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LEGAL SERVICE DIVISION  
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (2527 0790)

21 July 2017

Ms Eureka CHEUNG  
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Financial Services and the Treasury Bureau  
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2 Tim Mei Avenue,  
Tamar, Hong Kong

Dear Ms CHEUNG,

### **Companies (Amendment) Bill 2017**

We are scrutinizing the legal and drafting aspects of the captioned Bill and shall be grateful if you could clarify the following matters:

#### Clause 4 – new sections 653P, 653Q and 653R

It is proposed under the new sections 653P(2) and 653P(3) that if an applicable company knows, or has reasonable cause to believe, that a person is a significant controller of the company, or that a particular person knows the identity of another person who is such a controller, the company must give a notice in accordance with the new section 653Q or 653R to the person, or the particular person, within seven days.

It is proposed under the new section 653Q(2)(b) that the notice given by an applicable company under the new section 653P(2) should specifically require the addressee (i) to state whether or not the addressee knows the identity of another person who is a significant controller of the company, and (ii) if the addressee knows the identity of such a person, to provide to the company all the specified particulars of that person that are known to the addressee and state

whether or not the particulars are provided with that person's knowledge. Similarly, under the new section 653R(1)(b), it is proposed that if the addressee confirms pursuant to a notice given under the new section 653P(3) that he/she knows the identity of another person who is a significant controller of the company, the addressee would be required to provide to the company all the specified particulars of that person that are known to the addressee and state whether or not the particulars are provided with that person's knowledge. It would be an offence punishable by a fine of \$25,000 if an addressee does not comply with the above requirements.

Please clarify whether the proposed requirements under the new sections 653Q(2)(b) and 653R(1)(b) ("the proposed notice requirements"), specifically the requirement on an addressee to provide an applicable company with certain information about other person(s) to be entered into the Significant Controllers Register ("SCR"), would constitute infringement of any protected rights under the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383), specifically, whether the proposed notice requirements would be against the protection of privacy from "arbitrary or unlawful interference", which is protected under Article 14 of the Hong Kong Bill of Rights. Please provide detailed explanation on whether and how the proposed notice requirements could satisfy the four-step proportionality test as laid down by the Court of Final Appeal in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 ("the four-step proportionality test") as follows:

- (a) whether the proposed notice requirements pursue a legitimate aim;
- (b) whether the proposed notice requirements are rationally connected to that legitimate aim;
- (c) whether the proposed notice requirements are no more than is necessary to accomplish that legitimate aim; and
- (d) whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the person, in particular whether pursuit of the societal interest resulted in an unacceptably harsh burden on the person.

Furthermore, we note that in order for an addressee of a notice to comply with the proposed notice requirements, the addressee may have to access and make use of information which is protected under a confidentiality agreement, or such information may be confidential in nature by virtue of other arrangements. Please clarify whether an addressee would be required to comply with the proposed notice requirements even if such compliance would be in breach of, for example, a confidentiality agreement entered into between the addressee and

another person/entity. Please also consider whether it is necessary to provide in the Bill some form of qualified immunity from suits for addressees acting in compliance with the proposed notice requirements, such as protection against civil liability or claim arising from access and/or use of information subject to a confidentiality agreement or other arrangement. Reference can be made to section 35A(10) of the Telecommunications Ordinance (Cap. 106).

Clause 4 – new sections 653X, 653Y and 653Z

It is proposed under the new section 653X that a law enforcement officer ("officer") has the power to, in the performance of his/her specified function, inspect SCR of an applicable company at the place at which it is kept and make a copy of SCR (or a part of it). "Specified function" is defined in the new section 653A to mean "a function of the officer under the law of Hong Kong that is a function relating to the prevention, detection or investigation of money laundering, or terrorist financing, as defined by section 1 of Part 1 of Schedule 1 to the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615)".

Under the new section 653X, there is no specific restriction on the manner in which the officer may exercise the above inspection power. In this regard, we note that under the new section 653Y, if the Court of First Instance ("Court"), on an application by an officer, orders an applicable company to permit the officer to inspect the company's SCR, the Court may under subsection (3)(b) specify the duration and manner of the inspection. Similarly, the Court under the new section 653Z(3) may specify in an order (relating to the making of copy of SCR) the time, duration and manner of inspection, including the circumstances in which and the extent to which the copying of information would be permitted in the course of inspection.

Please explain the rationale for empowering the Court to provide for how the officer's power under the new section 653X is to be exercised, and the reasons for the absence of any built-in restriction on the scope of the officer's power under the new section 653X. For instance, there is no provision to stipulate that the officer must not engage in any "fishing expedition" in the course of an inspection of an applicable company's SCR, and to provide that in the event such officer comes into contact with other information (including commercially sensitive information) in the company's possession, custody, or control in the course of an inspection, the officer must not in any way make use of such information in the performance of his/her specified function or to make use of such information in any other manner.

In this regard, please also consider whether the lack of such provision(s) restraining the power of the officer under the new section 653X would lead to encroachment on the protection of privacy from "arbitrary or unlawful interference", which is protected under Article 14 of the Hong Kong Bill

of Rights. Please provide detailed explanation on whether and how the new section 653X could satisfy the four-step proportionality test.

Clause 4 – new section 653ZA

It is proposed under the new section 653ZA(2) that if an addressee is charged with an offence for non-compliance with a requirement made under the new section 653Q, 653R or 653U, it would be a defence for the addressee to prove that the requirement was frivolous or vexatious. Please clarify the meaning of "frivolous or vexatious" and the relevant standard of proof. Please explain in particular whether it is the Government's intention that the addressee would have to prove that an applicable company, in issuing a notice under the new section 653Q, 653R or 653U, has abused the requirement under the new section(s), or that the requirement set out in the notice is an abuse of process, oppressive in some way, or lacks bona fides. In this regard, reference may be made to the standard of proof applicable to applications to strike out pleadings under rule 19 of Order 18 of the Rules of the High Court (Cap. 4A).

Your attention is also drawn to the fact that the new section 653ZA(2) seeks to provide a statutory defence only and that there is no provision under the Bill which could enable an aggrieved addressee to challenge a notice issued by an applicable company on the basis that the requirement under such a notice is, for example, *ultra vires*. In this regard, given that the companies are private bodies which are not amenable to judicial review, compliance with the requirements under the new sections 653Q, 653R and 653U on the part of addressees may be exceptionally onerous if they are not provided with any measure of protection against *ultra vires* acts by applicable companies in purported compliance with the proposed statutory requirements. Please clarify whether there is any mechanism for an addressee of a notice to challenge the validity of a requirement made under the new section 653Q, 653R or 653U.

It is appreciated that your reply in both English and Chinese could reach us as soon as practicable.

Yours sincerely,



(Joyce CHAN)

Assistant Legal Adviser

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