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8 January 2018

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 4 January 2018

I refer to your email dated 4 January. 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', with a long, sweeping flourish extending to the right.

(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)

Annex

1. As mentioned in our reply dated 3 January 2018 and emphasised at previous Bills Committee meetings, estate agents in Hong Kong only need to conduct anti-money laundering and counter-terrorist financing (“AML/CTF”) measures in accordance with Schedule 2 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (“AMLO”) when they are involved in transactions concerning the buying or selling of real estate which take place in Hong Kong. The geographical location of the real estate is immaterial. This policy intent applies equally to the subject matter of the other transactions mentioned in section 5A(3) and (5). Having regard to the views raised at the Bills Committee, we will include a Committee Stage Amendment under section 5A to clarify beyond doubt that it is immaterial whether the subject matter of a transaction referred to in section 5A(3), (4) or (5) is in Hong Kong or elsewhere.
2. Section 5 of the Trading Funds Ordinance (Cap. 430) provides that “notwithstanding any provision of another Ordinance, the income received for the provision of a government service in respect of which a trading fund is established under section 3 is to be paid into the trading fund”. It is therefore a matter of policy that, unless otherwise stipulated in a legislation, income received for the provision of a government service under a trading fund concerned is to be credited into the trading fund. As the administration and enforcement of the provisions of the AMLO regarding the trust or company service providers (“TCSPs”) licensee is proposed to be included as services provided by the Companies Registry Trading Fund (“CRTF”), the related income, including pecuniary penalty, received under the TCSP regime should be paid into the CRTF for consistency sake. Pursuant to section 53ZB(3), in exercising the disciplinary power to impose a pecuniary penalty, the Registrar of Companies (“Registrar”) must have regard to the guidelines published by the Registrar, which set out the relevant factors to be considered. The financial position of the Companies Registry (“CR”) is not a relevant factor and the Registrar’s decisions on imposing pecuniary penalty cannot and will not be influenced by the financial position of the CR.

For the Office of the Communications Authority Trading Fund, section 20(5) of the Communications Authority Ordinance (Cap. 616) provides that “any fines or penalties imposed by the Authority or a former authority must be paid into the general revenue.” Given the different policy intents and backgrounds of the two ordinances, a direct comparison is considered not appropriate. There is no similar pecuniary penalty imposed by the Post Office, the Land Registry and the Electrical and Mechanical Services Trading Funds.

3. Having regard to the discussion of the last Bills Committee meeting, we will include a Committee Stage Amendment to revise the proposed new section 53ZK(1)(d) of the AMLO to allow the Registrar to disclose information to the Estate Agents Authority.
4. The new section 53ZO provides for the time limit for prosecution of all offences under the proposed new Part 5A of the AMLO. This is the equivalent provision

of section 53 which applies to money service operators and prescribes the time limit for prosecution of offences under Part 5. There are a number of other legislation (for example, section 34A of the Marriage Ordinance (Cap. 181) and section 43B of the Mandatory Provident Fund Schemes Ordinance (Cap. 485)) in which the time limit for prosecution runs from the date of discovery, or notice, of the offence. It is not a new formula. The offences under Part 5A, which include carrying on a TCSP business without a licence (section 53F) and failure to obtain approval to become a director (section 53U) etc., are not minor offences as they are punishable by a fine of \$50,000 or more and, in some cases, imprisonment for 6 months.

5. The new section 80(1A)(e) of the AMLO provides an option for the Registrar to give notice to a person vide email in order to facilitate more effective and timely communications with the person. The Registrar can only invoke the power under the section by sending a notice to the person's last known email address when that has been provided to the Registrar in the relevant specified forms. There are similar provisions in other legislations which provide for the giving of notices to persons by email, for example, section 400(1) of the Securities and Futures Ordinance (Cap. 571) and section 167(1) of the Competition Ordinance (Cap. 619).
6. Our legislative proposals closely follow the Financial Action Task Force ("FATF") Recommendation, which defines designated non-financial businesses and professions ("DNFBPs") to cover TCSPs when they prepare for or carry out transactions for a client concerning –
 - (a) the forming of companies or other legal persons;
 - (b) acting, or arranging for another person to act, as a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;
 - (c) providing a registered office, business address, correspondence or administrative address or other related services for a company, a partnership or any other legal person or arrangement; and
 - (d) acting, or arranging for another person to act, as a trustee of an express trust or similar legal arrangement, or a nominee shareholder for a person other than a company whose securities are listed on a regulated market.

Given the FATF's requirement on category (c) above, anyone who carries on a business in Hong Kong which amounts to the provision of a registered office, business address, correspondence or administrative address or other related services for a company, a partnership or any other legal person or arrangement will be required to apply for a TCSP licence from the Registrar in future.

7. As highlighted at the last Bills Committee meeting, our policy intent of amending section 9(b) of Schedule 2 under the AMLO is to provide financial institutions ("FIs") and DNFBPs with a more risk-sensitive, flexible option when applying supplementary measures, which is adaptable to the use of technology. Given the volumes of information which may be collected from a customer during the customer due diligence ("CDD") process, much of which relates to risk profiling rather than for identification purposes, the existing requirement for verifying "all" information may not be proportionate to the objective and in

practice may even restrict the application of a risk-based approach. We consider that the current drafting strikes a right balance and provides flexibility for FIs and DNFBPs to adopt a risk-based approach in determining the extent of information to be verified based on the different risk levels of customers, which is in line with the international standards as well as our policy intent.

8. Sections 53S, 53T and 53U require a person to obtain approval from the Registrar to become an ultimate owner, partner or director of a licensee respectively. In the case of director, the term “director” is defined in Schedule 1 Part 1 of the AMLO as (a) in relation to a corporation that is a company as defined by section 2(1) of the Companies Ordinance (“CO”)—means a director as defined by that section; and (b) in relation to any other corporation—means a person (by whatever name called) who occupies in the corporation a position similar to that of a director referred to in (a) above. According to section 2(1) of the CO, “director” includes any person occupying the position of director (by whatever name called). This can include persons who are acting as directors without formal appointment as “director”. Such a person will also be in breach of section 53U.

Similarly, in the case of a partner or an ultimate owner, whether a person is a partner or an ultimate owner of a licensee is a matter of fact and may not depend on formal appointment. We therefore do not consider it necessary to introduce any amendments to sections 53S, 53T and 53U.

As regards the suggested reference to section 8ZZV of the Payment Systems and Stored Value Facilities Ordinance (Cap. 584), we note that the section is so formulated as to create a continuing offence (with a daily penalty) of acting as a director etc. without the Monetary Authority’s approval. In the case of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 (“AML Bill”), we consider it sufficient to punish a person for the offence of becoming a director etc. without the approval of the CR, and it is not our policy intent to create a continuing offence with a daily penalty for one continuing to act as such in the absence of CR’s approval. Moreover, doing otherwise would also have an unintended effect on the other parts of the AML Bill and the existing provisions relating to money service operators (“MSO”) (viz. sections 35, 36 and 37 of the AMLO) which provide for the Commissioner of Customs and Excise’s prior approval for a person proposing to become a MSO licensee’s director, ultimate owner and partner respectively.

On the question of whether the ultimate owner of a licensed TCSP should be subject to regulation under the AMLO, it is worth noting that the FATF does not require sanctions to be imposed against ultimate owners for non-compliance with AML/CTF requirements.

9. There are a number of other legislations (for example, section 31 of the Financial Reporting Council Ordinance (Cap. 588), section 20E of the Waste Disposal Ordinance (Cap. 354) and section 34ZZC of the Mandatory Provident Fund Schemes Ordinance (Cap. 485)) in which the fault element of “causes or allows” are used in offence-creating provisions. It is not a new approach. We do not

consider it necessary to refine the phrase in the proposed new section 34(1)(a)(xiv)(A) and (xv)(A) of the Professional Accountants Ordinance (Cap. 50).

10. Having regard to the discussion of the last Bills Committee meeting, we propose to allow DNFBPs the option to rely on intermediaries for conducting CDD. The proposed new section 18(3)(c) of Schedule 2 under the AMLO will be refined to cover qualified estate agents in comparable jurisdictions as one of the specified intermediaries for carrying out CDD measures.

Financial Services and the Treasury Bureau
8 January 2018