

立法會
Legislative Council

LC Paper No. LS105/19-20

**Further Report by Legal Service Division on
Limited Partnership Fund Bill**

Members may recall from LC Paper No. LS97/19-20 dated 10 June 2020 and issued to Members vide LC Paper No. CB(2)1185/19-20 that the Legal Service Division ("LSD") was scrutinizing the legal and drafting aspects of the Bill.

2. To recap, the Bill seeks to provide for the registration of funds as limited partnership funds ("LPFs"); to provide for the operation, striking off, deregistration, dissolution and winding up of the registered funds; and to provide for incidental and related matters. LSD has sought clarification from the Administration on certain legal and drafting aspects of the Bill. Details of LSD's enquiries and the Administration's response at **Annexes 1 and 2** respectively are summarized below.

Clause 3(2)(a), etc. – meaning of "business"

3. In response to LSD's enquiry on the meaning of the undefined term "business" in clause 3(2)(a), etc. of the Bill, the Administration has explained that "business" can be understood by using its ordinary dictionary meaning, which means, among others, "commercial activity". Hence, the Administration considers it not necessary to define "business" in the Bill.

Clause 4(1) – Financial Secretary may prescribe arrangements as not being regarded as funds, etc.

4. Under clause 4(1), the Financial Secretary ("FS") may by notice published in the Gazette prescribe that an arrangement, etc. would not be regarded as a fund. Under clause 10, FS may by order published in the Gazette specify any word or expression regarding the naming of LPFs. In response to LSD's enquiry on the circumstances under which FS would invoke clauses 4(1) and 10, the Administration has replied that its policy intent is for FS to use the power under clause 4(1) whenever market conditions show that a certain arrangement should not be regarded as a fund so as to safeguard investors' interests. FS may invoke the power under clause 10 when he considers that the use of certain words in the names of LPFs may be misleading, etc. The Administration has also clarified that the notice/order made under clauses 4(1) and 10 would be subsidiary legislation subject to the negative vetting procedure under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1).

Clause 7(1) – age requirement for limited partner who is a natural person

5. In response to LSD's enquiry on the rationale for not specifying any age requirement for a limited partner who is a natural person in clause 7(1)(d)(i), the Administration has replied that it is considered not necessary to do so as, generally speaking,

a limited partner would bear very limited legal liability for activities which would contravene the proposed statutory requirements of the Bill. The policy intent is to allow flexibility for the scope of qualified limited partners to keep the proposed LPF regime competitive.

Clause 15(b) – no legal personality for limited partnership fund

6. On LSD's enquiry on the reasons for providing that LPF would not have a legal personality under clause 15(b), the Administration has explained that it has made reference to the practice of the Limited Partnerships Ordinance (Cap. 37) and comparable overseas regimes (e.g. United Kingdom), under which limited partnerships do not have a legal personality.

Clause 21(3)(a) – whether auditor must be independent of limited partner(s)

7. LSD has enquired how an auditor appointed for LPF would be considered as "independent" of a general partner ("GP") and an investment manager ("IM") under clause 21(3)(a), and whether the auditor should also be independent of the limited partner(s) of the fund. The Administration has explained that the Hong Kong Institute of Certified Public Accountants has promulgated guidelines on ensuring auditors' independence. As the audit of LPFs would be primarily for investor protection purposes, the Administration considers it sufficient to explicitly require the auditor to be independent from GP and IM who would manage the fund.

Clause 22 – liability for failing to comply with duty to ensure proper custody of assets

8. As to what would amount to "proper custody arrangements" by GP under clause 22 and whether there would be any liability in case of non-compliance with clause 22, the Administration stated that it would defer the judgment of "proper custody arrangements" to GP or IM or custodian (if any) of LPF as it is not practicable to specify the custody arrangements in the law. The Administration has also clarified that there would be no criminal liability for non-compliance with clause 22.

Clause 23(10) – consequence(s) for failing to comply with filing duty

9. Under clause 23(10), if a person resigns as an authorized representative ("AR"), the person would be required to file a notification of the resignation with the Registrar of Companies ("Registrar"). In response to LSD's enquiry on whether AR would be subject to any sanction for failing to comply with clause 23(10), the Administration has replied that the AR would not be criminally liable. On the other hand, GP would have an obligation to file such a notification under clause 23(6), and a failure to do so would be an offence under clause 23(9).

Clause 24(2)(c) – declaration in annual return

10. Under clause 24, GP would be required to file an annual return with the

Registrar after each anniversary of the date on which the certificate of registration is issued to LPF, and a failure to do so would be a criminal offence. Under clause 24(2)(c), the annual return must include a "declaration" by GP that the fund "will be in operation, or will carry on business as a fund, in the 12 months after the anniversary", etc. LSD has enquired whether (a) GP should include such a declaration in the annual return where GP actually believes that the fund will not be in operation, or will not carry on business as a fund, in the 12 months after the anniversary, and (b) GP would commit an offence for not including the declaration in the annual return under such circumstances. The Administration has agreed to LSD's concerns and planned to move a proposed amendment to amend clause 24(2)(c). The proposed amendment seeks to provide that the annual return would need to include a "statement" made by GP as to GP's "assessment on whether or not the fund will be in operation, or will carry on business as a fund, for any period in the 12 months after the anniversary", etc.

Clause 30 – liability for limited partner who makes records available for public inspection

11. LSD has made enquiries on the rationale (a) for the offence proposed in clause 30, under which a "specified person" (defined to mean GP or IM) who makes certain records of LPF (e.g. financial statements) available for public inspection would be a criminal offence, and (b) for not providing in clause 30 that a limited partner would commit an offence for doing the same act. The Administration has clarified that limited partners would supposedly not take part in the management of LPFs and would not be the specified persons to keep the relevant records. Therefore, the offence proposed under clause 30 would be irrelevant to limited partners.

Clause 35(2) – "knowingly causes or knowingly permits" ("明知而致使或准許")

12. LSD has made enquiry on why the corresponding Chinese text of "knowingly causes or knowingly permits" in clause 35(2) is "明知而致使或准許", while noting that the phrase "knowingly causes or knowingly permits" ("明知而致使或明知而准許" in the Chinese text) is used in section 5(7) of the existing Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615). The Administration has agreed to LSD's concern and planned to move a proposed amendment to add "明知而" before "准許" in the Chinese text of clause 35(2).

Clause 46(5) – determining whether a name is the same as or too like another name

13. When determining whether an LPF's name would be the same as or too like the name of a body corporate incorporated, etc. under an Ordinance (so that the Registrar may direct the LPF to change its name), it is proposed in clause 46(5) that the (a) type or case of letters and (b) spaces between letters, etc. must be disregarded. In response to LSD's enquiry on whether the singular or plural form of a word should also be disregarded, the Administration has replied that in the experience of the Companies Registry ("CR") in implementing section 111 of the Companies Ordinance (Cap. 622), the singular or plural form of a word would not be disregarded. Therefore, the Administration considers it unnecessary

to amend clause 46(5) to include the singular or plural form of a word.

Clause 62 – Registrar must make LPF Register available for public inspection

14. On LSD's enquiry on why the LPF Register would not be made available for public inspection (under clause 62) free of charge with reference to section 20ZY(1) and (5) of the Financial Reporting Council Ordinance (Cap. 588) and section 5H(2) and (5) of the Insurance Ordinance (Cap. 41), the Administration has replied that CR is required to fund all its expenditure out of the revenue received. Specified fees proposed under clause 62 are set on a cost recovery basis for inspecting the LPF Register.

Clause 65(1), etc. – Registrar's enquiry letter and LPF Register

15. LSD has enquired whether the Registrar would be required to include documents (e.g. Registrar's enquiry letter that may be issued pursuant to clause 65(1)) which would suggest that the striking off or deregistration process regarding LPF is taking place, or annotate the existence of those documents in the LPF Register pursuant to clause 61. The Administration has replied that CR would include an information sheet in the LPF Register setting out the relevant fact, and a remark of that fact would also appear in the particulars of an LPF in the LPF Register.

Clause 69 – objection to proposed deregistration of limited partnership fund

16. On LSD's enquiry on whether clause 69 would be amended to specify the proposed procedure for dealing with an objection to a proposed deregistration of LPF (e.g. whether the applicant and the objecting party would have the opportunity to be heard, and whether there would be any appeal mechanism), the Administration has replied that clause 69 is modelled on section 751 of Cap. 622, and that the procedures for dealing with an objection would essentially be administrative procedures. Accordingly, the Administration considers it not necessary to set out in the Bill the detailed steps CR would take under clause 69(2).

Clause 71(3) – consequence(s) for non-compliance with filing requirement

17. Under clause 71(3), a person who applies for a court order to dissolve LPF would be required to file a copy of the order with the Registrar after the order is made. In response to LSD's enquiry on the consequence(s) (if any) for non-compliance with clause 71(3), the Administration has replied that if LPF is dissolved by a court order but a copy of the court order is not filed with the Registrar, CR may still strike the LPF's name off the LPF Register under clauses 65(1) and 65(2)(e)(i). The Administration therefore considers it unnecessary to provide for criminal sanction under clause 71(3).

Clause 76(1)(a) – disqualification orders inapplicable to limited partnership funds

18. It is proposed in clause 76(1)(a) that Part IVA (Disqualification Orders) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) would not

apply to the winding up of LPF. LSD has enquired whether there would be any system in place for disqualifying anyone who has committed an indictable offence under the Bill from becoming GP, and if not, the rationale for not having such a system. The Administration has replied that it is a market practice for the partners in a private equity fund to agree by way of contract matters in relation to the operation of the fund. It is therefore not considered essential to make the existing Part IVA of Cap. 32 applicable to the Bill given the industry practice, e.g. relevant contracts would typically provide for the replacement of GP under certain circumstances.

Clause 88 – offence for purported dissolution of limited partnership fund not in compliance with limited partnership agreement

19. It is proposed in clause 88 that a person would commit an offence if the person purports to dissolve LPF in accordance with the limited partnership agreement of the fund ("LPA"), and the way in which the fund is purportedly dissolved does not comply with LPA and the maximum penalty proposed for the offence includes imprisonment. LSD has enquired whether (a) clause 88 is compatible with Article 7 of the Hong Kong Bill of Rights ("HKBOR") under section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383), which provides that "[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation", and (b) the words "in a material respect" (used in clause 87(1), etc.) should be added to the end of clause 88(1), so that minor non-compliance would not be a criminal offence. The Administration has explained that its policy intent is that clause 88 would not be against mere failure to honour a contractual obligation, etc. The provision seeks to punish a person who "purportedly" dissolves LPF in accordance with LPA but as a matter of fact the way in which the fund is purportedly dissolved is not in compliance with LPA. A defence would be available to the person concerned under clause 89, etc. Therefore, the Administration takes the view that Article 7 of HKBOR is not engaged. Upon LSD's further telephone enquiry, the Administration has clarified that it is considered not necessary to add "in a material respect" in clause 88(1) because the offence proposed in that clause concerns "purported" dissolution, and it would not be easy to mistakenly commit the proposed offence.

Clause 89 – defence

20. Under clause 89, in any legal proceedings against a person for an offence under the Bill, it would be a defence to establish that the person took all reasonable steps to avoid committing the offence. In response to LSD's enquiry on the relevant burden and standard of proof for the defence, in particular whether the burden on the defendant is only an "evidential burden" (i.e. sufficient evidence is adduced to raise an issue), or the defendant would be required to prove it on a balance of probabilities, the Administration has clarified that the burden on the defendant would only be an "evidential burden". Upon LSD's further telephone enquiry, the Administration has replied that they would move a proposed amendment to the effect that (a) the defence would only be applicable to the offences under clauses 18(3), 23(9), 24(3), 25(4), 29(8), 30(3), 31(4), 40(4), 56(3), 57(3), 70(7), 72(4), 85 and 88(1) of the Bill, and (b) only an evidential burden would apply to the defence under clause 89.

Clause 92 – power to make regulations "for the better carrying out of the purposes of" the Bill

21. Given that the power of FS to make regulations proposed in clause 92 is drafted in wide terms, LSD has made enquiry on the policy intent of clause 92 and asked the Administration to consider stating expressly in clause 92 the intended area(s) to be covered in the regulations. The Administration has replied that the policy intent is concerned with the administration of the registration regime for LPFs, and similar provisions are found in other local primary legislation. Given the fast-changing market condition and advancement of technologies, the Administration considers such regulation-making power indispensable.

Clause 96(1) – power of Registrar to notify relevant regulatory authority

22. LSD has made enquiry on whether clause 96(1) should be amended, so that the Registrar "must", instead of just "may", notify the relevant regulatory authority of IM (if any) in relation to a statement made by IM to the Registrar that is false, misleading or deceptive in a material respect. The Administration has replied that it is not practicable to make this a mandatory requirement, as many IMs of private equity funds are based overseas and thus under the jurisdictions of overseas regulators with which CR may not have entered into any memorandum of understanding on exchange of information.

Clause 104 – use of "Note"

23. Clause 104 proposes to add a "Note" to section 326 of Cap. 32. In response to LSD's enquiry on whether the "Note" would have legislative effect, the Administration has replied that the main purpose of adding the "Note" is to draw the attention of readers of Cap. 32 to the relevant provisions of the Bill. The Note itself is not intended to, and would not, bring about any substantive change to the effect of Cap. 32 and the new Ordinance (if the Bill was passed).

Concluding observations

24. As stated in paragraphs 10, 12 and 20 above, the Administration has planned to move amendments to the Bill (see **Annex 3**). Subject to Members' views on the above matters, no difficulties have been identified in relation to the legal and drafting aspects of the Bill and the Administration's proposed amendments.

Encls.

Prepared by
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Assistant Legal Adviser
Legislative Council Secretariat
26 June 2020



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



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LEGISLATIVE COUNCIL SECRETARIAT

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URGENTBy Fax (2294 0460)

15 June 2020

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Financial Services and the Treasury Bureau
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Dear Ms CHEUNG,

Limited Partnership Fund Bill

We are scrutinizing the legal and drafting aspects of the Limited Partnership Fund Bill ("Bill"). We should be grateful if you could clarify the following matters.

Clause 3(2)(a), etc. – meaning of "business"

2. It is noted that the term "business" is used in clauses 3(2)(a) and 83(1)(b), etc. However, "business" is not defined in the Bill. On the other hand, it is noted that "business" is defined in section 2 of the Partnership Ordinance (Cap. 38) and section 2(1) of the Business Registration Ordinance (Cap. 310). Please clarify what would constitute "business" under the Bill. Please also clarify whether it is necessary to define "business" for the purposes of the Bill.

Clause 4(1) – Financial Secretary may prescribe arrangements as not being regarded as funds, etc.

3. It is stated in clause 4(1) that the Financial Secretary ("FS") may by notice published in the Gazette prescribe, either generally or in a particular case, that an arrangement, or a class or description of arrangements, would not be

regarded as a fund. Please clarify under what circumstances FS may do so. Please also clarify the circumstances under which FS may by notice published in the Gazette specify any word or expression under clause 10 for the purposes of clause 9(2)(b) regarding the naming of limited partnership funds ("LPFs"). Please also clarify whether the above notices would be subsidiary legislation subject to the negative vetting procedure under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1).

Age requirement for limited partner who is a natural person

4. It is noted in clause 7(1)(c)(i) that the general partner ("GP") of an LPF who is a natural person should be at least 18 years old. In the circumstances, please clarify the rationale for not specifying any age requirement for a limited partner who is a natural person in clause 7(1)(d)(i).

Clause 15(b) – no legal personality for limited partnership fund

5. Please clarify the rationale for providing in clause 15(b) that LPF would not have a legal personality.

Whether auditor must be independent of limited partner(s)

6. It is proposed in clause 21(3)(a) that an auditor appointed for LPF should be independent of GP in, and investment manager ("IM") of, the fund. Please clarify how the auditor would be considered as "independent" and whether the auditor should also be independent of the limited partner(s) of the fund.

Clause 22 – liability for failing to comply with duty to ensure proper custody of assets

7. Clause 22 seeks to provide that GP in LPF should ensure that there are "proper custody arrangements" for the assets of the fund as specified in the limited partnership agreement of the fund. Please clarify what would amount to "proper custody arrangements". Please also clarify whether there would be any liability (criminal or otherwise) in case of non-compliance with clause 22 and how this clause would be enforced.

Clause 23(10) – consequence(s) for failing to comply with filing duty

8. Under clause 23(10), if a person resigns as the authorized representative ("AR") of LPF, the person must file a notification of the resignation with the Registrar of Companies ("Registrar"). Please clarify the consequence(s) or criminal liability, if any, for AR who does not comply with clause 23(10).

Clause 24(2)(c)(ii) – declaration in annual return

9. Under clause 24(1), (2)(c)(ii) and (3), GP in LPF must file a return (i.e. annual return) with the Registrar within 42 days after each anniversary of the date on which the certificate of registration is issued to LPF. The annual return must include a declaration by GP that the fund "will be in operation, or will carry on business as a fund, in the 12 months after the anniversary". Failure to file the annual return would be a criminal offence. Please clarify whether GP should include such a declaration in the annual return in the case where GP actually believes that the fund will not be in operation, or will not carry on business as a fund, in the 12 months after the anniversary. Please also clarify whether GP would commit an offence if he does not include the declaration in the annual return under such circumstances.

Liability for limited partner who makes records available for public inspection

10. It is proposed in clause 30(1) that the "specified person" (defined to mean GP or IM in clause 28) of LPF must not make certain records of LPF (e.g. financial statements) available for public inspection. Under clause 30(3), each of the specified persons would commit an offence for not complying with clause 30(1). Please clarify the rationale:

- (a) for the proposed offence; and
- (b) for not providing in clause 30(1) that a limited partner would commit an offence for doing the same act.

Clause 35(2) - "knowingly causes or knowingly permits" ("明知而致使或准許")

11. It is proposed in clause 35(2) that if a responsible person "knowingly causes or knowingly permits" ("明知而致使或准許" in the Chinese text) LPF to contravene a specified provision (which has the meaning given by section 5(11) of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615)), the person would commit an offence. It is noted that the phrase "knowingly causes or knowingly permits" ("明知而致使或明知而准許" in the Chinese text) is used in section 5(7) of Cap. 615. Please clarify whether the words "明知而" should also appear before the term "准許" in the above Chinese phrase "明知而致使或准許" in clause 35(2).

Clause 46 – determining whether a name is the same as or too like another name

12. It is proposed in clause 42(1)(c) that the Registrar may by written notice direct LPF to change a name by which the fund is registered if, in the Registrar's opinion, the name is, as at the time of the registration, too like a name of a body

corporate incorporated or established under an Ordinance. When determining whether a name is the same as or too like another name, it is proposed in clause 46(5) that (a) type or case of letters, (b) spaces between letters, (c) accent marks, and (d) punctuation marks must be disregarded. Please clarify whether clause 46(5) should be amended, so that the singular or plural form of a word should also be disregarded.

Clause 62 – Registrar must make LPF Register available for public inspection

13. It is proposed in clause 62(1) and (3) that the Registrar must make the LPF Register available for public inspection at all reasonable times, and the Registrar must, on receiving the specified fee payable for inspection (proposed to be \$13 for each inspection of any document on the LPF Register pursuant to Schedule 3 to the Bill), allow a person to inspect any document on the LPF Register in any form that the Registrar considers appropriate. With reference to section 20ZY(1) and (5) of the Financial Reporting Council Ordinance (Cap. 588) and section 5H(2) and (5) of the Insurance Ordinance (Cap. 41), please clarify why the LPF Register would not be made available for public inspection free of charge.

Clause 65, etc. – Registrar's inquiry letter and LPF Register

14. Under clause 65(1), it is proposed that if the Registrar has reasonable cause to believe that, in relation to LPF, any of the circumstances specified in subsection (2) exists (e.g. LPF does not have IM), the Registrar may send to GP in the fund by post a letter inquiring whether the circumstances exist. Please clarify whether the Registrar would be required to:

- (a) include a copy of that letter in the LPF Register pursuant to clause 47, which seeks to require the Registrar to establish and maintain a register of LPF to keep records of the information contained in every document that the Registrar decides to register under the Bill, etc.; and
- (b) annotate the existence of that letter or the related fact pursuant to clause 61.

Please also clarify similar scenarios as regards the documents (including letters and Gazette notices) in relation to clauses 65(4), 66(2), 67(1) and 69(1).

Clause 69 – objection to proposed deregistration of limited partnership fund

15. Under clause 68, it is proposed that GP in LPF may apply to the Registrar for the deregistration of the fund. On receiving the application, the Registrar must publish in the Gazette a notice of the proposed deregistration of LPF (unless the Registrar is aware of certain failure). Under clause 69(2), it is proposed that the notice must state that the Registrar may deregister the fund unless

an "objection to the deregistration" is received within three months after the date of publication of the notice. The Bill does not seem to specify how the objection would be dealt with. Please clarify whether clause 69 would be amended to specify:

- (a) that a written statement of objection (instead of a mere oral objection) setting out the nature of and reasons for the objection must be delivered to the Registrar; and
- (b) the proposed procedure for dealing with the objection, including whether:
 - (i) the applicant of the proposed deregistration would be informed of the objection (and if so, how);
 - (ii) the applicant and the objecting party (or their authorized representatives) would have the opportunity to be heard;
 - (iii) the Registrar would inform all relevant parties in writing after refusing/rejecting the deregistration application or objection (as the case may be), and the relevant reasons, as in clause 55(2); and
 - (iv) there would be any avenue to appeal against the Registrar's decision, as in clauses 14(1), 45(1) and 54(1).

Clause 71(3) – consequence(s) for non-compliance with filing requirement

16. It is proposed in clause 71(3) that if the Court of First Instance makes an order dissolving LPF, the person who makes the application for the order must file a copy of the order with the Registrar within 15 days after the order is made. Please clarify whether the consequence(s) for non-compliance with clause 71(3), if any, should be explicitly stated in the Bill.

Clause 76(1)(a) – disqualification orders and limited partnership funds

17. It is proposed in clause 76(1)(a) that Part IVA (Disqualification Orders) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) would not apply to the winding up of LPF. Please clarify whether there would be any system in place for disqualifying anyone who has committed an indictable offence under the Bill (as stated in section 168E in Part IVA of Cap. 32) from becoming GP under the Bill, and if not, the rationale for not having such a system.

Clause 88 – offence for purported dissolution of limited partnership fund not in compliance with limited partnership agreement

18. It is proposed in clause 88(1) that a person would commit an offence if the person purports to dissolve LPF in accordance with the limited partnership agreement of the fund and the way in which the fund is purportedly dissolved does not comply with the agreement. Under clause 88(2), a person who commits the offence would be liable on summary conviction to a fine at level 5 (i.e. \$50,000) and to imprisonment for six months, or on conviction on indictment to a fine of \$150,000 and to imprisonment for two years.

- (a) Article 7 of the Hong Kong Bill of Rights under section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) provides that "[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation". Please clarify whether clause 88 is compatible with that Article in Cap. 383.
- (b) Please also clarify whether the words "in a material respect" (used in clauses 87(1) and 96(1)) should be added to the end of clause 88(1) (i.e. after the words "does not comply with the agreement" above), so that minor non-compliance would not be a criminal offence.

Clause 89 – defence

19. It is proposed in clause 89 that in any legal proceedings against a person for an offence under the Bill, it would be a defence to establish that the person took all reasonable steps to avoid committing the offence. Please clarify the relevant burden and standard of proof, in particular whether the burden on the defendant is only an "evidential burden" (i.e. sufficient evidence is adduced to raise an issue), or the defendant would be required to prove it on a balance of probability.

Clause 92 – power to make regulations "for the better carrying out of the purposes of" the Bill

20. It is proposed in clause 92 that FS may make regulations for the better carrying out of the purposes of the Bill. It is noted that regulations would be made for the purposes of specific matters as stated in paragraph 28 of the Legislative Council Brief (File Ref: ASST/3/1/8C (2020) Pt.6) issued by the Financial Services and the Treasury Bureau on 18 March 2020. Please clarify the policy intent behind the proposed empowering provision in clause 92, which appears to give FS a wide power to make regulations. Please also provide examples of the regulations that FS may make under clause 92, and consider stating expressly in clause 92 the intended area(s) to be covered in the regulations for the sake of clarity and certainty.

Clause 96(1) – power of Registrar to notify relevant regulatory authority

21. It is proposed in clause 96(1) that the Registrar "may" notify the relevant regulatory authority of IM of LPF in relation to a statement made by IM to the Registrar that is false, misleading or deceptive in a material respect. Please clarify whether clause 96(1) should be amended, so that the Registrar "must", instead of just "may", notify the relevant regulatory authority of IM (if any).

Clause 104 – use of "Note"

22. Clause 104 of the Bill seeks to add the following words at the end of the existing section 326 of Cap. 32:

"Note—

For the application of this Part to a limited partnership fund (as defined by section 2 of the Limited Partnership Fund Ordinance (of 2020)), see Division 2 of Part 6 of that Ordinance."

There is no provision in the Bill stating whether the "Note" has legislative effect (in comparison, it is stated in the existing section 265A(5) of Cap. 32 that a "note" located in the text of Subdivision 2, Division 5, Part V of that Ordinance is "provided for information only and has no legislative effect"). Please clarify whether the "Note" in clause 104 would have legislative effect.

We look forward to receiving your reply in both English and Chinese before the first meeting of the Bills Committee.

Yours sincerely,



(Cliff IP)
Assistant Legal Adviser

c.c. Department of Justice

(Attn: Mr Michael LAM, Deputy Law Draftsman II (Acting) (Fax: 2536 8124);
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Legal Adviser

Senior Assistant Legal Adviser 1

Clerk to the Bills Committee

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19 June 2020

Mr Cliff IP
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Central
Hong Kong

Dear Mr Ip,

Limited Partnership Fund Bill

I refer to your letter of 15 June 2020 seeking clarifications in relation to the captioned Bill (“the Bill”). I am writing to provide information as requested.

Clause 3(2)(a), etc. – meaning of “business”

2. The word “business” in the Bill can be understood by using its ordinary dictionary meaning. For example, according to the Concise Oxford Dictionary (10th edition), the word “business” means, among others, “commercial activity”. Whether something amounts to the carrying on a business in those cases would be a question of fact and degree to be answered by the relevant authority upon the consideration of circumstances. In this light, we do not consider it necessary to define “business” in the Bill.

3. We note that the word “business” is not specifically defined in the Companies Ordinance (Cap. 622) or the Securities and Futures Ordinance

(Cap. 571).

Clause 4(1) – Financial Secretary may prescribe arrangements as not being regarded as funds, etc.

4. Under Clause 4(1) of the Bill, our policy intent is for the Financial Secretary (“FS”) to prescribe any arrangement as not being regarded as a fund whenever market conditions show that a certain arrangement should not be regarded as a fund so as to safeguard the interests of investors. Further, under clause 10 of the Bill, the FS may by order publish in the Gazette specify any word or expression regarding the naming of LPFs when he considers, for example, that the use of certain words or expressions in the names of LPFs may be misleading, would constitute a criminal offence, or is offensive or otherwise contrary to the public interest. It is worth noting that there are similar provisions in the Securities and Futures Ordinance (Cap. 571) and the Companies Ordinance (Cap. 622).

5. The notice/order under clauses 4(1) and 10 of the Bill, if made by the FS, would be a piece of subsidiary legislation subject to the negative vetting procedure under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1).

Age requirement for limited partner who is a natural person

6. Generally speaking, a limited partner is an investor of an LPF who is not supposed to take part in the management of the LPF, and hence bears very limited legal liability for any activities conducted in relation to the LPF which is found in contravention with the statutory requirements of the Bill. Policy-wise, it is our intent to allow sufficient flexibility for the scope of qualified limited partners to keep the LPF regime competitive. In this connection, we do not find it necessary to set an age requirement for a limited partner who is a natural person in the Bill.

Clause 15(b) – no legal personality for limited partnership fund

7. In considering the legal personality of an LPF, we drew reference from the prevalent practice of the Limited Partnerships Ordinance (Cap. 37) and comparable overseas regimes (e.g. United Kingdom, Singapore, Ireland, Cayman Islands, etc.). Under those regimes, limited partnerships do not have a legal personality. From anti-money laundering angle, the proposed

arrangement would carry the benefit of keeping the identity of the general partner or authorized representative (if any) of an LPF transparent in the sense that the general partner or authorized representative (if any), as a legal person, has to enter into contract in his/her/its own name on behalf of the LPF.

Whether auditor must be independent of limited partner(s)

8. The Hong Kong Institute of Certified Public Accountants has promulgated guidelines on ensuring auditors' independence. Specifically, the "Hong Kong Standard on Auditing 200 – Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Hong Kong Standards on Auditing"¹ and the "Code of Ethics for Professional Accountants"² describe auditors' independence as comprising both independence of mind and independence in appearance.

9. As the audit of LPFs is primarily for investor protection purposes, we consider it sufficient to explicitly require the auditor to be independent from the general partner and the investment manager who manage the fund. That said, in a private equity fund (which are most likely to use the LPF vehicle) setting, it is highly likely that the auditor (who is typically a professional audit firm) is also independent from the limited partners (who are typically institutional investors).

Clause 22 – liability for failing to comply with duty to ensure proper custody of assets

10. We defer the judgment of "proper custody arrangements" to the general partner or investment manager or custodian (if any) of an LPF who would have to take into account the nature of assets to be held by the LPF when making custody arrangements. Given the wide variety of assets (ranging from shares of private companies, real estate properties to valuables) LPFs (which are primarily private equity funds) could invest in, it is not practicable to specify the custody arrangements in the law. Flexibility should be allowed in this regard in keeping with the industry's practice. In this light, there would be no criminal liability for non-

¹ URL:
https://app1.hkicpa.org.hk/hksaebk/HKSA_Members_Handbook_Master/volumeIII/hksa200cfd.pdf

² URL:
http://app1.hkicpa.org.hk/ebook/HKSA_Members_Handbook_Master/volumeI/COErevised.pdf

compliance with clause 22 of the Bill.

Clause 23(10) – consequence(s) for failing to comply with filing duty

11. A person who resigns as the authorized representative of an LPF but fails to file a notification of the resignation with the Registrar will not be criminally liable. On the other hand, under clause 23(6) of the Bill, the general partner of the LPF has an obligation to file a notification with the Registrar if there is a change in the particulars in the LPF Register relating to the fund's authorized representative. That would include a resignation. The general partner who fails to do so commits an offence under clause 23(9) of the Bill.

Clause 24(2)(c)(ii) – declaration in annual return

12. We consider the possible scenario suggested in your letter realistic. We will consider altering the relevant provision(s) of the Bill to cater for that scenario by moving Committee Stage amendments (“CSAs”).

Liability for limited partner who makes records available for public inspection

13. Limited partners, who are primarily investors and are not supposed to take part in the management of LPFs, are not the specified persons required under clause 29 of the Bill to keep the records. In this connection, the offence under clause 30(3) is irrelevant to limited partners.

Clause 35(2) – “knowingly causes or knowingly permits” (“明知而致使或准許”)

14. The phrase “明知而” in the Chinese text of clause 35(2) of the Bill is intended to qualify both the words “致使” and “准許”. To put this beyond doubt and to tally with section 5(7) of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615), we will consider moving a CSA to add “明知而” before “准許”.

Clause 46 – determining whether a name is the same as or too like another name

15. Clause 46(5) of the Bill is modelled on section 111 of the Companies Ordinance (Cap. 622). In the experience of the Companies Registry (“CR”) in implementing section 111 of Cap. 622, the singular or plural form of a word would not be disregarded in considering whether a company’s name is the same as another name. Therefore, we consider amending clause 46(5) of the Bill to include the singular or plural form of a word unnecessary.

Clause 62 – Registrar must make LPF Register available for public inspection

16. The CR is a trading fund department and, as a trading fund, is required to fund all its expenditure out of the revenue received. The specified fees under clauses 62(3) and 62(4) of the Bill are set on a cost recovery basis. These clauses mirror Schedule 2 to the Companies (Fees) Regulation (Cap. 622K). Similar to other registers maintain by the CR, including the Register of Limited Partnerships (Cap. 37), the Register of Open-ended Fund Companies (Cap. 571AQ), the Companies Register (Cap. 622) and the Register of trustees corporations (Cap. 306), specified fees, set on a cost recovery basis, have to be paid for inspection of information in the various Registers.

Clause 65, etc. – Registrar’s inquiry letter and LPF Register

17. As regards a letter that may be sent by the Registrar pursuant to clauses 65(1) and 66(2)(a) of the Bill, the CR will include an information sheet in the LPF Register setting out the fact that the striking off process is under consideration. In addition, a remark of that fact will also appear in the particulars of an LPF in the Register.

18. Similarly, as regards the Gazette notices as stipulated in clauses 65(4), 66(2)(b), 67(1) and 69(1) of the Bill, an information sheet stating the fact that a Gazette notice is being published and the result of the striking off process will be included in the LPF Register for public inspection.

Clause 69 – objection to proposed deregistration of limited partnership fund

19. Clause 69 of the Bill is modelled on section 751 of the Companies Ordinance (Cap. 622). The operational mode has been running smoothly in the case of companies. In practice, statements of objection are only accepted by the CR if they are provided in written form. The detailed procedures for dealing with an objection received are essentially administrative procedures. The CR would solicit necessary information in relation to an objection from the relevant parties and keep them informed of the status as appropriate. We consider that it is not necessary to set out the detailed steps that would be taken by the CR under clause 69(2) of the Bill. The CR has not encountered any ambiguity in enforcing section 751 of Cap. 622 so far.

Clause 71(3) – consequence(s) for non-compliance with filing requirement

20. From the CR's experience in enforcing the Companies Ordinance (Cap. 622) in other cases which we have drawn on in the drafting of the Bill, the person who makes the application for a dissolution order would wish the fact to be made known to others and he/she would notify the CR as soon as practicable once a Court order is made for protection of his/her own interest. It appears to us too harsh to impose criminal liability for non-compliance with clause 71(3) of the Bill. In any event, if an LPF is dissolved by an order of the Court but a copy of the Court order is not filed with the Registrar, the CR may still strike the LPF's name off the LPF Register under clauses 65(1) and 65(2)(e)(i) of the Bill on the ground that the fund is not in operation or is not carrying on business as a fund. We therefore consider it unnecessary to provide for criminal sanction in such situation. We understand that the Companies Ordinance (Cap. 622) does not contain any provision similar to clause 71(3) of the Bill.

Clause 76(1)(a) – disqualification orders and limited partnership fund

21. It is a market practice for the partners in a private equity fund to agree by way of contract matters in relation to the operation of the fund. For investor protection, the contract typically provides for the replacement of general partner under certain circumstances and/or upon reaching a certain consensus threshold among the partners. Taking into account such industry practice, we do not find it essential to make Part IVA of Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) applicable to the Bill.

Clause 88 – offence for purported dissolution of limited partnership fund not in compliance with limited partnership agreement

22. Section 88 of the Bill provides that:

“ (1) A person commits an offence if-

- (a) the person purports to dissolve a limited partnership fund in accordance with the limited partnership agreement of the fund; and
- (b) the way in which the fund is purportedly dissolved does not comply with the agreement.

(2) A person who commits an offence under subsection (1) is liable-

- (a) on summary conviction – to a fine at level 5 and to imprisonment for 6 months; or
- (b) on conviction on indictment – to a fine of \$150,000 and to imprisonment for 2 years.”

23. Article 7 of the Hong Kong Bill of Rights (No imprisonment for breach of contract) (“BOR 7”) provides that “[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation”. BOR 7 corresponds to Article 11 of the International Covenant on Civil and Political Rights (“ICCPR 11”) which is in identical terms. Provision in similar wordings can also be found in Article 1 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Art 1 Pro 4 ECHR”)³.

24. The guarantee under the provision was primarily designed to tackle the phenomenon of “debtors’ prisons” (i.e. detention for debt) as this institution was known under earlier legal systems.⁴ However, as confirmed in the Council of Europe’s Explanatory Report on Art 1 Pro 4 ECHR (“Explanatory Report”), the prohibition in the provision is intended to relate to failure to fulfil contractual obligations of any kind and not only money debts. Thus, it may apply to “non-delivery, non-performance or non-forbearance”. Such obligations must, however, arise out of contract. The

³ It provides that “No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.”

⁴ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Germany: N.P. Engel, 3rd edn, 2017), p.294.

Article does not apply to obligations arising from legislation in public or private law.⁵

25. The words “merely on the ground of inability” in BOR 7 / Art 1 Pro 4 ECHR is important. According to the Committee of Experts on Human Rights of the Council of Europe, the provision “*aimed at prohibiting, as contrary to the concept of human liberty and dignity, any deprivation of liberty for the **sole reason** that the individual had not the material means to fulfil his contractual obligations.*” (emphasis added) Hence, deprivation of liberty is not forbidden if any other factor is present in addition to the inability to fulfil a contractual obligation, for example: (a) if a debtor acts with malicious or fraudulent intent; (b) if a person deliberately refuses to fulfil an obligation, irrespective of his reasons therefor; (c) if inability to meet a commitment is due to negligence.⁶ For this reason, the Committee of Experts thought that the provision **could not be interpreted as a prohibition on deprivation of liberty as a penalty “for a proved criminal offence or as a necessary preventive measure before trial for such an offence, even if criminal law recognized as an offence an act or omission which was at the same time a failure to fulfil a contractual obligation”**.⁷ (emphasis added)

26. The interpretative materials of ICCPR 11 are in line with the abovementioned view of the Council of Europe. Professor Manfred Nowak has pointed out that the UN Human Rights Committee has held that prohibition of detention for debt, enshrined in ICCPR 11 “*does not apply to criminal offences related to civil debts and that, in the case of fraud and negligent or fraudulent bankruptcy, the offender may be punished with imprisonment even when no longer able to pay the debts*”⁸.

27. More importantly, the reference to “inability” indicates that the person must be **incapable of fulfilling the relevant contractual obligation, rather than simply unwilling to do so**. This means that persons who

⁵ <https://rm.coe.int/16800c92c0>, European Treaty Series No. 46, Strasbourg, 16.IX.1963, at paras. 3-4.

⁶ *Ibid.*, at para. 5.

⁷ *Ibid.*, at para. 6. See also William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, 2015), p.1050, citing the Committee of Expert’s Examination of the Draft, Article 1, DH/Exp. (61) 3, 26 April 1961.

⁸ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary, op. cit.*, p.295.

simply refuse to honour a contractual duty will, regardless of their motives, not be protected by ICCPR 11.⁹

28. Our policy intent is that the prohibition in clause 88 of the Bill is not against mere failure to pay debt or mere failure to honour a contractual obligation. The provision seeks to punish a person who “purportedly” dissolves a limited partnership fund in accordance with the limited partnership agreement of the fund but as a matter of fact the way in which the fund is purportedly dissolved is not in compliance with the limited partnership agreement. Hence, clause 89 of the Bill provides for a defence to establish that the person took all reasonable steps to avoid committing the offence. In other words, it is not the legislative intention to punish a person *simply or merely* because he/she is unable to honour a contractual obligation. The scenario is different from that envisaged under BOR 7. Therefore, the Department of Justice takes the view that BOR 7 is not engaged in the present case.

Clause 89 – defence

29. Our policy intent is to merely impose an evidential burden on the defendant to establish that he/she has taken all reasonable steps to avoid committing the offence. The legal burden of proving beyond reasonable doubt all the elements of the relevant offence should still rest with the prosecution.

Clause 92 – power to make regulations “for the better carrying out of the purposes of” the Bill

30. The policy intent of clause 92 of the Bill is to empower the FS to make regulations for “the better carrying out of the purposes” of the Bill in relation to the administration of the registration regime for LPFs. This clause is modelled on section 909 of the Companies Ordinance (Cap. 622). Similar clauses are commonly found in other local primary legislation. Given the fast-changing market condition and advancement of technologies, we consider such regulation-making power indispensable for the Bill to ensure the regulations in keeping with evolving market conditions and technological advancement whenever necessary.

⁹ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary*, 3rd ed., at p.335.


Clause 96(1) – power of Registrar to notify relevant regulatory authority

31. Many of the investment managers of private equity funds are based overseas and thus under the jurisdictions of overseas regulators with which the CR may not have entered into any memorandum of understanding on exchange of information. It is not practicable to make this a mandatory requirement under clause 96(1) of the Bill.

Clause 104 – use of “Note”

32. The main purpose of adding a “Note” to section 326 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) under clause 104 of the Bill is to draw the attention of readers of Cap. 32 to Division 2 of Part 6 of the Ordinance enacted by the Bill. The Note itself is not intended to, and will not, bring about any substantive change to the effect of Cap. 32 and the new Ordinance.

Yours sincerely,



(Ms Estrella CHEUNG)

for Secretary for Financial Services and the Treasury

c.c. Registrar of Companies (Attn: Ms Mandy LAM)
Department of Justice (Attn: Mr Michael LAM)
Legal Adviser
Senior Assistant Legal Adviser 1
Chief Council Secretary(1)4

Limited Partnership Fund Bill

Committee Stage

Amendments to be moved by the Secretary for Financial Services and the Treasury

<u>Clause</u>	<u>Amendment Proposed</u>
24(2)	<p>By deleting paragraph (c) and substituting—</p> <p>“(c) include a statement made by the general partner as to—</p> <ul style="list-style-type: none">(i) whether or not the fund has been in operation, or has carried on business as a fund, for any period during the 12 months before the anniversary; and(ii) the general partner’s assessment on whether or not the fund will be in operation, or will carry on business as a fund, for any period in the 12 months after the anniversary; and”.
35(2)	<p>In the Chinese text, by adding “明知而” before “准許”.</p>
89	<p>By deleting the clause and substituting—</p> <p>“89. Defence</p> <ul style="list-style-type: none">(1) In the legal proceedings against a person for a specified offence, it is a defence to establish that the person took all reasonable steps to avoid committing the offence.(2) The person is taken to have established that the person took all reasonable steps to avoid committing the specified offence if—<ul style="list-style-type: none">(a) there is sufficient evidence to raise an issue that the person took all reasonable steps to avoid committing the offence; and(b) the contrary is not proved by the prosecution beyond reasonable doubt.(3) In this section— <p><i>specified offence</i> (指明罪行) means an offence under section 18(3), 23(9), 24(3), 25(4), 29(8), 30(3), 31(4), 40(4),</p>

56(3), 57(3), 70(7), 72(4), 85 or 88(1).”.