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20 December 2017

Legal Service Division
Legislative Council Secretariat
1 Legislative Council Road
Central, Hong Kong
(Attn: Mr Hugo Chiu)

Dear Hugo,

**Bills Committee on Anti-Money Laundering and Counter-Terrorist Financing
(Financial Institutions) (Amendment) Bill 2017 and
Companies (Amendment) Bill 2017**

Follow-up to meeting on 11 December 2017

I refer to your letter dated 12 December. The Administration's responses are set out in **Annex** for your information.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Eureka Cheung', written over a large, stylized loop.

(Ms Eureka Cheung)
for Secretary for Financial Services and the Treasury

c.c.

Bills Committee Chairman	(Attn: Hon. Wong Ting-kwong, GBS, JP)
Registrar of Companies	(Attn: Ms Ada Chung)
Secretary for Justice	(Attn: Ms Nilmini Dissanayake Ms Rayne Chai)

Approach in applying statutory customer due diligence (“CDD”) and record-keeping requirements to the legal professionals

1. As emphasized at the previous Bills Committee meetings, we fully respect the professional self-regulatory regime governing designated non-financial businesses and professions (“DNFBPs”) at present. Our intention, and in fact the stated objective of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 (“AML Bill”), is to leverage on the existing regulatory regimes applicable to DNFBPs to enforce the statutory CDD and record-keeping requirements. In the case of legal professionals, the Law Society of Hong Kong (“LSHK”) will take on statutory oversight for monitoring and ensuring their compliance with the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) (“AMLO”) requirements. Non-compliance with the requirements will be handled in accordance with the prevailing investigation and disciplinary mechanism under the Legal Practitioners Ordinance (Cap. 159) (“LPO”) governing professional misconduct. To facilitate the LSHK in their discharge of regulatory functions in relation to statutory CDD and record-keeping requirements that are applicable to legal professionals, enabling provisions have been built in the AML Bill to the effect that the LSHK, as the sole authority for enforcing AMLO requirements for legal professionals, has the discretion to promulgate guidelines as they consider appropriate in relation to the operation of the AMLO Schedule 2 requirements. Moreover, the LSHK may have regard to or take into account any practice direction that it issues in providing guidance on the statutory CDD requirements. The above approach has already struck a balance between the need to observe Financial Action Task Force (“FATF”) requirements and the equally important need to keep compliance burden to the absolute minimum. We are prepared to refine the relevant clauses as necessary having regard to discussions of the Bills Committee and our ongoing exchanges with the LSHK.

Issues relating to the implementation of requirements under the AML Bill

2. We have already included in the AML Bill enabling provisions which allow regulatory bodies to issue industry-specific guidelines to provide guidance in relation to the operation of the AML/CTF requirements under the AMLO. As mentioned in our reply dated 8 December [Ref: LC Paper No. CB(1)331/17-18(02)], we understand that the Hong Kong Institute of Certified Public Accountants (“HKICPA”) and the Estate Agents Authority (“EAA”) are in the process of preparing AML/CTF guidelines on the basis of AMLO Schedule 2 requirements. Given the HKICPA and the EAA will be the regulatory bodies and issuing authorities for guidelines under clause 8 of the AML Bill, we trust that they will ensure consistency between their guidelines and the AML/CTF requirements as set out in the AMLO. We will continue to liaise with the

HKICPA and the EAA closely to follow through the issue of guidelines.

3. The FATF recommends that financial institutions (“FIs”) and DNFBPs should maintain records on customer identification and transactions for **at least** five years. In other words, jurisdictions have the discretion to consider the appropriate length of record-keeping in accordance with the risk-based approach provided that the threshold is met. The six-year record-keeping requirement now applicable to FIs under the AMLO has been drawn up having regard to the FATF Recommendations, relevant requirements in other Ordinances as well as views received during public consultations, and has worked smoothly for FIs since the commencement of the AMLO in 2012. As the AMLO is intended to be an overarching piece of enabling legislation, and its Schedule 2 provides a ready basis for extension to DNFBPs, we propose that DNFBPs be subject to the same CDD and record-keeping requirements therein. Such a legislative approach received general support during the stakeholder consultation. Against the above backdrop, we do not consider it necessary to revise the record-keeping requirement in the AMLO from six years to five years.
4. The Companies Registry is in the process of preparing AML/CTF guidelines for trust or company service providers (“TCSPs”) in consultation with the industry and relevant stakeholders. We are prepared to share a copy of the guidelines for Members’ reference once they are finalised.
5. “Trust or company service” as defined in clause 25(3) of the AML Bill includes the provision in Hong Kong by a person, by way of business, of the service of acting as a trustee of an express trust or a similar legal arrangement. The term “business” according to dictionary meaning is a person’s official or professional duties as a whole; one’s regular, habitual, or stated profession, trade or occupation; a trade and all activities relating to it, especially considered in terms of volume or profitability, commercial transactions, engagements, and undertakings regarded collectively (Oxford English Dictionary). We note that similar concepts of “carrying on a business” are adopted in various other Ordinances such as the Banking Ordinance (Cap. 155), the Securities and Futures Ordinance (Cap. 571) and the Business Registration Ordinance (Cap. 310). According to case law, the question of whether something amounts to the carrying on of a business is a question of fact and degree to be answered upon a consideration of all the circumstances [Lee Yee Shing v CIR [2008] 3 HKLRD 51; SFC v C.L. Management Services Ltd & Another [2016] HKCU 1314].

In considering whether a person is carrying out a trust or company service by way of business, we believe it relevant to take into account whether the person –

- (a) undertakes one or more of the activities of a trust or company service provider;
- (b) advertises or publicises his business activity or receives referrals from other businesses;

- (c) aims to make a profit when he carries out the activity;
- (d) carries out the activity with reasonable or recognizable continuity.

Therefore, if, for example, a person acts as the trustee for a trust, charges for his service, publicises his service and carries on the activity continuously, it is clear that he is carrying on a business and needs to obtain a licence. On the contrary, a licence is unlikely to be required if a person accepts a one-off appointment by a friend or relative to act as a trustee of a trust in his personal capacity and with no commercial gain.

- 6. As mentioned in our reply dated 8 December [Ref: LC Paper No. CB(1)331/17-18(02)], we believe that it should not be common for DNFBPs to rely on FIs or other DNFBPs as intermediaries to conduct CDD measures on their behalf. Nonetheless, we are prepared to consider the views raised at the Bills Committee meetings and allow DNFBPs to rely on intermediaries to conduct CDD measures.

Immunity for regulatory bodies of DNFBPs

- 7. Section 4 of the AMLO provides that a relevant authority of an FI does not incur any civil liability for anything done or omitted to be done by the relevant authority or the person in good faith in the performance or purported performance of a function conferred or imposed on the relevant authority by or under this Ordinance. It does not provide for the FI to claim losses arising from the mistakes of the relevant authority. When extending the AMLO requirements to cover DNFBPs, we consider it fair and consistent to confer similar protection to a regulatory body of DNFBPs. Despite any provision in the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) that provides for claiming losses, the two Ordinances are not comparable given their entirely different natures. We do not see the need to include a similar provision in the AMLO.

Financial Services and the Treasury Bureau
20 December 2017