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From : Clerk to the Legislative Council

To : All Members of the Legislative Council

Council meeting of 3 March 2010

**Proposed resolution under
the Inland Revenue Ordinance**

I forward for Members' consideration a proposed resolution which the Secretary for Financial Services and the Treasury will move at the Council meeting of 3 March 2010 under the Inland Revenue Ordinance. The President has directed that "it be printed in the terms in which it was handed in" on the Agenda of the Council.

2. The speech, in both English and Chinese versions, which the Secretary will deliver when moving the proposed resolution is also attached.

(Ms Miranda HON)
for Clerk to the Legislative Council

Encl.

INLAND REVENUE ORDINANCE

RESOLUTION

(Under section 49 of the Inland Revenue Ordinance (Cap. 112))

RESOLVED that the Inland Revenue (Disclosure of Information) Rules, made by the Chief Executive in Council on 26 January 2010, be approved.

INLAND REVENUE (DISCLOSURE OF INFORMATION) RULES

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INLAND REVENUE (DISCLOSURE OF INFORMATION) RULES

(Made by the Chief Executive in Council under section 49 of the
Inland Revenue Ordinance (Cap. 112) subject to
the approval of the Legislative Council)

PART 1

PRELIMINARY

1. Commencement

These Rules come into operation on the day appointed for the commencement of the Inland Revenue (Amendment) Ordinance 2010 (1 of 2010) (except sections 1, 2 and 3(4) of that Ordinance).

2. Interpretation

In these Rules –

"disclosure request" (披露請求) means a request for disclosure of information that is made by the government of a territory outside Hong Kong under any arrangements made with that government and having effect under section 49 of the Ordinance;

"relevant arrangements" (有關安排), in relation to a disclosure request, means the arrangements under which the request is made;

"requesting government" (提出請求政府), in relation to a disclosure request, means the government that makes the request.

PART 2
DISCLOSURE REQUEST

3. Approval of disclosure request

(1) A disclosure request may be approved only by one of the following persons personally –

- (a) the Commissioner;
- (b) any officer of the Inland Revenue Department not below the rank of chief assessor authorized in writing by the Commissioner personally for the purpose, either generally or in any particular case.

(2) The person mentioned in subsection (1)(a) or (b) may approve a disclosure request only if the person is personally satisfied that –

- (a) the request complies with –
 - (i) the provisions of the relevant arrangements that are applicable to the request; and
 - (ii) any procedures applicable to the request that may be specified in any instrument that amends or supplements the relevant arrangements; and
- (b) unless the Commissioner otherwise permits on reasonable grounds, the request contains the particulars set out in the Schedule.

4. Information that may be disclosed in response to disclosure request

The Commissioner must not disclose any information in response to a disclosure request unless the Commissioner is satisfied that the information does not relate to any

period before the relevant arrangements came into operation.

PART 3

PROVISIONS RELATING TO INFORMATION TO BE DISCLOSED

5. Notification before disclosure

(1) Subject to subsection (5), the Commissioner must, before any information is disclosed in response to a disclosure request, by a notice in writing given to the person who is the subject of the request –

- (a) notify the person of the nature of the information requested; and
- (b) notify the person that the person may request a copy of the information that the Commissioner is prepared to disclose to the requesting government.

(2) A request under subsection (1)(b) must be made, by a notice in writing given to the Commissioner, within 14 days after the notice under subsection (1) is given to the person.

(3) If a person makes a request in accordance with subsection (2), the Commissioner must, within a reasonable time, by a notice in writing given to the person –

- (a) provide the person with a copy of the information that the Commissioner is prepared to disclose to the requesting government; and
- (b) notify the person that the person may request the Commissioner to amend the information or any part of the information on any of the following grounds –

- (i) the information or that part of the information does not relate to the person;
- (ii) the information or that part of the information is factually incorrect.

(4) A request under subsection (3)(b) –

- (a) must be made, by a notice in writing given to the Commissioner, within 21 days after the notice under subsection (3) is given to the person;
- (b) must specify the manner in which the person requests the information to be amended, and the grounds for the request; and
- (c) must be accompanied by any documentary evidence that the person wishes to put forward in support of the request.

(5) The Commissioner is not required to notify a person who is the subject of a disclosure request in accordance with subsection (1) 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;
- (b) the notification is likely to undermine the chance of success of the investigation in relation to which the request is made; or
- (c) the Commissioner is under a tight time constraint to disclose the information in response to the request, such that –
 - (i) it is not practicable for the notification to be given, and the subsequent requests that the person may make in relation to the information to be finally determined under these

Rules, within the time constraint; and

- (ii) the failure of the Commissioner in disclosing the information to the requesting government within the time constraint is likely to frustrate the efforts of the requesting government in enforcing the tax laws of its territory.

6. Request to Commissioner for amendments to information to be disclosed

(1) If a person makes a request in accordance with section 5(4), the Commissioner must decide whether to fully approve, partially approve or refuse the person's request.

(2) If the Commissioner fully approves the person's request, the Commissioner must, within a reasonable time, by a notice in writing given to the person –

- (a) notify the person that the Commissioner has fully approved the request and has amended the information to be disclosed to the requesting government in the manner requested; and
- (b) provide the person with a copy of the information that has been so amended.

(3) If the Commissioner partially approves the person's request, the Commissioner must, within a reasonable time, by a notice in writing given to the person –

- (a) notify the person that the Commissioner has partially approved the request and has amended part of the information to be disclosed to the requesting government in the manner requested;
- (b) provide the person with a copy of the information that has been so amended; and

- (c) give reasons why the Commissioner has only partially approved the request.

(4) If the Commissioner refuses the person's request, the Commissioner must, within a reasonable time, by a notice in writing given to the person –

- (a) notify the person that the Commissioner has refused the request; and
- (b) give reasons for the refusal.

7. Request to Financial Secretary for directions relating to information to be disclosed

(1) If a person is notified under section 6(3) or (4) of the Commissioner's refusal to amend the information or any part of the information that the Commissioner is prepared to disclose in response to a disclosure request, the person may request the Financial Secretary to direct the Commissioner to make the amendments.

(2) A request for a direction under subsection (1) –

- (a) must be made, by a notice in writing given to the Financial Secretary, within 14 days after the Commissioner's notice is given to the person;
- (b) must specify the manner in which the person requests the information to be amended, and the grounds for the request; and
- (c) must be accompanied by –
 - (i) a copy of the Commissioner's notice; and
 - (ii) any documentary evidence that the person wishes to put forward in support of the request.

(3) If a person makes a request in accordance with subsection (2), the Financial Secretary –

- (a) may require the Commissioner to disclose to the Financial Secretary any information relating to the person in the Commissioner's possession, custody or control that the Financial Secretary considers to be relevant for the purpose of determining the person's request; and
- (b) must decide whether to fully approve, partially approve or refuse the person's request.

(4) If the Financial Secretary fully approves the person's request, the Financial Secretary must –

- (a) direct the Commissioner to –
 - (i) amend the information to be disclosed to the requesting government in the manner requested; and
 - (ii) provide the person with a copy of the information that has been so amended; and
- (b) within a reasonable time, by a notice in writing given to the person, notify the person that the Financial Secretary has fully approved the request and has given the direction mentioned in paragraph (a).

(5) If the Financial Secretary partially approves the person's request, the Financial Secretary must –

- (a) direct the Commissioner to –
 - (i) amend part of the information to be disclosed to the requesting government in the manner requested; and
 - (ii) provide the person with a copy of the information that has been so amended; and
- (b) within a reasonable time, by a notice in writing given to the person –

- (i) notify the person that the Financial Secretary has partially approved the request and has given the direction mentioned in paragraph (a); and
- (ii) give reasons why the Financial Secretary has only partially approved the request.

(6) If the Financial Secretary refuses the person's request, the Financial Secretary must, within a reasonable time, by a notice in writing given to the person –

- (a) notify the person that the Financial Secretary has refused the request;
and
- (b) give reasons for the refusal.

(7) The Financial Secretary's decision made under this section is final.

PART 4

PROVISIONS RELATING TO INFORMATION THAT HAS BEEN DISCLOSED

8. Notification at time of disclosure

(1) If the Commissioner is not required to notify a person who is the subject of a disclosure request under section 5(1) for the reason given in section 5(5)(c), the Commissioner must, at the time when information is disclosed in response to the request, by a notice in writing given to the person –

- (a) notify the person of the nature of the information requested; and
- (b) notify the person that the person may request a copy of the information that the Commissioner has disclosed to the requesting government.

(2) A request under subsection (1)(b) must be made, by a notice in writing given to the Commissioner, within 14 days after the notice under subsection (1) is given to the person.

(3) If a person makes a request in accordance with subsection (2), the Commissioner must, within a reasonable time, by a notice in writing given to the person –

(a) provide the person with a copy of the information that the Commissioner has disclosed to the requesting government; and

(b) notify the person that the person may request the Commissioner to amend the information or any part of the information on any of the following grounds –

(i) the information or that part of the information does not relate to the person;

(ii) the information or that part of the information is factually incorrect.

(4) A request under subsection (3)(b) –

(a) must be made, by a notice in writing given to the Commissioner, within 21 days after the notice under subsection (3) is given to the person;

(b) must specify the manner in which the person requests the information to be amended, and the grounds for the request; and

(c) must be accompanied by any documentary evidence that the person wishes to put forward in support of the request.

9. Request to Commissioner for amendments to information that has been disclosed

(1) If a person makes a request in accordance with section 8(4), the Commissioner must decide whether to fully approve, partially approve or refuse the person's request.

(2) If the Commissioner fully approves the person's request, the Commissioner must, within a reasonable time, by a notice in writing given to the person –

- (a) notify the person that the Commissioner has fully approved the request and has amended the information in the manner requested; and
- (b) provide the person with a copy of the information that has been so amended.

(3) If the Commissioner partially approves the person's request, the Commissioner must, within a reasonable time, by a notice in writing given to the person –

- (a) notify the person that the Commissioner has partially approved the request and has amended part of the information in the manner requested;
- (b) provide the person with a copy of the information that has been so amended; and
- (c) give reasons why the Commissioner has only partially approved the request.

(4) If the Commissioner refuses the person's request, the Commissioner must, within a reasonable time, by a notice in writing given to the person –

- (a) notify the person that the Commissioner has refused the request; and

(b) give reasons for the refusal.

(5) The Commissioner must, within a reasonable time, disclose any information that has been amended as mentioned in subsection (2) or (3) to the requesting government.

10. Request to Financial Secretary for directions relating to information that has been disclosed

(1) If a person is notified under section 9(3) or (4) of the Commissioner's refusal to amend the information or any part of the information that the Commissioner has disclosed in response to a disclosure request, the person may request the Financial Secretary to direct the Commissioner to make the amendments.

(2) A request for a direction under subsection (1) –

(a) must be made, by a notice in writing given to the Financial Secretary, within 14 days after the Commissioner's notice is given to the person;

(b) must specify the manner in which the person requests the information to be amended, and the grounds for the request; and

(c) must be accompanied by –

(i) a copy of the Commissioner's notice; and

(ii) any documentary evidence that the person wishes to put forward in support of the request.

(3) If a person makes a request in accordance with subsection (2), the Financial Secretary –

(a) may require the Commissioner to disclose to the Financial Secretary any information relating to the person in the Commissioner's

possession, custody or control that the Financial Secretary considers to be relevant for the purpose of determining the person's request; and

- (b) must decide whether to fully approve, partially approve or refuse the person's request.

(4) If the Financial Secretary fully approves the person's request, the Financial Secretary must –

- (a) direct the Commissioner to –
 - (i) amend the information that has been disclosed to the requesting government in the manner requested; and
 - (ii) provide the person with a copy of the information that has been so amended; and
- (b) within a reasonable time, by a notice in writing given to the person, notify the person that the Financial Secretary has fully approved the request and has given the direction mentioned in paragraph (a).

(5) If the Financial Secretary partially approves the person's request, the Financial Secretary must –

- (a) direct the Commissioner to –
 - (i) amend part of the information that has been disclosed to the requesting government in the manner requested; and
 - (ii) provide the person with a copy of the information that has been so amended; and
- (b) within a reasonable time, by a notice in writing given to the person –
 - (i) notify the person that the Financial Secretary has partially approved the request and has given the direction

mentioned in paragraph (a); and

- (ii) give reasons why the Financial Secretary has only partially approved the request.

(6) If the Financial Secretary refuses the person's request, the Financial Secretary must, within a reasonable time, by a notice in writing given to the person –

- (a) notify the person that the Financial Secretary has refused the request;
and
- (b) give reasons for the refusal.

(7) The Financial Secretary's decision made under this section is final.

(8) The Commissioner must, within a reasonable time, disclose any information that has been amended as directed under subsection (4)(a)(i) or (5)(a)(i) to the requesting government.

PART 5

GENERAL

11. Manner of giving notice to Commissioner or Financial Secretary

(1) Any notice required to be given to the Commissioner under these Rules may be given by sending the notice by post, or delivering it, to the Commissioner.

(2) Any notice required to be given to the Financial Secretary under these Rules may be given by sending the notice by post, or delivering it, to the Financial Secretary.

SCHEDULE

[s. 3]

PARTICULARS TO BE CONTAINED IN
DISCLOSURE REQUEST

1. The identity of the person or authority that makes the disclosure request ("competent authority").
2. The purpose of the disclosure request and the tax type concerned.
3. The identity of the person who is the subject of the disclosure request.
4. A statement on the information requested, including –
 - (a) the nature of the information;
 - (b) the relevance of the information to the purpose of the disclosure request; and
 - (c) the form in which the competent authority wishes to receive the information from the Commissioner.
5. The ground for believing that the information requested is held by the Commissioner or is in the possession of a person in Hong Kong.
6. The name and address of any person believed to have possession of the information requested.

7. A statement that –
 - (a) the disclosure request complies with the laws and administrative practices of the requesting government's territory;
 - (b) the competent authority is able to obtain the information under the laws of the requesting government's territory or in the normal course of the administrative practices of the requesting government's territory; and
 - (c) the disclosure request complies with the relevant arrangements.

8. A statement that the requesting government has pursued all means available in its territory to obtain the information, including getting the information directly from the person who is the subject of the disclosure request.

9. The tax period for which information is requested.

10. The period within which the competent authority wishes the disclosure request to be met.

11. If applicable, a statement –
 - (a) confirming that the competent authority is of the opinion that notification to the person who is the subject of the disclosure request is likely to undermine the chance of success of the investigation in relation to which the request is made; and
 - (b) giving reasons for the opinion.

12. If applicable, a statement –
- (a) confirming that the competent authority is of the opinion that prior notification to the person who is the subject of the disclosure request is likely to frustrate the timely enforcement of the tax laws of the requesting government's territory; and
 - (b) giving reasons for the opinion.

Clerk to the Executive Council

COUNCIL CHAMBER

26 January 2010

Explanatory Note

These Rules are made by the Chief Executive in Council under section 49 of the Inland Revenue Ordinance (Cap. 112) ("the Ordinance") for carrying out the provisions of any arrangements having effect under that section.

2. The Rules contain 5 Parts and a Schedule.

Part 1

3. Part 1 (sections 1 and 2) contains preliminary provisions.
4. Section 1 provides that the Rules come into operation on the day appointed for the commencement of the Inland Revenue (Amendment) Ordinance 2010 (1 of 2010) (except

sections 1, 2 and 3(4) of that Ordinance). The Inland Revenue (Amendment) Ordinance 2010 (1 of 2010) contains, among others, amendments to section 49 of the Ordinance.

5. Section 2 defines the terms used in the Rules.

Part 2

6. Part 2 (sections 3 and 4) contains provisions relating to a disclosure request.

7. Section 3 –

(a) provides that a disclosure request may be approved only by the Commissioner of Inland Revenue, or an authorized directorate officer in the Inland Revenue Department, personally; and

(b) sets out the criteria to be applied in making the decision.

8. Section 4 requires that the Commissioner of Inland Revenue must not disclose any information in response to a disclosure request if the information relates to any period before the relevant arrangements came into operation.

Part 3

9. Part 3 (sections 5 to 7) contains provisions relating to information to be disclosed in response to a disclosure request.

10. Sections 5 and 6 –

(a) require that, unless exceptional circumstances exist, the Commissioner of Inland Revenue must notify the person who is the subject of a disclosure request before any information is disclosed in response to the request; and

- (b) set out the procedures to be observed if that person requests the Commissioner for a copy of the information or requests the Commissioner to amend any part of the information.

11. Section 7 –

- (a) provides that if the Commissioner of Inland Revenue refuses the request of the person who is the subject of a disclosure request to amend any part of the information that the Commissioner is prepared to disclose in response to the disclosure request, that person may request the Financial Secretary to direct the Commissioner to make the amendments; and
- (b) sets out the procedures to be observed if that person requests the Financial Secretary to give the direction.

Part 4

12. Part 4 (sections 8 to 10) contains provisions relating to information that has been disclosed in response to a disclosure request.

13. Sections 8 and 9 –

- (a) require that if the Commissioner of Inland Revenue does not notify a person who is the subject of a disclosure request under section 5(1) for the reason given in section 5(5)(c), the Commissioner must notify the person at the time when information is disclosed in response to the request; and

- (b) set out the procedures to be observed if that person requests the Commissioner for a copy of the information or requests the Commissioner to amend any part of the information.

14. Section 10 –

- (a) provides that if the Commissioner of Inland Revenue refuses the request of the person who is the subject of a disclosure request to amend any part of the information that the Commissioner has disclosed in response to the disclosure request, that person may request the Financial Secretary to direct the Commissioner to make the amendments; and
- (b) sets out the procedures to be observed if that person requests the Financial Secretary to give the direction.

Part 5

15. Section 11 provides for how a notice required by the Rules may be given to the Commissioner of Inland Revenue or the Financial Secretary.

Schedule

16. The Schedule sets out the particulars to be contained in a disclosure request.

(Translation)
Inland Revenue Ordinance (Cap. 112) -
Inland Revenue (Disclosure of Information) Rules

Speech by the Secretary for Financial Services and the Treasury
on the Resolution
at the Legislative Council meeting on 3 March 2010

President,

I move that the motion, as printed on the Agenda under my name, on the resolution to make the Inland Revenue (Disclosure of Information) Rules be passed by this Council.

2. The Legislative Council (LegCo) passed the Inland Revenue (Amendment) (No. 3) Bill 2009 on 6 January this year, which enables the Inland Revenue Department (IRD) to collect and transfer a person's information as legitimately requested by our comprehensive avoidance of double taxation agreement (CDTA) partners, even if IRD has no domestic tax interest in such information. The amendment ordinance enables Hong Kong to adopt the latest international standard for exchange of information (EoI) in CDTAs. This helps to expand our CDTA network and enhance our tax transparency. LegCo members and the business and professional sectors supported the change in general, but requested the Government to provide safeguards in addition to those provided in individual CDTAs to protect taxpayers' privacy and confidentiality of the information exchanged. In response to these suggestions, the Chief Executive in Council has made the Inland Revenue (Disclosure of Information) Rules pursuant to the Inland Revenue Ordinance.

3. We presented the major provisions of the draft Rules to the Bills Committee during the scrutiny of the amendment bill. The business and professional sectors were also given opportunities to express their views on these provisions. Both Members of the Bills Committee and the stakeholders supported the Rules. We have taken into account their suggestions when finalising the Rules.

4. Key provisions of the Rules are as follows -

- (a) the decision on whether to accede to an EoI request has to be made by a directorate officer of the IRD in accordance to specified

criteria;

- (b) a mechanism to notify taxpayers before the information is exchanged;
- (c) a system that enables taxpayers to request a review on the factual accuracy of the information by the Commissioner of Inland Revenue and the Financial Secretary;

The Secretary for Financial Services and the Treasury has pointed out in his speech for the resumption of second reading debate of the amendment bill that the notification and review system was not found in most countries and was additional protection we formulated in response to public concerns. In response to the suggestion of the Bills Committee, we have also undertaken that the Government will report the effectiveness of the notification and review system to the Panel on Financial Affairs within 18 months of its implementation;

- (d) the Rules stipulate that the EoI should not have retrospective effect. Any information that relates to a period before the relevant CDTA comes into operation shall not be disclosed; and
- (e) to ensure that the EoI requests are foreseeably relevant in order to prevent fishing expeditions, the Rules set out the particulars that individual EoI request should contain.

5. In response to the suggestion of the Bills Committee, we will arrange major provisions of the amendment ordinance and the Rules to commence at the same time. Meanwhile, we have started more CDTA negotiations with other countries and these negotiations have achieved good progress. Upon the commencement of the new law, we will sign as soon as possible several CDTAs with the latest standard on EoI. We will also conduct negotiations with other countries at full speed, aiming to make significant progress. I invite Members to support this resolution and approve the making of the Inland Revenue (Disclosure of Information) Rules.

6. Thank you, President.

- END -