

財經事務及庫務局



香港添馬添美道二號  
政府總部二十四樓

**FINANCIAL SERVICES AND THE  
TREASURY BUREAU**

24/F, Central Government Offices,  
2 Tim Mei Avenue, Tamar  
Hong Kong

傳真號碼 Fax No. : (852) 2810 2370  
電話號碼 Tel. No. : (852) 2179 5848  
本函檔號 Our Ref. : TsyB R 00/800-2/20/0(C)  
來函檔號 Your Ref. : LS/B/1/17-18

**By fax (2877 5029)**

10 November 2017

Miss Evelyn Lee  
Assistant Legal Advisor  
Legal Service Division  
Legislative Council Secretariat  
Legislative Council Complex  
1 Legislative Council Road  
Central, Hong Kong

Dear Miss Lee,

**Inland Revenue (Amendment) (No. 5) Bill 2017**

Thank you for your letter dated 1 November 2017 on the captioned Bill. Our response is set out in the attached note.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Pecvin Yong'.

( Ms Pecvin Yong )

for Secretary for Financial Services and the Treasury

c.c.

Commissioner of Inland Revenue  
Department of Justice

(Attn: Mr KK Chiu)  
(Attn: Ms Phyllis Poon)

# Inland Revenue (Amendment) (No. 5) Bill 2017

## Government's Response

### Alignments with the Common Reporting Standard (“CRS”)

The CRS is the standard for automatic exchange of financial account information in tax matters (“AEOI”) developed by the Organisation for Economic Co-operation and Development (“OECD”)<sup>1</sup>. It sets out the financial account information to be collected and exchanged, the financial institutions (“FIs”) required to file reports to the tax authorities, the different types of financial accounts and taxpayers covered, as well as common due diligence procedures to be followed by FIs.

2. In ensuring effective implementation of the CRS in Hong Kong, we need to make necessary legislative amendments to align the Inland Revenue Ordinance (Cap. 112) (“IRO”) with the CRS by removing inconsistencies identified either by ourselves or by the OECD during its recent examination of our legislation.

3. A table summarising the changes proposed in clauses 5 to 11 of the Inland Revenue (Amendment) (No. 5) Bill 2017 (“the Bill”) and the corresponding provisions in the CRS is set out at **Annex**.

### Definition of “controlling person”

4. According to the CRS, the term “controlling persons” means the natural persons who exercise control over an entity, and must be interpreted in a manner consistent with the Financial Action Task Force (“FATF”) recommendations<sup>2</sup>. Further, the CRS provides that for the purposes of determining the controlling persons of an account holder, a reporting FI may rely on information collected and maintained pursuant to Anti-Money Laundering/Know Your Customer (“AML/KYC”) procedures<sup>3</sup>.

---

<sup>1</sup> The standard is available on the OECD website at <http://www.oecd.org/tax/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters-second-edition-9789264267992-en.htm>.

<sup>2</sup> Subparagraph D(6), Section VIII of the CRS (p. 57).

<sup>3</sup> Subparagraph D(2)(b) and (c), Section V (p.39 and 40); and subparagraph A(2)(b), Section VI (p. 42) of the CRS. This has also been reflected in the IRO – see section 8 and 9, Division 3, Part 5, Schedule 17D; and section 5, Part 6, Schedule 17D.

“AML/KYC procedures” is defined in section 50A of the IRO and refers to the customer due diligence procedures required to be carried out by a reporting FI pursuant to anti-money laundering requirements or similar requirements (including requirements to know a customer) to which the reporting FI is subject.

5. Under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) (“AMLO”) which has incorporated and implemented FATF’s recommendations in Hong Kong, FIs are required to conduct statutory due diligence measures so as to identify and verify the customers’ identity and their beneficial owner(s). As explained to the Legislative Council during the scrutiny of the Inland Revenue (Amendment) Bill 2016, in order to reduce the compliance burden of FIs in carrying out the due diligence procedures for AEOI, it is the Government’s policy that FIs may resort to information collected under the AMLO in performing the relevant due diligence requirements (including the AML/KYC procedures) under the AEOI regime. This is also provided for under the CRS.

6. Given the AMLO has already incorporated and implemented FATF’s recommendations in Hong Kong, we consider it appropriate to draw reference to the AMLO (in particular the interpretation of “beneficial owner”) in formulating the legislation for “controlling person” under the IRO for the AEOI regime.

7. The term “enforcer of the trust”, which appears under the interpretation of “beneficial owner” in relation to a trust in AMLO, is not defined in the FATF’s recommendations, CRS, AMLO or IRO. Therefore the term should here be given its ordinary or literal meaning in the context of the proposed provision and the IRO. In *Shorter Oxford English Dictionary*, “enforcer” means a “person, organisation, etc. that enforces something” and “enforce” means “compel the occurrence or performance of” and “compel the observance of (a law, rule, practice, etc.)”. Accordingly, an “enforcer of the trust” could be a person that compels the occurrence, performance or observance of the trust.

8. Clause 5(14) of the Bill seeks to tally the provision in the IRO with the corresponding provision in the AMLO. This would ensure the consistency of required procedures applied by FIs in both regimes.

**Proposed Changes in Clauses 5 to 11 of the Inland Revenue (Amendment) (No. 5) Bill 2017 (“the Bill”) and Corresponding Provisions in the Common Reporting Standard (“CRS”)**

Clause in the Bill	Reference in Inland Revenue Ordinance	Provision in CRS	Reasons for Change
5(1)	Section 50A(1) Interpretation – annuity contract	Subparagraph C(6), Section VIII (p. 51)	To clarify that <i>annuity contract</i> also includes a contract— (i) that is considered to be an annuity contract in accordance with the law, regulation or practice of the jurisdiction in which the contract was issued; and (ii) under which its issuer agrees to make payments for a term of years (see proposed paragraph (b)).
5(2)	Section 50A(1) Interpretation – cash value	Subparagraph C(8), Section VIII (p. 52)	To clarify that the <i>cash value</i> could be determined by either the amount that the policyholder can borrow under, <i>or with regard to</i> , the contract.
5(3)	Section 50A(1) Interpretation – depository account	Subparagraph A(5) and C(2), Section VIII (p. 44 and 51)	To clarify that accounts maintained by authorised institutions (defined by section 2(1) of the Banking Ordinance (Cap. 155)) also fall within the meaning of <i>depository account</i> .
5(4)	Section 50A(1) Interpretation – financial account	Subparagraph C(1)(b), Section VIII (p. 50)	To clarify that any equity interest or debt interest in an advising manager are <i>financial accounts</i> if the class of such interests was established with the purpose of avoiding reporting under section 50F(1) and (2) of the Inland Revenue Ordinance (“IRO”).
5(5)	Section 50A(1) Interpretation – pre-existing account		By adding the reference to “its related entities within Hong Kong” to align the wording of paragraph (b)(ii)(A) with paragraph (b)(i) of the existing definition of <i>pre-existing account</i> .

Clause in the Bill	Reference in Inland Revenue Ordinance	Provision in CRS	Reasons for Change
5(6) & 5(7)	<p>Section 50A(1)</p> <p>Interpretation – specified insurance company</p> <p>New definition of insurance company</p>	<p>Paragraphs 26 and 27,</p> <p>Commentary on Section VIII (p. 165)</p>	<p>To clarify that only insurance company that issues, or is obliged to make payments with respect to a cash value insurance contract or an annuity contract, would fall within the scope of <i>specified insurance company</i>.</p> <p>The entities in paragraphs (a), (b) and (c) are moved to the new definition of <i>insurance company</i>. Insurance companies are only qualified as specified insurance companies if they issue, or are obliged to make payments with respect to cash value insurance contracts or annuity contracts.</p>
5(8) – 5(15)	<p>Section 50A(6)</p> <p>Interpretation regarding the exercise of control in the definition of “controlling person”</p>	<p>Subparagraph D(6), Section VIII (p. 57);</p> <p>Paragraphs 132-137,</p> <p>Commentary on Section VIII (p. 198-199)</p>	<p>To include the determinant of “senior managing official” in identifying a controlling person, which is in line with the Financial Action Task Force (“FATF”) recommendation on determining beneficial ownership.</p> <p>Also to align the relevant provisions in the IRO with the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) to facilitate compliance by financial institutions.</p> <p>For example, the threshold for determining control is currently by reference to “not less than” the specified percentage of the issued share capital[or voting rights][or capital or profit] of an entity. The threshold is proposed to be changed to “more than” the relevant specified percentage.</p> <p>It is worth noting that having reviewed the latest FATF requirement and the prevailing practice of other jurisdictions, the Government proposes relaxing the threshold of defining beneficial ownership from the current “not less than 10%” to “more than 25%” in the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017, which is currently under the scrutiny of the Legislative Council.</p>

Clause in the Bill	Reference in Inland Revenue Ordinance	Provision in CRS	Reasons for Change
5(16)	Section 50A(12)  Interpretation of the term “advising manager”		Consequential amendment is made following the amendment to paragraph (d) of the definition of <i>financial account</i> (see clause 5(4) of the Bill).
6	Section 50B  Due diligence obligations on reporting financial institutions	Subparagraph A(2), Section IX (p. 61)	The CRS requires that <b>both</b> evidence relied on, and any record of the steps taken in due diligence are kept, but not either one.
7	Section 50C  Obligations of reporting financial institutions to furnish returns		Improving the clarity of the scope of information that could be decided by the Commissioner of Inland Revenue.  Section 50C(2) of the IRO provides that an assessor’s notice may request for information in relation to reportable accounts maintained by financial institutions during the “specified information period”. The proposed section 50C(2A) further clarifies the meaning of specified information period.

Clause in the Bill	Reference in Inland Revenue Ordinance	Provision in CRS	Reasons for Change
8	<p>Section 8 Qualified credit card issuer</p> <p>Part 2 Non-reporting Financial Institutions</p> <p>Schedule 17C</p>	<p>Subparagraph B(8)(b), Section VIII (p. 49)</p>	<p>The CRS stipulates that the rule in determining the scope of overpayment (existing section 8(2) of Part 2, Schedule 17C to the IRO) apply to <b>both</b> cases in the existing section 8(1)(b)(i) and (ii) of Part 2, Schedule 17C to the IRO.</p>
9	<p>Section 9 Exempt collective investment vehicle</p> <p>Part 2 Non-reporting Financial Institutions</p> <p>Schedule 17C</p>	<p>Subparagraph B(9), Section VIII (p. 49); Paragraph 52, Commentary on section VIII (p. 173)</p>	<p>To clarify that for a collective investment vehicle (“CIV”) to fall within the description of non-reporting financial institutions, all of the interests in such CIV should be held by individuals or entities that are not reportable persons. If the interests are held by or through a passive NFE, and one of the controlling persons of such passive NFE is reportable person, then the CIV concerned would not be regarded as an exempt CIV.</p> <p>The current formulation in the IRO could not exempt a CIV where its interests are held by entities (other than passive NFES) that are not reportable persons.</p>

Clause in the Bill	Reference in Inland Revenue Ordinance	Provision in CRS	Reasons for Change
10	Section 7 Dormant account  Part 3 Excluded Accounts  Schedule 17C	Paragraph 9, Commentary on section III (p. 112)	The CRS requires that <b>all</b> the conditions (but not either one of) in existing sections 7(a), 7(b) and 7(d) of Part 2, Schedule 17C to the IRO to be met in order to render an account dormant and hence excluded from reporting. An additional situation is now included in clause 10(4) of the Bill to elaborate what may also constitute a dormant account in accordance with the CRS (see the proposed section 7(2)).
11	Section 6 Determining residence of controlling persons of passive NFE  Part 6 Due Diligence Requirements for New Entity Accounts  Schedule 17D	Paragraph 20, Commentary on section VI (p. 148)	To align with the requirement of the CRS Commentary that a reporting financial institution may rely <b>only</b> on a self-certification (with no other reliance) from either an account holder or controlling person for the purpose of determining whether the controlling person is a reportable person for new entity accounts.