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**Addendum to the Report of the
Bills Committee on Stamp Duty (Amendment) Bill 2012**

Purpose

This paper reports on the deliberations of the Bills Committee on Stamp Duty (Amendment) Bill 2012 ("the Bills Committee") at its last meeting on 18 February 2014.

Background

2. Since 18 January 2013, the Bills Committee has held a total of 21 meetings with the Administration. It has reported its deliberations to the House Committee on 7 February 2014. The House Committee notes that the Bills Committee has completed its work and has raised no objection to the resumption of the Second Reading debate on the Stamp Duty (Amendment) Bill 2012 ("the Bill") at the Council meeting of 19 February 2014. A report of the Bills Committee, summarizing the deliberations of the Bills Committee up to 7 February 2014, was tabled at the Council meeting of 19 February 2014 under LC Paper No. CB(1)904/13-14.

3. On 13 February 2014, Members were informed vide LC Paper No. CB(3) 380/13-14 that the President had given permission for Hon Martin LIAO Cheung-kong to move proposed Committee stage amendments ("CSAs") to the Bill. Hon Martin LIAO Cheung-kong is not a member of the Bills Committee. As such, his proposed CSAs have not been studied by the Bills Committee.

4. The CSAs proposed by Hon Martin LIAO Cheung-kong would allow the rates of Special Stamp Duty ("SSD") and Buyer's Stamp Duty ("BSD") to be amended by Financial Secretary ("FS") by notice published in the Gazette. While the amended rates would take immediate effect upon gazettal of the notice, FS is required to move a motion to seek the

Legislative Council ("LegCo")'s approval of the notice. If such a motion is not passed within six months of the date of publication of the notice in the Gazette or is negatived by LegCo, the notice would cease to have effect. Upon such cessation, the pre-amendment rates would be restored. Any excess of stamp duty paid during the interim period would have to be refunded to the payer and any shortfall of stamp duty would have to be paid to the Government within 30 days of such cessation, as the case may be.

5. On 14 February 2014, the Secretary for Transport and Housing ("STH") announced that he would in his speech on the resumption of the Second Reading debate of the Bill give a formal undertaking that while retaining the negative vetting mechanism in the Bill for future adjustments of the SSD or the BSD rates under the new section 63A, any proposed increase in SSD or BSD rates in future would be taken forward by way of a bill to amend the Stamp Duty Ordinance (Cap. 117) as in the present case while downward adjustments (reducing or withdrawing the rates by reducing them to zero) would be effected by way of subsidiary legislation subject to negative vetting under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1). The amended rates effected by notice published in the Gazette by FS under the negative vetting mechanism would come into operation immediately upon its gazettal, subject to subsequent scrutiny (amendments or repeal) by LegCo without retrospective effect.

6. Pursuant to Hon James TO's request, the Chairman has directed that an urgent meeting of the Bills Committee be held on 18 February 2014 to discuss the proposed arrangement of adopting different legislative approaches for future upward or downward adjustments to the rates of SSD and BSD and related issues.

Deliberations at the meeting on 18 February 2014

7. Dr Hon LAM Tai-fai, Hon Paul TSE and Hon Cyd HO (non-Bills Committee Member) and members belonging to the Democratic Party, Liberal Party, Civic Party, Business and Professional Alliance for Hong Kong and Labour Party present at the meeting, have expressed grave concern about the Administration's last-minute announcement of the formal undertaking in respect of the different legislative approaches for adjusting the rates of SSD and BSD detailed in paragraph 5 above, which has not yet been deliberated by the Bills Committee. They are of the view that this has deprived Members of their right to move CSAs to the

Bill to rectify the present situation which has popped up shortly before the resumption of the Second Reading debate on the Bill as the deadline for moving amendment to the Bill has expired.

8. The above members have questioned the legality and enforceability of the undertaking to be made by STH. Taking note of the legal opinion of the Legal Service Division of the LegCo Secretariat that a formal undertaking given by a designated official on behalf of the Government pursuant to Article 62 of the Basic Law would be a statement of intention that is not law and has no legal effect, some members have expressed concern that in the event of a deviation from such an undertaking, the matter would unlikely be justiciable in a court of law, and it would then be up to Members of LegCo to pursue through the political process.

9. These members consider it improper that administrative measures or a designated official's undertaking, which is not legally binding and subject only to moral and political sanctions, should take the place of legislation. They have criticized the proposed arrangement as damaging the dignity of LegCo, defying the rule of law, disrespectful of the well-established legislative procedures as well as undermining the scrutiny power of LegCo. There is also concern that according to STH, the undertaking is binding on the current term of Government only, the definition of which is unclear.

10. Hon Mrs Regina IP however points out that for policy implementation, it may not always be necessary to rely solely on legislation. In some precedent cases, the use of administrative measures and the giving of Government undertaking can also achieve the same policy effect.

11. Some members including Hon Kenneth LEUNG, Hon James TO, Hon Emily LAU, Hon Alan LEONG, Dr Hon LAM Tai-fai, Hon Paul TSE and Hon Cyd HO (non-Bills Committee Member) hold a strong view that the procedures for LegCo's scrutiny of legislation should be clearly set out in the legislation and approved by LegCo. Since the new section 63A, as presently drafted, does not reflect the Administration's latest intent, they strongly urge the Administration to postpone the resumption of the Second Reading debate on the Bill to allow further deliberations by the Bills Committee, and for the Administration to move CSAs to the proposed section 63A to provide expressly in the Bill for the proposed different legislative approaches for effecting upward and downward adjustments to the relevant rates.

12. Hon Mrs Regina IP however points out that many property agents and members of the public would like to see the early passage of the Bill. To speed up the matter, Hon Alan LEONG and Hon Paul TSE suggest that the Administration can consider seeking the President's agreement to waive the notice requirement for moving a relevant CSA to the Bill to reflect the Administration's latest intent.

13. As a means to rectify the present undesirable situation, Hon James TIEN has requested the Administration to undertake, subject to the passage of the Bill, to move the relevant CSAs to amend the proposed section 63A within a specified period, say three months, after the enactment of the Bill.

14. The Administration has explained that in view of the market-sensitive and time-critical nature of the property market, the negative vetting mechanism proposed in the Bill is in the best interest of the community as it enables prompt adjustments to the applicable rates (to zero if necessary) in the light of the market situation to ensure the healthy and stable development of the property market. This is particularly important in the case where the relevant measures need to be tapered or even withdrawn promptly when the market goes down.

15. The Administration maintains that a piece of subsidiary legislation to adjust certain rates under the negative vetting procedure is a well-established procedure in processing subsidiary legislation and is widely adopted in the laws of Hong Kong. According to the Administration, under the negative vetting mechanism, while the SSD and BSD rates as amended by FS may take effect before the relevant subsidiary legislation is tabled at LegCo, LegCo's scrutiny power is in no way compromised as LegCo can still repeal or amend the proposed rates within the specified scrutiny period of 28 days under the negative vetting mechanism (which period may be extended by a further 21 days if LegCo so decides).

16. According to the Administration, there are precedent cases in which the Administration, instead of making amendments by subsidiary legislation as provided for in the relevant ordinance, would seek to effect changes by way of an amendment bill¹. The Administration stresses that it has no intention to sideline the role of LegCo. The use of different legislative approaches for adjusting the relevant rates is put forward so as

¹ For example, the Dutiable Commodities (Amendment) Regulation 2008 and the Motor Vehicles (First Registration Tax) (Amendment) Bill 2011.

to strike a balance between addressing Members' general views that any proposed increase in SSD and BSD rates should be subject to more deliberations by LegCo on the one hand and preserving the effectiveness of the demand-side management measures on the other. The Administration is satisfied that the Government's commitment to use an amendment bill to amend the rates upwards is legally in order and does not require further amendment to the Bill.

17. A majority of members have reiterated their concern that the negative vetting mechanism under the proposed section 63A of the Bill is highly undesirable as it would usurp the scrutiny power of LegCo and undermine its gate-keeping role in monitoring the Government. Some members have questioned why the future adjustments to the SSD and BSD rates which are matters of taxation are not subject to LegCo's positive vetting, or by a resolution of LegCo, as proposed by Hon James TO. These members are dissatisfied that under the negative vetting procedure, deliberations of important issues impacting Hong Kong people, such as the one now at stake, should be confined to a specified scrutiny period.

18. Some members have expressed support for the CSAs moved by Hon Martin LIAO Cheung-kong outlined in paragraph 4 above. These members are of the view that the proposed mechanism, which is broadly similar to the operations of the orders² made by the Chief Executive under the Public Revenue Protection Ordinance (Cap. 120) ("PRPO") and which enables the relevant legislations to come into effect immediately, have the merits of retaining LegCo's scrutiny power while providing the necessary flexibility for the Administration to make timely response to any changes in the property market situation and the external economic environment.

19. The Administration does not agree to Hon James TO's CSAs as the positive vetting procedure which entails a protracted process may not be able to provide the flexibility for introducing timely adjustments to the relevant rates when necessary. The Administration holds the view that since there is no time limit for the completion of the scrutiny process, amendment by positive vetting would have adverse implications for the property market by delaying any necessary adjustment to the demand-side management measures. Furthermore, as the adjusted rates would apply

² An order made by the CE under section 2 of the PRPO is a subsidiary legislation subject to negative vetting and comes into force immediately upon the signing by the CE unless otherwise specified and expires when the bill or resolution is passed, withdrawn, or rejected by the LegCo or, in any event, after four months from the day on which the order came into force (section 5).

only to transactions that take place after the passage by LegCo and gazettal of the subsidiary legislation, a window of opportunity for speculation would be created between the announcement and the effective dates of the adjustment, bringing about uncertainty to the market and leading to greater risks to the macro-economy and the financial sector.

20. As regards Hon Martin LIAO Cheung-kong's CSAs, the Administration has highlighted that SSD and BSD measures are not revenue measures, but are tools to manage demand and accord priority to the home ownership needs of Hong Kong Permanent Residents amidst the current tight housing supply situation. The Administration is concerned that under the adjustment mechanism proposed by Hon Martin LIAO Cheung-kong, although the adjustment might take immediate effect upon the gazettal of the notice and the scrutiny period is limited to six months, such a mechanism would still create uncertainty for the market, as the new rates announced in the gazette notice would still be subject to change. If the Government's proposed adjustment is negated by LegCo, or if LegCo's scrutiny is not completed within six months of the gazettal of the notice, the proposed new rates would cease to have effect. The original rates would then be restored retrospectively, affecting all transactions that have taken place during the interim period. Any excess of stamp duty paid would have to be refunded to the payer and any shortfall of stamp duty would have to be paid to the Government within 30 days of the cessation of the notice, as the case may be. The Administration is of the view that this would cause confusion to the market and bring inconvenience to the relevant sectors.

Motion passed at the meeting

21. A majority of the members present at the meeting did not subscribe to the Administration's explanation. Hon Kenneth LEUNG moved a motion urging the Government to postpone the resumption of the Second Reading debate on the Bill so that the Bills Committee will have sufficient time to examine in detail the latest proposal put forward by the Administration and the relevant legislative procedures.

22. The Administration has responded that it has no intention to defer the resumption of the Second Reading debate as it is in the best interest of the community that the Bill be enacted as soon as practicable.

23. The Chairman has indicated that the Democratic Alliance for the Betterment and Progress of Hong Kong is in support of the resumption of the Second Reading debate at the Council meeting of 19 February 2014.

24. The motion was put to vote and was carried, with 10 members voted for and 5 members voted against.

Council Business Division 1
Legislative Council Secretariat
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