



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (2294 0460)

3 January 2019

Miss Carrie CHANG
Principal Assistant Secretary for Financial Services &
the Treasury (Financial Services)1
Financial Services and the Treasury Bureau
24/F, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Miss CHANG,

**Inland Revenue (Profits Tax Exemption for Funds)
(Amendment) Bill 2018**

I am scrutinizing the captioned Bill with a view to advising Members on its legal and drafting aspects. To facilitate Members' consideration of the Bill, I should be grateful if you could clarify the following matters.

Clause 6 – proposed section 20AM

- (a) Under the proposed section 20AM(6), a business undertaking for general commercial or industrial purposes would not be regarded as a "fund" for the purposes of the proposed profits tax exemption. It is noted that a business undertaking *directly (my emphasis)* engaging in any one or more of the activities as stated in the proposed section 20AM(7) ("specified activities") would be regarded as a business undertaking for general commercial or industrial purposes. Under what circumstances would a business undertaking be regarded as "directly" engaging in any one or more of the specified activities? Would a business undertaking "indirectly" engaging in any one or more of the specified activities be regarded as a business undertaking for general commercial or industrial purposes?

- (b) If the answer to (a) is in the affirmative, under what circumstances would a business undertaking "indirectly" engaging in any one or more of the specified activities be regarded as a business undertaking for general commercial or industrial purposes? Would it be appropriate to set out these circumstances in the Bill? For the sake of clarity and certainty, would you consider adding "or indirectly" after "directly" in the proposed section 20AM(7)?

Clause 6 – proposed section 20AN

Currently, profits tax exemption is given to offshore privately offered funds under section 20AC of the Inland Revenue Ordinance (Cap. 112). Clause 4 of the Bill seeks to amend section 20AC by providing that on and after 1 April 2019, a reference in section 20AC to a non-resident person does not include a "fund" within the meaning of the proposed section 20AM. The effect of such a proposed amendment seems to be that any offshore fund meeting the new definition of "fund" under the proposed section 20AM would be eligible for profits tax exemption under the proposed section 20AN. In respect of profits tax exemption for offshore funds, please clarify whether there is any overlap between the amended section 20AC and the proposed section 20AN if the Bill is passed. Under what circumstances would an offshore fund be eligible for profits tax exemption under the amended section 20AC if it fails to meet the new definition of "fund"?

Clause 6 – proposed section 20AN (regarding open-ended fund companies)

Currently, under section 20AH(2)(b) of Cap. 112, an open-ended fund company ("OFC") must be non-closely held ("non-closely held requirement") in order to be eligible for profits tax exemption. According to paragraph 8 of the Legislative Council ("LegCo") Brief (File Ref.: ASST/3/1/5/1C (2017) Pt. 6) on the Inland Revenue (Amendment) (No. 4) Bill 2017 issued by the Financial Services and the Treasury Bureau on 21 June 2017, the non-closely held requirement aimed to ensure that such an OFC is not owned by only a few individuals or corporate investors and to prevent an individual or a corporate investor to abuse the tax exemption by repackaging its business as an OFC. Section 20AH is proposed to be repealed under clause 5 of the Bill. However, it is noted that the non-closely held requirement is not incorporated in the Bill. Please clarify:

- (a) why the non-closely held requirement is not incorporated in the Bill; and
- (b) how the concerns as stated in paragraph 8 of the above LegCo Brief could be addressed in the new profits tax exemption regime as proposed by the Bill.

Clause 6 – proposed sections 20AP and 20AQ

The proposed sections 20AP and 20AQ seek to set out the circumstances under which the profits tax exemption in the proposed sections 20AN and 20AO would not apply to a fund or a special purpose entity. However, it is noted that, under the proposed sections 20AP(2) and 20AQ(2), profits tax exemption would still be granted to a fund or a special purpose entity if a condition specified in the proposed section 20AP(3) or 20AQ(3) is met in good faith. Please clarify the meaning of "good faith" in these proposed sections. What would be the intended circumstances under which the specified condition would not be regarded as met in "good faith"?

Clause 6 – proposed section 20AS

For an OFC, profits earned from transactions in assets of a class that is not specified in the proposed Schedule 16C ("non-Schedule 16C class") could enjoy profits tax exemption under the proposed section 20AN. However, under the proposed section 20AS, an OFC would not be entitled to the profits tax exemption if it carries on a direct trading or direct business undertaking in Hong Kong in assets of a non-Schedule 16C class, or holds assets of a non-Schedule 16C class that are utilized to generate income. Under what circumstances would an OFC be regarded as carrying on a direct trading or direct business undertaking in Hong Kong in assets of a non-Schedule 16C class, or holding such assets to generate income? Would it be appropriate to set out these circumstances in the Bill?

I look forward to receiving your reply in both English and Chinese as soon as possible, preferably before the second meeting of the Bills Committee.

Yours sincerely,



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