views/Concerns**	**Response by the Administration**
	<u>General</u>	
HKICPA KPMG	● The proposed procedural safeguards should be incorporated in the subsidiary legislation, i.e. the IRR, so as to give a legally binding effect for the procedures.	● We agree to make reference to section 105D(2) of, and the Eighth Schedule to Singapore's Income Tax (Amendment) (Exchange of Information) Bill 2009 and add similar provisions in the proposed IRR. Any future change to the IRR will be subject to the scrutiny of LegCo.
KPMG	● The Administration should confirm that it will make the DIPN available to the public.	● Confirmed.
ACCA PWC	● The legal status of the procedures specified in the Appendix to the DIPN should be clarified.	● Please refer to reply to HKICPA/KPMG above.
PWC	● Adequate mechanism or measures should be put in place to restrict the discretion of the Commissioner of IRD in amending or removing any procedures in the DIPN in handling individual cases.	● Please refer to reply to HKICPA/KPMG above.
	<u>Approval of a disclosure request</u>	
BCC	● The draft DIPN does not explain the criteria which the Commissioner of IRD will adopt in approving the disclosure requests.	● The IRR provides that the approving officer of IRD may only approve an EoI request if he is satisfied that it meets the provision of the relevant CDTAs and that it contains the particulars set out in the Schedule of the IRR and any applicable procedures.
LSHK	● Questions the consistency of the provisions and procedures for approval of the disclosure request (paragraphs (a) to (c) of the DIPN) with the existing provision under section 49(5) of IRO. LSHK also queries the standard response time of 90 days for disclosure requests.	● Individual CDTA and protocol are implemented as subsidiary legislation and provide the legal framework and scope for the disclosure of information. The administrative practices, memoranda of understanding, minutes of meetings and exchanges of correspondence, etc. are only meant to set out the implementation details

		of the EoI article of the CDTA and will not contradict with section 49(5) of the IRO. ● The standard response time of 90 days is set by OECD.
PCPD	● The exclusion clause in the OECD Model Article that a contracting state has no obligation to supply "information that would disclose any trade, business, industrial, commercial or professional secret or trade process, or information on the disclosure of which would be contrary to public policy." is not fully covered in the DIPN which only refers to information relating to "any trade or business secret".	● Further elaboration will be added to the DIPN.
	<u>Procedures with which a disclosure request must comply</u>	
PCPD	● The phrase "its relevancy to" shall be inserted before "the tax purpose for which the information is sought" in paragraph 3(c) of the Appendix of the draft DIPN to guard against "fishing expeditions".	● Agreed. This will be set out in the IRR.
	● The requesting party should be required to confirm whether it has pursued all means available in its own territory to obtain the information except those that would give rise to disproportionate difficulties, and unless the disproportionately difficulties are in the nature that would likely prejudice the assessment and collection of the tax concerned, it may not be sufficient to invoke the exemption in paragraph 3(h) of the Appendix to the DIPN.	● The principle will be set out in the IRR.
REDA	● Suggests to set out in the DIPN that third party information can only be obtained with the consent of the party concerned or by an order issued by a magistrate.	● Please refer to reply to HKAB under **item (III) - Approval of disclosure requests** above.

Abbreviations for Organizations:

ACCA	**Association of Charted Certified Accountants Hong Kong**
BCC	**The British Chamber of Commerce in Hong Kong**
CPA(A)	**CPA Australia Limited**
DTT	**Deloitte Touche Tohmatsu**
HKAB	**The Hong Kong Association of Banks**
HKBA	**Hong Kong Bar Association**
HKICPA	**Hong Kong Institute of Certified Public Accountants**
KPMG	**KPMG Tax Limited**
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**
STEP	**Society of Trust and Estate Practitioners, Hong Kong Limited**