Rewrite of the Companies Ordinance

First Phase Consultation on the Draft Companies Bill

Consultation Conclusions

BACKGROUND

1. In mid-2006, the Government launched a major and comprehensive exercise to rewrite the Companies Ordinance (CO). By updating and modernising the CO, we aim to make it more user-friendly and facilitate the conduct of business to enhance Hong Kong's competitiveness and attractiveness as a major international business and financial centre.

2. Taking into account views collected during previous public consultation exercises in 2007 and 2008, we prepared a draft Companies Bill (CB) for further consultation. The first phase consultation covered 10 Parts of the CB and was launched on 17 December 2009. Besides seeking views on the draft provisions, the consultation paper highlighted several issues for consultation. These included –

   (a) whether the headcount test for approving a scheme of compromise or arrangement should be retained or abolished (*Questions 1 to 3 of the consultation paper*);

   (b) whether residential addresses of directors and identification numbers of directors and company secretaries should continue to be disclosed on the public register (*Questions 4 to 5 of the consultation paper*);

   (c) whether private companies associated with a listed or public company should be subject to more stringent regulation similar to public companies for the purposes of the provisions on fair dealings by directors (*Question 6 of the consultation paper*); and

(d) whether the common law derivative action should be abolished (*Question 7 of the consultation paper*).

3. The consultation paper and the draft clauses were widely circulated to various stakeholders including relevant professional bodies, business organisations, market practitioners, chambers of commerce, financial regulators, academics, etc. They were posted on the CO rewrite website of the Financial Services and the Treasury Bureau (FSTB) and hard copies were made available to the general public at a number of Government premises.

4. During the consultation period, we briefed the Legislative Council Panel on Financial Affairs on the reform proposals on 4 January 2010 and held a public consultative forum on 4 February 2010. We attended meetings/forums organised by other interested organisations to brief the participants on the proposals and listen to their views. A list of the forums and meetings we attended is at Appendix I. We have also sought the views of the Standing Committee on Company Law Reform (SCCLR).

OUTCOME OF CONSULTATION

5. The consultation ended on 16 March 2010. We received a total of 164 submissions (104 from companies; 30 from individuals; and 30 from business and professional organisations including the Hong Kong General Chamber of Commerce (HKGCC), Hong Kong Association of Banks (HKAB), Law Society of Hong Kong (LSHK), Hong Kong Bar Association (HKBA), Hong Kong Institute of Certified Public Accountants (HKICPA), Hong Kong Institute of Chartered Secretaries (HKICS), Hong Kong Institute of Directors (HKIoD), etc.), with some of them reaching us after the end of the consultation period. A list of the respondents is at Appendix II. A compendium of the submissions is also available at the FSTB's CO Rewrite website[1]. The respondents' comments and our responses are summarised below.

----

[1] Available at http://www.fstb.gov.hk/fsb/co_rewrite/.

Issues Highlighted for Consultation

A. Headcount test

6. Under section 166(2) of the CO, in order for a compromise or arrangement between a company and its members to be approved at a meeting ordered by the court under section 166(1), a majority in number of those who cast votes must have voted in favour of the compromise or arrangement (headcount test). The majority in number must also represent three-fourths in value of the members voting. In Chapter 6 of the consultation paper, we asked if the headcount test for members' schemes of listed companies, non-listed companies, and creditors' schemes should be retained, abolished, or retained but giving the court discretion to dispense with the test. We also asked whether there should be some forms of additional protection for small shareholders if the headcount test is to be abolished for non-listed companies.

Respondents' views

7. A total of 144 submissions commented on the subject focusing primarily on members' schemes of listed companies, including 101 from companies (most of which are listed companies), 26 from individuals and 17 from organisations. Views were diverse as to whether the headcount test should be retained or abolished.

Members' Schemes of Listed Companies

8. A total of 124 submissions opted for abolishing the test for members' schemes of listed companies, including those from business and professional bodies like HKGCC, LSHK, HKBA, HKICPA, HKICS, HKIoD and the Chamber of Hong Kong Listed Companies (CHKLC). There are also 91 submissions from listed companies supporting the abolition. The main arguments for abolition are –

   (a) the headcount test could not effectively reflect the preference/views of beneficial owners, particularly as a very

large proportion of shares in listed companies were held by nominees and custodians in the Central Clearing and Settlement System (CCASS). While beneficial owners can withdraw their shareholdings from CCASS and become registered shareholders, the process is cumbersome and involves cost;

(b) the headcount test might attract attempts for vote manipulation; and

(c) it is against the one share one vote principle, i.e. giving disproportionate weight to minority shareholders in the scheme approval process.

9. On safeguarding the interests of minority shareholders, most of the above submissions considered that the Code on Takeovers and Mergers[2] (Takeovers Code) issued by the Securities and Futures Commission (SFC) already provided sufficient safeguards and that any additional safeguards should be dealt with by the SFC through amendments to the Code. Some respondents, including LSHK and HKIoD, highlighted that notwithstanding the abolition, the court still retains the discretion not to approve a scheme in the event of irregularities or where the rights of minority shareholders are at stake.

10. At the same time, some 20 submissions, including those from the SFC, the Chinese General Chamber of Commerce (CGCC), the British Chamber of Commerce (BCC), the Association of Chartered Certified Accountants (Hong Kong) (ACCA), the HK Securities Association (HKSA) and HKAB, supported retaining the headcount test. They believed that the headcount test serves as an essential check on the share value test. The existing problem of

[2] Under the Takeovers Code, there are additional requirements to protect the interests of minority shareholders, including:
(a) under Rule 2 of the Takeovers Code, an independent board committee comprising all non-executive directors who have no conflict of interest in the scheme has to be established to give advice to disinterested shareholders and the committee would seek advice from an independent financial adviser; and
(b) Rule 2.10(b) of the Takeovers Code stipulates that the number of votes cast against the resolution shall not be more than 10% of the voting rights attached to all disinterested shares, i.e. shares not held by the controlling shareholders or their connected parties.

the headcount test mentioned in paragraph 8(a) above could be overcome by the proposal to pursue a scripless market and that there was no credible evidence indicating that vote manipulation was common. Among these respondents, a majority saw merit in the option of giving the court a discretion to dispense with the test. They considered that it would be a fairer option which allowed the court to intervene in the event of possible abuses of the process. They also considered that it would strike a reasonable balance between protecting the right of the minority shareholders and avoiding giving too much veto power to the minority shareholders.

Members' Schemes of Non-listed Companies

11. Only 49 respondents commented on how to deal with the headcount test for members' schemes of non-listed companies. In general, those who supported the abolition of the headcount test for members' schemes of listed companies tended to support the same for non-listed companies, except for a few like HKBA, which argued that the headcount test should be retained for non-listed companies given that they were not affected by the problems relating to CCASS.

Creditors' Schemes

12. Some 48 respondents commented on the headcount test for creditors' schemes. The majority (33 submissions) preferred abolishing the test. Some of them argued that minority creditors would be able to petition for winding up. On the other hand, 10 submissions including the HK Confederation of Trade Unions, LSHK, HKBA, HKICPA and several accounting/legal firms supported retaining the headcount test for creditors' schemes, arguing that the test served to protect the interests of small creditors. There are arguments that the position of creditors bore little resemblance to that of shareholders in the context of schemes of arrangement and that the interests of large creditors did not usually align with small creditors.

Our response

Members' Schemes of Listed Companies and Non-Listed Companies

13. We note the divergent views expressed by the respondents on the abolition or retention of the headcount test for members' schemes. In particular, we note the market concern that the abolition may undermine the protection of the interests of minority shareholders. For public and listed companies, while the Takeovers Code offers some protection for minority shareholders, we agree that the Code is intended to supplement, but not substitute, the statutory protection in the CO. As a scheme will bind all members and permit the compulsory acquisition of the shares of dissenting shareholders, it would be important to ensure that the interests of minority shareholders are sufficiently safeguarded.

14. The criticism that the headcount test fails to reflect the decisions of beneficial owners of shares under CCASS can be addressed by the proposed introduction of a scripless market in Hong Kong. The proposal will reduce significantly the processing time and cost for beneficial owners of shares held under CCASS to become registered shareholders with voting rights. As regards the concern that the headcount test attracts vote manipulation, we note the SFC's advice that there has been no credible evidence to support the suggestion that attempts to manipulate the vote are common.[3]

15. We have reviewed the latest overseas development in this regard. The headcount test has been retained in other common law jurisdictions including the UK[4], Australia[5], Singapore, Bermuda, and the Cayman Islands. Australia has amended its legislation in late 2007 to give the court a discretion to dispense with the

---

[3] See para. 15 of SFC's submission on the Draft Companies Bill – First Phase Consultation dated 28 January 2010, available at http://www.fstb.gov.hk/fsb/co_rewrite/.

[4] In the UK, the Company Law Review Steering Group (CLRSG) reviewed the headcount test and recommended its abolition as the widespread use of nominees had made it an irrelevant test, and no other meeting of members contained such a test. However, the UK government did not adopt the recommendation the UK Companies Act 2006 as it considered that the test was still an important investor safeguard.

[5] The Australian Corporations and Markets Advisory Committee (CAMAC) has conducted a review and published a report on 28 January 2010 recommending, among other things, that the headcount test for companies with share capital be abolished. The Australian government has yet to take a view on whether to adopt the recommendation.

headcount test in circumstances where there is evidence that the result of the vote has been unfairly influenced by activities such as share splitting or in other extraordinary circumstances.[6]

16. On balance, we are inclined to believe that there are merits in retaining the headcount test for members' schemes while giving the court a discretion to dispense with the test so as to tackle the problem of share splitting by parties opposing a scheme. This is similar to the approach being adopted in Australia. We will keep this under review in the light of developments in other jurisdictions.

Creditors' Schemes

17. Views are even more diverse as to whether the headcount test should be retained or abolished for creditors' schemes. The concern for vote manipulation and problems arising from CCASS do not exist for creditors' schemes. We consider it desirable to retain the headcount test to protect small creditors. In fact, the headcount test was originally introduced to protect the interests of small creditors in creditors' schemes. As it is unlikely for small creditors who oppose a proposed scheme to manipulate the outcome of voting by assigning part of their debts to other persons, we see no need to extend the court's discretion to dispense the headcount test to cover creditors' schemes.

B. Disclosure of Directors' Residential Addresses and the Identification Numbers of Directors and Company Secretaries

18. At present, directors and secretaries of companies incorporated or registered in Hong Kong (including non-Hong Kong companies) are required by the CO to provide their residential addresses and identity card or passport numbers ("identification numbers") to the Companies Registry ("CR") for incorporation and registration purposes. As such information is available on the CR's register

[6] One possible "extraordinary circumstance" may be where a single shareholder holds shares on behalf of a large number of beneficial owners. In *pSivida Ltd v New pSivida, Inc* [2008] FCA 624, the Court observed, at [11]-[12].

or can be inspected and copied by members of the public, there may be concerns over data privacy and possible abuses. While we consider that there is no longer a need to require company secretaries to disclose their residential address, we asked in Chapter 7 of the consultation paper whether directors' residential addresses and directors/secretaries' identification numbers should continue to be displayed on the public register without restriction. We also asked the public that, if residential addresses are not going to be disclosed on the public register, whether we should follow the Australian approach (i.e. a director allowed to substitute his usual residential address by a service address if his or his family members' personal safety is at risk) or the UK approach (i.e. a director given the option to show his service address on the public register while keeping his residential address on a separate record with restricted access mainly to public bodies).

Respondents' views

19. A total of 68 submissions (30 from companies, 21 from individuals and 17 from organisations) have expressed views on the subject matter.

Directors' Residential Addresses

20. The majority (46) including the CHKLC, CGCC, HKIoD, HKICS and HKSA opined that directors' residential addresses should not be disclosed on the public register, mainly for reasons of privacy and risk of abuse. Most of them suggested that the service address of directors would be sufficient for contacting the directors and service of documents. Some respondents also noted that given Hong Kong did not have a residency requirement for directors, the foreign residential addresses provided by non-Hong Kong directors did not serve any meaningful purpose.

21. As regards whether the UK approach or the Australian model should be adopted to restrict access to directors' residential addresses, more respondents (32), including the CHKLC, HKICS, HKIoD and LSHK, preferred the UK model.

22. Some 20 respondents including HKBA, HKICPA, HKAB and some trade unions preferred maintaining the status quo. They did not see any strong grounds for changing the current regime given that cases of abuse were rare in Hong Kong and that neither the UK nor the Australian model could be easily administered. They also cited reasons like the need for law enforcement authorities and creditors to access information on directors' residential addresses.

Identification Numbers

23. Some 53 submissions expressed views on whether directors/secretaries' identification numbers should continue to be displayed on the register. The majority (43) considered that certain digits of the identification numbers should be masked. These include some chambers of commerce such as the CHKLC, CGCC and BCC, and professional bodies like HKICS, HKIoD, ACCA and CPA Australia. They considered that masking some digits of the identification numbers would give better protection to personal privacy without affecting the identification of individual persons. On the other hand, 10 submissions from the labour/trade unions, professional/business bodies like HKBA, LSHK, HKICPA and HKAB as well as a few accountancy/law firms objected to the proposal to mask certain digits of the identification numbers, arguing that such information provide a unique and effective identifier for individuals and that the disclosure on the public register so far has not created a major problem of abuse.

Our response

Directors' Residential Addresses

24. While there is little evidence that the current disclosure of directors' residential addresses on the public register has caused any major personal safety problems, we note the rising concerns over the protection of personal privacy and information as reflected in the views of the majority of respondents. We agree that access to directors' residential addresses should be restricted. After consulting the SCCLR, we also agree with the views of the majority of the respondents that the UK approach in maintaining

separate records for directors' service addresses and residential addresses would be preferred. We note that the Australian approach would offer less effective protection to directors' personal information as directors may only apply for substitution of residential addresses after the risks in relation to their or their family's personal safety are established.

25. Under the proposed approach, every director will be given the option of providing a service address for the public register of the CR while the residential address may be kept on the confidential record to which access will be restricted to public authorities, specified regulators, liquidators and provisional liquidators. Any other person can only access the residential address pursuant to a court order or by inspection of the register of directors kept by the company. There are provisions in Part 12 of the CB to the effect that if the company fails to allow inspection of its register, the court may on application order an inspection, but the court must not make such an order if the right of inspection is being abused. This would strike a balance between protecting directors' personal information and access to such information on bona fide grounds.

26. Regarding the directors' residential addresses already on the public register kept by CR, in view of the huge volume of information involved, the existing records containing the residential addresses of directors would only be purged upon application in accordance with specified procedures and upon payment of a fee. This is also in line with the practice in the UK.

Identification Numbers

27. In view of the overwhelming support for better protection of personal data, we will mask certain digits of the identification numbers in new records of individuals on the public register. It is a common and acceptable practice for masking certain digits of the identification numbers and the remaining digits (together with the name) should be sufficient to identify the individual persons.

28. Like directors' residential addresses, access to the full identification numbers of individuals will be limited to public

authorities, specified regulators, liquidators and provisional liquidators, and other persons pursuant to a court order. Existing records of identification numbers on the register will be purged upon application and payment of a fee, similar to the treatment of existing residential addresses on the register.

C. Regulating Directors' Fair dealings in respect of Private Companies Associated with a Listed or Public Company

29. Currently, a private company that is a member of a group of companies which includes a listed company (a "relevant private company"[7]) is in essence treated in the same manner as a public or listed company in the CO in respect of prohibitions on loans, quasi-loans and credit transactions in favour of directors or directors of its holding company or another company controlled by one or more of its directors.[8] The relevant private companies are thereby subject to more stringent restrictions than other private companies. In Part 11 of the CB, we propose relaxing the prohibitions on public companies in respect of these transactions. A new exemption will be introduced to enable public companies to make a loan, a quasi-loan or enter into a credit transaction in favour of a director or connected entity subject to disinterested members' approval.[9] Private companies will generally continue to be subject to less stringent regulations. We asked the public in Chapter 8 of the consultation paper on whether relevant private companies should be subject to more stringent restrictions similar to a public company.

Respondents' views

30. Among the total of 44 submissions received which expressed views on the subject matter, more respondents (16) including HKAB, HKICS, HKLS and some law firms preferred option 4, suggesting that the concept of relevant private company should be modified to cover only private companies which are subsidiaries of a

---

[7] See section 157H(10) of the CO.

[8] The prohibitions are extended to cover certain connected persons (e.g. spouse, child and step-child) of the directors in the case of listed companies and relevant private companies.

[9] See paragraphs 24 to 27 of Explanatory Note on Part 11.

listed/public company. There are suggestions that this option would keep the law simple. Some also suggested that the restrictions regarding the regulation of quasi-loans/credit transactions involving directors should be applicable to companies on a needs basis and companies caught under the definition of "relevant companies" should be clearly and easily identifiable.

Our response

31. The view of a majority of the respondents, to confine relevant private companies only to those private companies which are subsidiaries of a public company, whether listed or non-listed, avoids casting the net too wide. Other types of private companies in a group, such as those whose holding company is a private company but which is also a majority shareholder of a listed company, can be excluded from the concept of relevant private company. We have doubts as to whether such private companies should be subject to tighter restrictions since the public investors of the listed companies concerned generally have no interests in such private companies.

32. Taking into account the majority view and having consulted the SCCLR, we agree to modify the concept of relevant private company to cover only private companies which are subsidiaries of a public company.

D. Common Law Derivative Action

33. Shareholder remedies provisions were substantially revised by the Companies (Amendment) Ordinance 2004 with a view to enhancing legal remedies available to members of a company. One of the significant changes was to provide a new statutory derivative action (SDA) procedure that may be taken on behalf of a company by a member of the company in Part IVAA of the CO. By section 168BC(4), the right to take a common law derivative action (CDA) was specifically preserved.

34. The Legislative Council has recently passed the Companies (Amendment) Bill 2010, which includes the proposal to extend the scope of SDA to cover "multiple" derivative actions (i.e. members of an associated company of the specified corporation[10] would be able to take a SDA). In anticipation of the extension, we asked in Chapter 9 of the consultation paper whether the existing right to take a CDA as preserved under section 168BC(4) of the CO should be abolished.

Respondents' views

35. A total of 29 submissions commented on the proposal. Based on the submissions, more respondents, including major business and professional bodies such as HKBA, HKAB, HKICS and HKIoD, supported the retention of CDA for reasons that it would provide necessary protection to shareholders in Hong Kong for obtaining remedies in relation to non-Hong Kong companies. There are arguments that there would not be any confusion arising from the retention and litigants could select the appropriate route that suits their case.

Our response

36. Noting that more respondents including the major business and professional bodies supported the retention of the CDA for reasons that it would provide necessary protection to shareholders in Hong Kong for obtaining remedies in relation to non-Hong Kong companies, we agree to retain CDA in the CB.

E. Codification of Directors' Duty of Care, Skill and Diligence

37. In clause 10.13 of the CB, we suggest codifying directors' duty of care, along the lines of section 174 of the UK Companies Act 2006 (CA 2006), so that a director must exercise reasonable care, skill

[10] An "associated company" in relation to a specified corporation means any company that is the specified corporation's subsidiary or holding company, or a subsidiary of that specified corporation's holding company.

and diligence, meaning the care, skill and diligence that would be exercised by a reasonably diligent person with –

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company (the "objective test"); and

(b) the general knowledge, skill and experience that the director has (the "subjective test").

Respondents' views

38. We received some comments from chambers of commerce, several professional organisations such as HKLS, HKBA, HKICS, HKAB and HKICPA as well as some listed companies on the proposal to codify directors' duty of care, skill and diligence. While most of the respondents supported the proposed codification in principle, some expressed reservation over the introduction of a "mixed objective/subjective test". The main concern was that the subjective test would set an even higher standard for those directors having special knowledge or experience. They considered that the subjective test would be onerous and problematic in operation and would discourage persons having good qualifications from taking up directorships in Hong Kong.

39. Some also suggested that in the event that the subjective test was included in the legislation, a set of clear statutory guidelines on the operation/application of the subjective test would be required and that a "safe harbour" should be developed to define the circumstances where the directors would be protected from liability arising from the subjective test due to their background and qualification, in particular as regards the duty of care, skill and diligence as required of a non-executive director who subjectively is well-qualified but objectively does not participate in the daily operations and affairs of the company. Some also suggested adopting a "business judgment rule" similar to that in jurisdictions like Australia to protect directors from liability for bona fide business decisions which subsequently turn out to be mistaken.

Our response

40. While the subjective element of the proposed mixed test has been interpreted as raising the standard where the particular director has special knowledge, skill and experience, it does not depart significantly from the common law position in Hong Kong of directors' duty of care, skill and diligence in this respect.[11] Also, it seems that the concerns of some respondents may arise from a misunderstanding that the minimum objective standard of conduct of all directors would necessarily raise the standard to be followed by non-executive directors to require them to use the same care, skill and diligence of executive directors. Indeed clause 10.13 makes it clear that the courts must also take into account the "functions carried out by the relevant director". This means that the courts should consider the different functions of executive and non-executive directors when determining whether a particular director has exercised reasonable care, skill and diligence.[12] Clause 20.10 (in the second phase consultation) provides that the court may relieve an officer of a company from liability for any misconduct if he has acted honestly and reasonably and ought fairly to be excused having regard to all the circumstances (including those connected with his appointment). There is no obvious need to introduce a "safe harbour" as suggested by some respondents.

41. As regards the proposed introduction of a statutory "business judgment rule", previous studies have considered the proposal and were of the view that the existing common law on review of management decisions was sound and that there was no need for a statutory formulation of the business judgment rule.[13] The

---

[11] The subjective test in Re City Equitable Fire Insurance Co Ltd [1925] Ch 407 was recognised as the applicable standard by Rogers JA in Law Wai Duen v Boldwin Construction Co Ltd [2001]3 HKLRD 430 as he stated in paragraph 10 of the judgement that "Perhaps the classic exposition of the duty of care required of a director was given by Romer J in the case of Re City Equitable Fire Insurance Co Ltd [1925] Ch 407. The standard which he described as being required of a director is, if anything, open to review in present day circumstances as, perhaps, being too low.

[12] See Gower and Davies *"Principles of Modern Company Law"* 8th ed. p.491.

[13] Recommendation 6.15, p.124 of *the Consultancy Report of the Review of Hong Kong Companies Ordinance* undertaken by Ermanno Pascutto in 1997 and p.84 of the SCCLR's *Report on the Recommendations of a Consultancy Report of the Review of the Hong Kong Companies Ordinance* (2000).

SCCLR also revisited the issue in 2007 and came to the same conclusion. We consider that there is no compelling need for a statutory business judgment rule at this juncture.

42. In the light of the above, we consider that there is no need to modify the proposal of codifying directors' duty of care with a "mixed objective/subjective test".

CONCLUSION

43. In summary, we are prepared to adopt the following proposals -

(a) The headcount test for members' schemes for listed/non-listed companies and creditors' schemes under section 166 of the CO will be retained but the court will be given a discretion to dispense with the test for members' schemes in special circumstances, such as where there is evidence that the result of the vote has been unfairly influenced by share splitting;

(b) Directors will be allowed to provide a service address for display on the public register of the CR whereas their residential addresses will be kept on the confidential record with access restricted to public and enforcement/regulatory authorities, liquidators, provisional liquidators and those who have obtained court orders for disclosure. Directors' residential addresses in the existing records will be purged upon application and payment of a fee;

(c) Certain digits in the identification numbers of individuals will be masked on the public register. The identification numbers in the existing records will be purged upon application and payment of a fee;

(d) On the assumption that a new disinterested members' approval exception to prohibitions on loan and similar transactions in favour of directors and their connected persons will be introduced in respect of public companies,

the concept of relevant private company will be modified to cover only private companies which are subsidiaries of a listed or public company;

(e) CDA currently preserved in section 168BC(4) of the CO will be retained in the CB; and

(f) No change will be made to clause 10.13 of the CB which seeks to codify directors' duty of care, skill and diligence along the lines of the UK CA 2006.

Other Issues

44. Apart from the issues discussed above, we have considered the comments on other aspects of the CB, mainly concerning technical or drafting issues. The comments and our responses are summarised in Appendix III.

WAY FORWARD

45. The Second Phase Consultation of the Draft CB was completed on 6 August 2010. We shall revise the CB taking into account the above proposals and views received. We aim to introduce the CB into the Legislative Council in late 2010.

Financial Services and the Treasury Bureau
30 August 2010

Appendix I

List of Forums and Meetings Attended

Date	Organising Parties	Nature
7 January 2010	Small and Medium Enterprises Committee*	Meeting
12 January 2010	Labour Advisory Board*	Meeting
4 February 2010	Companies Bill Team, Financial Services and the Treasury Bureau	Forum
22 February 2010	Hong Kong General Chamber of Commerce*	Forum
1 March 2010	Federation of Hong Kong Industries*	Briefing
2 March 2010	The Hong Kong Institute of Directors*	Forum
8 March 2010	The Hong Kong Institute of Chartered Secretaries*	Meeting
15 March 2010	The Association of Chartered Certified Accountants*	Seminar

* We were invited by the organising parties to attend the forums and meetings to further introduce the proposals on the Draft Companies Bill – First Phase Consultation. Comments on the proposals were also received from members of the organising parties through discussions.

Appendix II

List of Respondents

1. Asia Satellite Telecommunications Holdings Limited
2. Asian Citrus Holdings Limited
3. Association of Chartered Certified Accountants, Hong Kong, The
4. British Chamber of Commerce in Hong Kong, The
5. CASH Financial Services Group Limited
6. Celestial Asia Securities Holdings Limited
7. Century Legend (Holdings) Limited
8. Chamber of Hong Kong Listed Companies, The
9. CHAN, Eric
10. CHAN, Raymond Wai Man
11. Cheung Kong (Holdings) Limited
12. Cheung Kong Infrastructure Holdings Limited
13. Chevalier International Holdings Limited
14. China Energy Development Holdings Limited
15. China Haidian Holdings Limited
16. China Haisheng Juice Holdings Co., Ltd.
17. China Mandarin Holdings Limited
18. China Metal Recycling (Holdings) Limited
19. China Railway Group Limited
20. China Sci-Tech Holdings Limited
21. Chinasoft International Limited
22. CHOI, Ivan

23. Chu Kong Shipping Development Company Limited
24. Chun Wo Development Holdings Limited
25. Cinda International Holdings Limited
26. CK Life Sciences Int'l., (Holdings) Inc.
27. CLARK, Stephen J
28. Clifford Chance
29. CLP Holdings Limited
30. Computershare Hong Kong Investor Services Limited
31. Consumer Council
32. CPA Australia Limited
33. CSI Properties Ltd.
34. Eagle Asset Management (CP) Limited
35. Emperor Capital Group Limited
36. Emperor Entertainment Group Limited
37. Emperor Entertainment Hotel Limited
38. Emperor International Holdings Limited
39. Emperor Watch and Jewellery Limited
40. Far East Holdings International Limited
41. Far East Hotels And Entertainment Limited
42. Federation of Hong Kong Industries
43. Fountain Set (Holdings) Limited
44. Get Nice Holdings Limited
45. Global Consultants and Services Limited
46. Golden Resorts Group Limited
47. GOME Electrical Applicances Holding Limited

48. Great Eagle Holdings Limited

49. G-Rescources Group Limited

50. Group Sense (International) Limited

51. Guoco Group Limited

52. Hanny Holdings Limited

53. Henderson Land Development Company Limited

54. Heritage International Holdings Limited

55. Hermes Equity Ownership Services Limited

56. HO, Tak Wing

57. Hong Kong Aircraft Engineering Company Limited

58. Hong Kong Association of Banks, The

59. Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies

60. Hong Kong Bar Association

61. Hong Kong Federation of Insurers

62. Hong Kong General Chamber of Commerce

63. Hong Kong Institute of Certified Public Accountants

64. Hong Kong Institute of Chartered Secretaries

65. Hong Kong Institute of Directors, The

66. Hong Kong Public Key Infrastructure Forum Limited

67. Hong Kong Trustees' Association Limited

68. Hongkong and Shanghai Banking Corporation Limited, The

69. Hongkong Electric Holdings Ltd.

70. Hopewell Holdings Limited

71. HUI, L T

72. Hutchison Harbour Ring Limited

73. Hutchison Telecommunications Hong Kong Holdings Limited
74. Hutchison Telecommunications International Limited
75. Hutchison Whampoa Limited
76. iMerchants Asia Limited
77. International Chamber of Commerce - Hong Kong, China
78. International Trademark Association
79. ITC Corporation Limited
80. ITC Properties Group Limited
81. JONES, Gordon
82. K. Wah International Holdings Limited
83. Keck Seng Investments (Hong Kong) Limited
84. Kerry Properties Limited
85. KPMG
86. LAM, W H
87. Law Society of Hong Kong, The
88. Lee & Man Holding Limited
89. Linklaters
90. Luk Fook Holdings (International) Limited
91. Lung Cheong International Holdings Ltd.
92. Mandatory Provident Fund Schemes Authority
93. Melco International Development Limited
94. Mexan Limited
95. MOK Yun Lee Paul
96. MTR Corporation Limited
97. National Investments Fund Limited

98. New Media Group Holdings Limited
99. New World Development Company Limited
100. NG, Wing Chung Michael
101. Norton Rose Hong Kong
102. P. C. Woo & Co.
103. Paradise Entertainment Limited
104. Paul Y. Engineering Group Limited
105. Perennial International Limited
106. PricewaterhouseCoopers
107. Prosperity Investment Holdings Limited
108. PYI Corporation Limited
109. QPL International Holdings Limited
110. Recruit Holdings Limited
111. Securities and Futures Commission
112. See Corporation Limited
113. Shanghai Industrial Holdings Limited
114. Shun Tak Holdings Limited
115. Solomon Systech (International) Limited
116. Sparkle Roll Group Limited
117. STEP Hong Kong Limited (Society of Trust and Estate Practitioners)
118. Strong Petrochemical Holdings Limited
119. Sun Hung Kai & Co. Limited
120. Sun Hung Kai Properties Limited
121. Sundart International Holdings Limited
122. Superb Summit International Timber Company Limited

123. Techtronic Industries Company Limited
124. TOM Group Limited
125. Trasy Gold Ex Limited
126. TSAO, Simon Y. T.
127. Universe International Holdings Limited
128. Van Shung Chong Holdings Limited
129. Wai Chun Group Holdings Limited
130. Wai Chun Mining Industry Group Limited
131. Wang On Group Limited
132. Win Hanverky Holdings Limited
133. Wing On Travel (Holdings) Limited
134. 王文治
135. 香港工會聯合會
136. 香港中華廠商聯合會
137. 香港中華總商會
138. 香港玩具廠商會
139. 香港證券業協會
140. 香港職工會聯盟
141. 港九勞工社團聯會
142. 陳娟
143. 新婦女協進會
144. 廖甘樹
145. 趙大君
146. 劉玉嬌
147. 劉耀東

148. 魏瑩思

149. 魏樹光

150 - 164 There are 10 anonymous submissions, and five submissions whose respondents have requested their names not to be disclosed.

Administration's Response to Comments Received during the First Phase Consultation of the Draft Companies Bill

Clause No.	Respondents' Comments[Note]	Our Response
Interpretation		
Clause 1.2	● The use of "associated company" will be in conflict with the general understanding of the accounting concept of "associated company". It can be considered whether the words "affiliated company" or "related company" are more appropriate. ● Under Clause 1.2 the word "company" means "a company formed and registered under the Ordinance or an existing company". On a literal reading of this provision, the possibility of a company incorporated outside Hong Kong should have been excluded. However, this is obviously not the case. ● The revised definition of "listed company" leaves it unclear whether companies listed by depositary receipts are included. ● It can considered that a general definition of the "public" should be inserted in line with other Ordinances like the Securities and Futures Ordinance, or clarifying the concept	We will consider the comment further in consultation with the Law Draftsman.

[Note] The comments cited here are a summary of the substantive comments in the submissions received. Comments on provisions being covered in the second phase consultation are not included.

Clause No.	Respondents' Comments[Note]	Our Response
	in each relevant provision. ● There is a strong case for all the definitions in the Companies Bill ("CB") to be at least referred to in clause 1.2 even if they are actually set out in greater detail in a subsequent part of the CB. This would help to reduce significantly overlaps and differences in interpretation between similar interpretation provisions.	
Responsible Person / Threshold of offences		
Clause 1.3	● There are concerns about the proposed extension of the scope of responsible person. It may be unfair to include a manager, who is just an employee and may be a relatively junior staff, in the definition of "responsible person". Many directors of privately-owned small enterprises in Hong Kong, who have no professional training and little understanding of laws and regulations, will be exposed to penalties. ● The position of "secretary" should be specifically defined.	● The proposal to lower the threshold for a breach or contravention is to strengthen the enforcement regime under the CB. The term "manager" is defined in section 2(1) of the Companies Ordinance ("CO") and Clause 1.2(1) of the CB as a person who performs managerial functions in relation to a company under the directors' immediate authority, and so should only cover senior managers in a company. To exclude managers, so defined, from the ambit of "responsible person" would narrow the present concept of "officer in default" as defined in section 351(2) of the CO and the section 2(1) definition of "officer". We do not see justification for such exclusion. ● There is no definition of "secretary" in the CO, the UK Companies Act or the Australian Corporations Act. It seems reasonably clear as to who is the secretary of a company and

Clause No.	Respondents' Comments[Note]	Our Response
		therefore we do not see the need to have a definition of "secretary" in the CB. However, we will consider renaming the term "secretaries" as "company secretaries" so as to clarify their status.
Person specified by the Registrar to certify a translator's competence		
Clause 1.4(3)	A new subsection (f) should be added for other person or entity specified by the Registrar to certify a translator's competence in order to allow maximum flexibility.	We consider that there is no need to add a new subsection as proposed as Clause 1.4(6) of the CB provides that the Secretary may amend subsection (3) by order published in the Gazette. We believe that the Clause has provided sufficient flexibility.
Definitions of Companies		
Clauses 1.7 to 1.11	It is highly unlikely that dispensing with private unlimited companies without share capital and non-private unlimited companies without share capital will lead to better discipline.	Currently there are no unlimited companies without share capital on the register. We are of the view that there is no demand for this type of company.
Clause 1.11	● The definitions of public and private companies and companies limited by guarantee are unclear and confusing. It is unclear whether a company limited by guarantee falls outside the definitions of both private and public companies. In UKCA 2006 a public company includes a company limited by guarantee and having a share capital. ● It is not necessary to fully define both a "private company"	● Under the CB, there will be three mutually exclusive categories of companies: private companies, public companies and companies limited by guarantee. A company cannot be formed or become a company limited by guarantee with share capital as from 13 February 2004 pursuant to section 4(4) of the CO. ● The definitions of "private company" and "public company"

Clause No.	Respondents' Comments[Note]	Our Response
	and a "public company" and Hong Kong should consider following the UK approach.	in the CB do not change the present position. Practitioners should be familiar with their meanings. However, we will consider the comment further in consultation with the Law Draftsman.
Clauses 1.12 to 1.20	● There may be a case for amending the definition of "holding company" in Clause 1.12(3), which refers to control of majority of voting rights on the board as opposed to numbers of directors (otherwise that would make no sense - see the definition of "parent undertaking" which uses the benchmark of voting rights on the board (Clause.1.16). ● The difference in the definitions of "holding company"/"subsidiary" and "parent undertaking" /"subsidiary undertaking" have been retained. The difference in the definitions is confusing and possibly unnecessary. Aside from issues of consistency, the definition of "holding company" and "subsidiary" should depend only on control and not participation in profits. Thus the appropriateness of Clause 1.12(1)(c), read together with Clause 1.12(5), should be revisited.	We consider that the definition in the CB in order. The terms "parent undertaking" and "subsidiary undertaking" are basically for accounting provisions. Accountants should be familiar with such definitions.
Clauses 1.13 and	The new Clause 1.13 states that for the purposes of defining a *"holding company"* and a *"subsidiary"*, powers exercised or shares held in a "fiduciary capacity" will be disregarded.	There is no change to the present position. Companies with common trustees holding shares should not be regarded as related

Clause No.	Respondents' Comments[Note]	Our Response
1.17	Presumably the purpose is to exclude the likes of agents and trustees but there are a number of conceptual and practical difficulties with this approach.	companies merely on the basis of there being common trustees.
Documents delivered to the Registrar		
Part 2	Consideration can be given to adding a provision to deal with the point at which a document will be considered delivered to the Registrar.	We will consider the comment further in consultation with the Law Draftsman.
Guidelines issued by the Registrar		
Clause 2.6(5)	The guidelines should not be regarded as part of substantial law and the court should not admit the guidelines as evidence and not give an unnecessary weight thereon.	We see no problem with the Clause. Even though the guidelines are admissible in evidence, they are not conclusive to prove the existence of a fact in issue. In fact, a similar provision can be found under section 13(4) of the Financial Reporting Council Ordinance (Cap. 588).
Unsatisfactory documents		
Clauses 2.16(2)(a) and (b)	It is unclear why a document or signature that is "altered" would immediately be considered unsatisfactory as a result of Clause 2.16(1)(a).	The Clause is based on section 348(1)(b) and (c) of the CO which are grounds for the Registrar to refuse registration of a document that is altered or with an altered signature. However, we will consider the comment further in consultation with the Law

Clause No.	Respondents' Comments[Note]	Our Response
		Draftsman.
Registrar's power to refuse to register documents		
Clause 2.18	There are concerns about the appropriateness of the ability of the Registrar to decline registration of documents where he considers it to be not properly delivered or unsatisfactory, which includes documents containing unnecessary material. For documents containing unnecessary material, there should be a "severance" provision to enable the Registrar to treat as duly filed the portions of the document which contain necessary and correct material.	We will consider the comment further in consultation with the Law Draftsman.
Clause 2.18(1)	● It should be considered changing the first part of the sentence to read "Where a document is delivered to the Registrar for registration, …" ● Under Clause 2.16, a document is unsatisfactory if it falls within (among other things) sub-clause (2) of that section. Sub-clause 2.16(2)(c) would seem to cover the situation where a document is not properly delivered under Clause 2.11. If that is the case, Clause 2.18(1)(a) is unnecessary as it is already covered by Clause 2.18(1)(b).	We will consider the comment further in consultation with the Law Draftsman.
Clause 2.18(2) and	There is no time limit on when the Registrar needs to revert as to whether a document is acceptable for registration. This could	It is not necessary to include the time limit. The Registrar is under an obligation to exercise the statutory power within a

Clause No.	Respondents' Comments[Note]	Our Response
(3)	lead to uncertainty and raises concern especially where it is important to determine the exact date (and time) of registration of a document.	reasonable period of time. According to the performance pledge of the CR, registration of general documents will be completed within six working days.
Clause 2.18(4)	This provides that even if a document is not properly delivered to the Registrar, the Registrar may register it if, in the opinion of the Registrar, the document is not unsatisfactory. This seems to be in conflict with section 2.16 (2)(c).	We do not consider that the provisions are in conflict. Clause 2.16(2)(c) provides that a document is unsatisfactory if the requirements of an Ordinance under which the document is delivered (other than the requirements as regards the contents/the forms/the authentication/the manner of delivery of the document) are not complied with.
Clause 2.20	The Clause seems to impose a burden by requiring the aggrieved party to seek a court order to rectify a document which could be costly.	This Clause deals with an appeal on the decision of the Registrar to refuse to register a document, and does not deal with rectification of the document as such.
Clause 2.21(4)	● This provides that penalty is payable from the 14th day after the date of notice of refusal to register is sent by the Registrar. However, under section 2.20, a person may appeal to the Court within 42 days if the Registrar refuses registration of a document. No penalty should be payable until the time for appeal has lapsed. ● For clarity, there should be a provision which states that the Registrar must provide reasons for its decision to refuse the registration of a document.	● The CR will not take enforcement action pending the hearing of an appeal against the Registrar's decision under Clause 2.20. ● We agree that the Registrar should provide reasons for her decision to refuse the registration of a document on the ground that it is unsatisfactory. We will consider the comment further in consultation with the Law Draftsman.

Clause No.	Respondents' Comments[Note]	Our Response
Registrar not responsible for verifying information		
Clauses 2.32 and 2.33	The risk of electronic filing with immunity for public officers places Hong Kong in a very vulnerable position. The immunity may lead to reckless behaviour.	We see no problem with the immunity provision as the immunity from civil liability will only be applicable if the Registrar or other public officers have acted in good faith.
Restriction on body corporate being director		
Clauses 10.3 to 10.5	● The proposal to require at least one individual director would increase the cost of operating business and drive businesses away from Hong Kong. Exemption should be granted to trust companies as well as dormant and small companies. ● Circumstances under which a reserve director can be appointed under Clause 10.3 should be enlarged. ● There should be a 2-year transitional period from the enactment of the new CO to allow companies to find and appoint individual directors. ● There are suggestions that the individual director must be accountant, lawyer or company secretary, and that the individual director should be local.	● We agree that exemption can be granted to existing dormant companies but they will need to comply with the requirements when they cease to be dormant. Regarding trust companies and small companies, we consider that it would be inappropriate to grant exemptions as it would be against the principles laid down and recommendations made by the Financial Action Task Force. Granting exemptions to small companies would lead to complexities in implementation as their status as small companies may change over time. ● The introduction of reserve director provisions under section 153A of the CO in 2003 was to cater for the situation where a private company has only one member who is also the sole director. For other companies, it is up to the companies to provide through their articles provisions relating to the appointment of directors, reserve or otherwise, to act in the event of specific circumstances.

Clause No.	Respondents' Comments[Note]	Our Response
		• We envisage that the new CO will come into force at least 18 months after enactment. After the new CO comes into force, a grace period of 6 months will be given under Clause 10.5(3). We believe that companies will have sufficient time to find and appoint individual directors. • We are of the view that requiring that the individual director must be a professional or must be local resident is too rigid and will adversely affect business operation in Hong Kong. We do not intend to introduce such requirement at the moment.
Direction requiring company to appoint director/secretary		
Clauses 10.6 and 10.26	Consideration should be given to enhancing the Registrar's power of enforcement in circumstances where the imposition of a fine is not effective to secure compliance. Possible measures include empowering the court to order the company to be struck off upon application by the Registrar where the company continues to be in default despite the imposition of a fine can be considered.	Section 177(2) of the CO has already provided that the Registrar may apply to the court to wind up a company if the company does not have at least one director throughout a period of not less than 6 months.
Validity of acts of director		
Clause 10.9	The clause is too wide in scope in protecting the interests of third parties dealing with the company. It will cause a lot of	The effect of the Clause is that, as between the company and persons having no notice to the contrary, directors de facto are as

Clause No.	Respondents' Comments[Note]	Our Response
	harm to the company concerned in case a person is actually unqualified to act as a director or the person has ceased to hold office as a director. Such clause may cause a lot of trouble and unnecessary disputes or civil litigation between the company and the third party.	good as directors de jure. Pursuant to existing case law, a person seeking to rely on such validation provisions must have acted in good faith and in particular, the defect must not have been known at the time of the appointment. It does not seem that Clause 10.9 of the CB will cause unnecessary disputes or civil litigation as the case law in construing these types of provisions is long established.
Directors' Liabilities		
Clauses 10.15 to 10.18	From the point of view of professional trustee companies, it would be desirable to have: (a) some clarification of the ability to allow shareholders to grant indemnities (where the company can not grant an indemnity); (b) clearer wording in Clause 10.17 (2) as to whether an insurance policy will be able to cover the costs of defending allegations of fraud or dishonesty; and (c) some clarification of whether insurance taken out against third part liabilities – see Clause 10.18 - need not be reimbursed.	● Any concern regarding professional trustee company's indemnity could be addressed through the purchase of directors' insurance. ● Insurance taken out against third party liabilities need not be reimbursed by the director if it is in compliance with clause 10.17, but this may be subject to any contrary agreement between the company and the director. ● As for the drafting comment, we will consider it further in consultation with the Law Draftsman.
Clauses 10.18 and	● The indemnity in favour of the director must be recorded in writing, duly authorised and executed by the company giving it. A permitted indemnity provision that is not in	● We believe that a written memorandum setting out the terms of the indemnity provisions as required in Clause 10.20 should be sufficient for the purpose of disclosure even if the provision

Clause No.	Respondents' Comments[Note]	Our Response
10.20	writing will create uncertainty. ● The permitted indemnity provision should not cover any civil proceedings brought by a shareholder in a derivative or similar action in which judgment is given against the director. Clause 10.18 (2)(b)(ii) should be expanded. ● In Clause 10.18(2)(b)(ii), any penalty payable in respect of non-compliance with any regulatory requirement is excluded from the scope of a permitted indemnity. An exemption should be provided for a regulatory requirement that is a purely routine administrative matter and has inconsequential impact on the shareholders.	is not in writing. ● We note the concern regarding derivative or similar action and will consider amending Clause 10.18(2)(b)(ii). ● We do not agree that any exemption should be provided for any regulatory requirement. It is still a director's duty to ensure that the company complies with all regulatory requirements regardless of their nature.
Clause 10.20(2)	There are a number of provisions in the CB which refer to a "prescribed place" where documents are available for inspection. The meaning of the term should be elaborated.	The expression "prescribed place" will be dealt with by Regulations to be made under Clause 12.125 of the CB.
Ratification of conduct by director		
Clause 10.22	● The Clause is too wide in scope in relation to ratification of wrongs done to the company by the director. It is going too far to require a single breach of duty of the individual director to be ratified by the shareholders. On the other hand certain breach of duties by the directors should not be ratifiable by the shareholders like misappropriation of	● It is a basic principle of the law relating to fiduciaries that those to whom the duties are owed may release those who owe the duties from their legal obligations. Clause 10.22(2), in requiring ratification by shareholders, is simply preserving the common law position. ● Clause 10.22(6) provides that nothing in clause 10.22 affects

Clause No.	Respondents' Comments[Note]	Our Response
	assets of the company and fraud on minority shareholders. ● Ratification of conduct by director amounting to negligence has to be done by resolution of members who are unconnected with the director. In the context of many family owned companies in Hong Kong, this could lead to a problem that nobody could vote on the resolution. This may be too restrictive especially in the case where no unconnected parties' position is prejudiced. ● A ratification may prejudice creditors. An unanimous vote to ratify should be valid only if the company is solvent as at the date of the passing of the resolution ratifying the act; and ● Section 10.22 should catch any act of ratification that occurs after commencement of the section.	the validity of a decision taken by unanimous consent of the company's members, so the restrictions imposed by clause 10.22 will not apply when every member approves the ratification. ● Clause 10.22(7) preserves existing common law rules which restrict ratification, so there is no need to provide expressly that ratification is valid only if the company is solvent as at the date of the passing of the resolution ratifying the act, or that certain breaches are not ratifiable. ● Clause 10.22 only applies to conduct by a director on or after the commencement of that clause. We do not suggest extending the provision to conduct by a director before the commencement as this will have the effect of altering retrospectively the consequence of a misconduct of a director.
Clause 10.22	Clause 10.22(3)(c) is redundant given that Clause 10.22(3)(b) already covers trustees (please refer to the definition in Clause 11.2).	Clause 10.22(3)(c) is not redundant as the category of trustees covered by Clauses 10.22(3)(b) and 11.2 is narrower compared with the category of trustees under Clause 10.22(3)(c).
Minutes of directors' meetings and written record of decision of sole director of private company		
Clauses 10.31(3) and	It is more appropriate that the liability rests on the officers in default instead of the company itself.	We consider that the prosecution should be given the flexibility to prosecute the company and / or officers in default, given the fact that it is sometimes difficult to prosecute officers because of

Clause No.	Respondents' Comments[Note]	Our Response
10.33(5)		difficulties in service or in proving criminal intention of the officers. In fact, the majority of Hong Kong companies are management owned, and the persons in default would often be the persons who suffer from the default if the companies are penalised.
Clauses 10.34(2)	There should also be a time limit on the retention of minutes of meetings held before the commencement of the provisions in the CB.	We agree that there should be a time limit and will follow up in revising the CB.
Fair dealing by directors		
Part 11	● If the self-dealing restrictions also apply to shadow directors, there may be complications, particularly in Corporate Finance or Alternative Investment context where enhanced monitoring measures will need to be put in place for connected parties related transactions. ● The definition under the CB should be aligned with the definition of "connected person" under the Listing Rules, in order to facilitate monitoring, control and compliance by listed companies. ● Whilst the proposed changes in Part 11 deal with prohibited transactions (presently covered by section 157H of the CO), it is not clear to what extent section 161B of the CO will be affected.	● We see the need for the restrictions to apply to shadow directors otherwise it may lead to abuse. ● The Listing Rules are the terms of a private contract between a listed issuer and the Hong Kong Exchange. It is inappropriate for the CB, which will apply to all companies, to follow the terms of a private contract. The statutory requirements in the CB are intended to regulate not just listed companies. While the current practice of listed companies may be of relevance, we also need to take into account compliance issues of other companies, such as small private companies. It should be expected that when the CB is passed, the Listing Rules may be amended in manner which the contracting parties consider appropriate to reflect the statutory requirements.

Clause No.	Respondents' Comments[Note]	Our Response
	● The threshold for substantial non-cash asset does not take into account the company size and is too inflexible.	● Section 161B of the CO will be replaced by Clauses 9.27(1)(d) and 9.95 in Part 9. The detailed disclosure requirements will be provided in the regulations to be made under section 9.27(4). ● We note the concern on the threshold of substantial non-cash asset and will consider further whether it should be relaxed.
Part 11	Unlike the drafting of Parts 1,2, 10, 12 and 14-18, where the draft clauses tend to be short and clear, Part 11 still contains very lengthy sections and a significant number of sub-sections with lengthy sentences. It is not at all clear and 'user-friendly'.	We will consider the comment further in consultation with the Law Draftsman.
Definition of connected person		
Clauses 11.2 to 11.4	The UK Companies Act 2006 expanded the definition of connected persons to parents and children of any age. This created some unintended consequences, and the implications of any change in Hong Kong will need to be fully investigated.	We consider it necessary to expand the definition of connected persons as parents and children, even adult children, seem very much to be the type of persons where questions of commonality of interest can arise. We would keep in view the implementation of the clauses.
Public company must not enter into credit transaction		
Clauses 11.19 and	● Clause 11.19 prohibits a public company from entering into a credit transaction. The available exemptions are	● Clause 11.27 of the draft CB provides that a loan transaction is not prohibited if it is entered into in the company's ordinary

Clause No.	Respondents' Comments[Note]	Our Response
11.30	different from those allowed under the Listing Rules. In certain respects, the Companies Bill is more stringent as, for example, the Listing Rules exempt the acquisition of consumer goods and services in the ordinary course of business of a listed issuer. More importantly, as the majority of public companies are listed companies, this will create two different regulatory regimes for "connected transactions". This creates an additional administrative burden for listed issuers which do not seem to be outweighed by any benefits to shareholders; ● In addition to the approval of its members before making any quasi loans or entering into a credit transaction, a public company must also seek the approval of its holding company's members under Clauses 11.17(2) and 11.19(2). However, if the holding company is incorporated offshore, this additional requirement does not apply. The exclusion of offshore companies will render the additional requirement largely superfluous. In any event, the additional requirement of having the transaction approved by a holding company's shareholders does not serve any substantive purpose. If a holding company is itself a listed company, it will already be subject to the requirement in Clauses 11.17(1) and 11.19(1) and the Listing Rules. ● Under Clause 11.30, an infringing transaction can be validated if it is affirmed by the company within a reasonable period after it is entered into. To avoid	course of business. ● We are of the view that requiring all public companies to seek the approval of its holding company before making any quasi loans or entering into a credit transaction with a director of the holding company can better protect the interests of the members of the holding company. However, we do not want to create any extraterritorial effect and thus the requirement will not be applicable if the holding company is incorporated offshore. ● We do not consider it necessary to state a definite cure period as "reasonable period" could be determined by the established common law principles.

Clause No.	Respondents' Comments[Note]	Our Response
	uncertainty, a definite cure period should be stated which can be extended with a court order.	
Exception to prohibition of small loan, quasi-loan and credit transaction		
Clauses 11.21 and 11.22	● The available exemptions should mirror those under the Listing Rules to avoid having two different regimes for listed issuers. ● Specifically, the financial limits for small loans, quasi loans and credit transactions imposed under Clauses 11.21 and 11.22 do not take into account the company size and are too inflexible. An alternative is to express the limit as the lower of (i) a fixed sum which is higher than the current limits and (ii) a fixed percentage of the company's net tangible assets value.	● The new CO will apply to all companies. We consider it inappropriate to mirror the exemption under the Listing Rules as the latter applies only to listed companies. ● We consider that fixed financial limits are clear. The calculation of the financial limits with reference to the percentage of a company's net tangible assets value will be difficult for the small private companies to follow.
Clause 11.23(1)(a)(i)	Please consider defining "misconduct" to mean any negligence, default, breach of duty or breach of trust by the director, as in the case in Clause 11.24(5).	We will consider the comment further in consultation with the Law Draftsman.
Clause 11.28	The words "Clause 11.16, 11.17" should be added before "Clause 11.18 or 11.19".	We will consider the comment further in consultation with the Law Draftsman.

Clause No.	Respondents' Comments[Note]	Our Response
Interpretation in relation to payment of loss of office		
Clauses 11.32(3) and (4)	The words "section 11.34" should be replaced by "section 11.33".	We will consider the comment further in consultation with the Law Draftsman.
Exception for payments in discharge of legal obligation etc.		
Clause 11.40(1)(c)	It should be considered including the words "the termination of" after "in connection with".	We will consider the comment further in consultation with the Law Draftsman.
Service contract		
Clause 11.47	Our reading of Clause 11.47 (defining directors' service contracts) suggests to us that this definition could extend to non-executive directors of listed companies. Such directors are often appointed pursuant to a letter of appointment or agreement, which is capable of being construed as a contract. Moreover, the wording of Clause 11.47(l)(a)(i) refers to a service contract as being one under which a director "undertakes personally to perform services, as director or otherwise, for the company.....". No distinction is suggested by this wording between the services provided by a director to a company in an executive or non-executive capacity. Given that the standard term of office for a director of a listed company is on the basis of a three yearly	Since the directors' appointments need to be made by the members, it does not seem to be too burdensome for the companies to also seek approval of the period of appointment at the same time. In any event, if the companies do not wish to require members' approval for the period of the appointment of non-executive directors, it is quite straightforward for the terms of appointment to expressly state that the rotation period or fixed period is subject to the company's right to terminate under the articles (if any) or under the statute. Under the case law, this should be sufficient to mean that removal from office by the members will not lead to a breach of contract, and so there is no guaranteed term of employment

Clause No.	Respondents' Comments[Note]	Our Response
	rotation (and annual general meetings do not necessarily occur on exactly the same date in each year) the effect of the proposed wording could be to require the terms of appointment of significant numbers of independent non-executive directors to be subject to members' approval and to be held in the public domain.	under the contract.
Clause 11.50	It is not clear whether it is the holding company's directors' employment contracts that are the subject of regulation or it is a company's own directors' employment contracts that are the subject of regulation.	We will consider the comment further in consultation with the Law Draftsman.
Clauses 11.52 and 11.53	The director's service contract in excess of three years must be recorded in writing, duly authorised and executed by the parties.	We believe that a written memorandum setting out the terms of a director's service contract should be sufficient for the purpose of disclosure even if the contract is not in writing.
Non-cash asset		
Clauses 11.55 to 11.59	● The available exemptions are too stringent. The thresholds proposed are too inflexible and could be more restrictive than the de minimis thresholds under Chapter 14A of the Listing Rules, creating two different regimes for listed issuers. ● The manner of approval drafted seems to suggest that approval will need to be sought at different layers of	● We note the concern on the thresholds and will consider further whether it should be relaxed. ● Members' approval is only required from a holding company if the arrangement involves a director of that holding company or an entity connected with such a director (Clause 11.59(2) and (3) of the CB) but not from several layers of holding

Clause No.	Respondents' Comments[Note]	Our Response
	intermediate holding companies. The resulting administrative inconvenience does not seem to be outweighed by any conceivable benefits to the shareholders as a whole. ● Under Clause 11.61, an infringing transaction can be validated if it is affirmed by the company within a reasonable period after it is entered into. To avoid uncertainty, a definite cure period should be stated which can be extended with a court order.	companies. ● We do not consider it necessary to state a definite cure period as "reasonable period" could be determined by the established common law principles.
Director must declare material interests		
Clause 11.63 (5)	● It can be considered to include two further exceptions to the requirement to declare material interests, as in the case under section 177(6) of the UK Companies Act 2006 - (i) if it cannot reasonably be regarded as likely to give rise to a conflict of interest; and (ii) the other directors are already aware of the interest. ● It is noted that there is a change in the requirement under Clause 11.63(5)(a) from the existing requirement under section 162(2) and (3) of the CO. It is assumed that this is an intentional change so that only the subjective awareness of the director would be taken into account.	● Our intention is that the triggering threshold should be the existing threshold under section 162 of the CO i.e. a direct or indirect material interest in connected transactions which was significant to a company's business instead of the threshold in section 177(6)(a) CA 2006 (i.e. if it cannot reasonably be regarded as likely to give rise to a conflict of interest). We also consider that the exemption in section 177(6)(b) CA 2006 (i.e. the other directors are already aware of the interest) may lead to abuse and should not be adopted. ● Regarding the awareness of the director, it is stated in 11.63(6) that a director is regarded as being aware of matters of which the director ought reasonably to be aware.

Clause No.	Respondents' Comments[Note]	Our Response
Clause 11.63	The word "arrangement" is difficult to understand and to apply in actual situations. It is wondered whether "arrangement" should be confined to the types under draft clauses 11.10, 11.12, 11.13, 11.14, 11.20, etc. The word may lead to unnecessary extension in scope of the obligation of the director to declare his interest to the other directors.	The references to "arrangement" in Clauses 11.10 etc are set out in different contexts and are inappropriate for Clause 11.63. Although there is no statutory definition of the term for the purposes of Clause 11.63, the statutory provision is no wider than the common law in this respect. If a director enters into an arrangement under the common law where there is a conflict of interest, then the directors will need the members' approval of the arrangement in order to avoid a breach of fiduciary duty. It is impractical to define the term precisely in statute, and the concept is best left to be determined with reference to the common law cases.
Company administration and procedure		
Part 12 and other parts	A number of the key proposed amendments set out in various parts of the draft Companies Bill follow the direction taken in the UK Companies Act 2006 (the "2006 Act"). However, some of the clauses of the draft Companies Bill which follow the provisions of the 2006 Act have not fully tracked their UK equivalents. It is recommended that the current draft CB be reviewed in light of the 2006 Act (as currently implemented) to ensure that any Hong Kong deviation in substance from the relevant UK sourced provisions are considered decisions which best suit the local context.	We will consider the comment further in consultation with the Law Draftsman.

Clause No.	Respondents' Comments[Note]	Our Response
Part 12	As the draft Part 12 runs for a monumental 93 pages, it might be desirable to further subdivide this into two parts.	We will consider the comment further in consultation with the Law Draftsman.
Passing of resolutions		
Clause 12.1 to 12.16	The new detailed provisions contained in Clauses 12.1 to 12.16 of the Bill will render the passing of resolutions in writing much more complex and there is no apparent abuse under the present law which need to be remedied. If the provisions are to be included, there should be a clear carve out for resolutions passed unanimously by private companies, including those belonging to a listed group.	The new provisions seek to set out the relevant procedures and requirements in a clear and detailed manner. They will not make the passing of resolutions more complex. Regarding resolutions passed unanimously, Clause 12.1(3) reflects the common law doctrine under the *Duomatic* principle, as mentioned in paragraph 6 in p.108 of the consultation paper.
Expenses of circulating information		
Clause 12.3 to 12. 7	There is concern over exempting the requesting shareholders to bear the expenses of circulating members' statements relating to business of, and proposed resolutions for, annual general meetings. It is suggested that the requesting shareholder shall bear 50% of the relevant expenses.	We do not consider it appropriate for members to bear the expenses of circulating members' statements and resolutions. There is already safeguard built in the CB to prevent any abuse including the 2.5% threshold for circulation of members' statement in Clause 12.3 and the mechanism in Clause 12.8.
Written resolution		
Clauses	Consideration can be given to adopt the same 5% threshold for	The 5% threshold in Clause 12.22 relates to the calling of a

Clause No.	Respondents' Comments[Note]	Our Response
12.3 and 12.22	Clause 12.3(2) given that both Clauses 12.3 and 12.22 deal with rights of members to initiate resolutions to be passed.	meeting, not the circulation of a proposed resolution. The lower threshold of 2.5% tallies with the threshold for circulation of a resolution proposed by members under section 115A of the CO (re-enacted in Clause 12.78(2)(a)) and will enhance minority shareholders' rights.
Clause 12.7	It should be clarified whether Clauses 12.7(2), 12.7(4), 12.7(5), 12.7(6) and 12.7(7) apply to circulation of written resolutions proposed by the company as well.	Clause 12.3(1) provides that a written resolution may be proposed by (a) directors; or (b) members representing not less than the requisite percentage of the voting rights. The provisions apply to written resolutions proposed by the directors, which can be regarded as written resolutions proposed by the company, or the members.
Clause 12.12	It should be clarified whether Clause 12.12 (period for agreeing to proposed written resolution) applies to all written resolutions and not only written resolutions proposed by directors or members.	The provision applies to written resolutions proposed by the directors, which can be regarded as written resolutions proposed by the company, or the members.
Clause 12.13	The requirement to send to its auditors every written resolution passed will create unnecessary administrative burden for both the company itself and the company's auditors. As a company is required to maintain all resolutions in its book of minutes, subsequent inspection by the auditors during their audit work should suffice.	We are of the view that auditors should be kept informed of all written resolutions. A similar requirement already exists in section 116BA of the CO.

Clause No.	Respondents' Comments[Note]	Our Response
Directors' duty to call general meeting requested by members		
Clause 12.23	There is no penalty provision in clause 12.23 in the event that the directors fail to call a meeting requested by members and circulate the relevant resolutions.	We consider that a penalty provision may not be necessary as members can call a meeting under Clauses 12.24 and 12.25. The court may also order a meeting to be called.
Notice required of general meeting		
Clauses 12.28	There is a suggestion that the notice period requirement for listed companies should be amended to fall in line with the Listing Rules requirement of 10 clear business days for EGMs and 20 clear business days for AGMs instead of the proposed requirement of 14 days for EGMs and 21 days for AGMs. On the other hand there is a suggestion that the company should give 21 days notice so that shareholders may have more time to consider the issue at stake, and the company does not have to call a meeting in haste.	We see no strong justification to change the proposed requirement of 14/21 days as the vast majority of companies incorporated in Hong Kong are used to this notice period. We consider that there a notice period of 14 days for EGMs can provide for a quicker and more efficient handling of company matters. In any case, a company may set a longer period in its articles if required.
Clause 12.32	Serving of notice of a general meeting of a company to the auditors does not serve any material purpose, unless the business to be transacted at the general meeting has a direct relationship to the auditors.	The Clause is based on the current section 141(7) of the CO and aligns with the requirement to notify auditors of written resolutions under Clause 12.13. The requirement can enhance auditors' knowledge of the company's affairs and facilitate preparation of the audit report and the proper carrying out of auditors' duties.

Clause No.	Respondents' Comments[Note]	Our Response
Voting at meetings		
Clause 12.47(2) and 12.65(3)	● The rationale for allowing a member to appoint more than one proxy while depriving the proxies the right to vote on a show of hands is not clear. ● With Clauses 12.47(2) and 12.65(3) as currently drafted, it is difficult to see how the two clauses could operate together if a member appoints (i) the Chairman of the meeting and (ii) another individual to act as his proxies.	● We propose that multiple proxies should not be permitted to vote on a show of hands because the result will be distorted. ● Pursuant to Clause 12.47 proxies appointed by the member will not be allowed to vote on a show of hands. The Chairman must disregard the direction given by such member when he votes in accordance with Clause 12.65(3). In such a case, the chairman should consider demanding a poll under Clause 12.51.
Clause 12.48	There are a number of practical issues associated with the clauses: (1) On the transfer instruments, under normal circumstances it is not possible to identify the signature of the "senior holder". (2) As a result of the problem associated in identifying the signature of the senior holder, the same would apply to a proxy form or an instrument appointing a proxy. (3) With the new Clauses 12.54 and 12.55 being implemented, whereby a member may inspect the voting documents, two possible consequences can happen if it is found that it is not the senior holder who has voted or that it is not the senior holder who has appointed the proxy:	● The problem in (1) can be solved by requesting the member to state its name on the ballot. ● The provision puts regulation 65 of Table A on a statutory footing. No change is necessary as the intention is that the vote of the most senior named shareholder, if he votes, will be counted. If he does not vote and the second or third named shareholder votes, the second named person will have priority etc. ● We consider that no change to the clause is necessary because the provision is subject to the articles which can provide a different mechanism,, see Clause 12.48(3).

Clause No.	Respondents' Comments[Note]	Our Response
	(a) That the entire meeting can be invalidated; and (b) That both listed Issuers and their appointed agents will have to deal with the legal consequences. (4) If the senior holder is unable to attend the meeting while the junior holder is going to attend, in order for the junior holder to attend and vote at the meeting, the senior would have to submit an instrument of proxy appointing the junior holder to attend and vote at the meeting, which does seems very impractical, considering that the junior holder may also have an interest in the shares. (5) As both senior and junior holders have the interests in their shares held, the junior holder should have a say in terms of decision making too.	
Clause 12.54 to 12.55	There is a concern on why the normal secrecy of the balloting process in relation to the voting on a poll should be departed from and there is no apparent abuse in this regard. This is particularly relevant in relation to certain companies which act as self-regulatory organisations, clubs and other non-commercial organisations where secrecy of the balloting process is normal and expected by members to avoid problems and retain freedom of choice among persons casting votes.	We are of the view that the concern is valid and we will consider withdrawing the proposal in revising the CB.

Clause No.	Respondents' Comments[Note]	Our Response
Proxies and corporate representatives		
Clause 12.58	• There are concerns about the proposal to allow multiple proxies, which may increase the cost of AGMs. The provision about multiple proxies should be made subject to the articles of association of a company. • The wisdom of the suggestion to extend proxy to companies limited by guarantee is questioned. Members should vote in person and those who are unable to attend not by their own choice are few and far between.	The provision is recommended by SCCLR. It paves way for paperless holding and voting by beneficial owners as well as enhances protection for members of guarantee company.
Clause 12.60	• If a black rainstorm warning or gale warning has been in effect within 48 hours before the meeting, it means that the company will have the obligation to postpone the meeting to another time. This may present difficulty to the company in terms of time and venue. The company may breach the 6-month rule for holding an annual general meeting. • Referring to Clause 12.60(2), equal treatment should be applied to both individual shareholders and corporate shareholders with the following suggestions: (i) Institute a record date to establish clearly who is entitled to vote in the meeting;	• We do not think that Clause 12.60 will require the meeting to be postponed, but because the provision may cause difficulties for members in sending the documents in time where there is an intervening black rainstorm warning or gale warning within the 48 hours before the meeting, we agree to remove Clause 12.60(3)(b). • On Clause 12.60(2), we consider it unnecessary to institute a record date to establish who is entitled to vote at a meeting as Clause 12.98 already provides for the closure of the register. We also do not see the reason why the deadline for appointment of proxies and corporate representatives should be the same as they are essentially different matters. A corporate representative represents the corporate shareholder. If the corporate shareholder wishes to cast votes according to

Clause No.	Respondents' Comments[Note]	Our Response
	(ii) Bring the deadline for appointment of proxies and corporate representatives to be the same; (iii) Proxies and corporate representatives to be allowed to co-exist as long as the number of shares represented does not exceed the number of shares recorded on the register of members against the represented shareholders.	the number of shares, it can appoint multiple proxies.
Dispensation with AGM		
Clause 12.76	There are some concerns that the dispensation of the AGM, worrying that it may work against good corporate governance. On the other hand, there is a suggestion that the consent should be 75% of the total voting rights with no shareholder objecting.	The proposal to allow dispensation of the AGM is to simplify the decision making process and save business costs. To prevent abuse, dispensation would require unanimous members' consent, in line with the threshold for passing written resolutions. An AGM will be required if any members objects to the dispensation. Also financial statements and reports will still need to be circulated to the members if the AGM is dispensed with.
Retaining the details of ex-members		
Clause 12.92	Section 12.92(6) changes the requirement in retaining the details of the ex-members of the company to 20 years. It is suggested that the 20-year requirement can even be shorter in line with the common practice to keep documents and records for 7 years.	This is in line with the period for keeping company records e.g. records and resolution of meetings (see Clause 12.82). We consider a 20-year period appropriate. In fact, it has been reduced from the existing requirement of 30 years A 7-year period only applies to keeping accounting records under section 121(3A) of the

Clause No.	Respondents' Comments[Note]	Our Response
		CO.
Branch register of members		
Clause 12.102	It is suggested that the ability of the company to have a branch register outside Hong Kong should not be conditional on the company having a place of business there.	There is a similar condition in section 103 of the CO and section 129(1) of UKCA 2006. We note the concern and we will consider removing the requirement in revising the CB.
FS to make regulations on the circumstances in which the court should not make an order for inspection of registers		
Clauses 12.110 (6)-(7), 12.117 (6)-(7),12.1 25 (4)(e)	It is doubtful whether it is right to leave it to the FS to make regulations on the circumstances in which the court should not make an order for inspection of registers because of abuse (under the current section 158(9), cf. Clauses l2.110(6)-(7), 12.117(6)-(7), 12.125(4)(e)), for it is undesirable to define the scope of abuse and it is best left to the court to work out on a case-by-case basis.	As the detailed requirements in relation to inspection will be provided in the regulations, the court's power to make, or not to make, the order to compel inspection will be provided in the regulations.
Requirement to deliver annual return		
Clause 12.130	The definitions of "return date" should be removed from section 12.130(2) and section 12.130(4) and added to section 12.130(9). If not, it needs to be made clearer that section 12.130(2) is referring to private companies and section 12.130(4) is referring	We will consider the comment further in consultation with the Law Draftsman.

Clause No.	Respondents' Comments[Note]	Our Response
	to public companies and companies limited by guarantee.	
Schedule to Part 12		
Schedule to Part 12	Paragraph (b) of Part 3 of the Schedule would better read "… a certified translation of the document in English or Chinese". The words "(to be annexed to that document)" are not required, as the concept is already included in the opening words to Part 3 of the Schedule, which instruct that the annual return is "accompanied by …".	We will consider the comment further in consultation with the Law Draftsman.
Remedies for protection of companies' or members' interests		
Part 14	The title of this part should be amended to read: 'Remedies to Protect Companies or Members' Interests' as the current title is too wordy.	We will consider the comment further in consultation with the Law Draftsman.
Unfair prejudice remedy		
Clauses 14.1 to 14.7	There is a concern that the provisions may lead to a large number of small claims being brought to court by disgruntled shareholders in small private companies. Consideration should be given to promoting (outside of the CO) alternative methods to enable disgruntled shareholders of small private companies to resolve their differences outside of court. It is also suggestd	The provisions are important for shareholder protection. We note the concern and also note that the Judiciary is promoting the use of mediation in disputes resolution. As for the suggestion in relation to SFO, we will consider it further in consultation with the SFC.

Clause No.	Respondents' Comments[Note]	Our Response
	that if changes along the lines of the UK Companies Act were implemented, s.214 of the Securities and Futures Ordinance ("SFO") (which empowers the Securities and Futures Commission ("SFC") to bring actions against listed companies in cases of, among other things, unfair prejudice (or oppression against minority shareholders)) should similarly be amended.	
Remedies for others' conduct in relation to companies etc.		
Clause 14.8	● A cross reference should be made to section 14.8(5), in sections 14.8(1)(a)(ii) and 4.8(2)(a)(ii) for ease of reference. ● The English text of section 14.8(2)(a)(i) would better read "…and that would also constitute a contravention of this Ordinance;". The same point arises in relation to section 14.8(2)(a)(ii) and 14.8(3)(b). ● Where a claim relates to conduct which took place prior to the commencement of section 14.8, and that conduct could not have given rise to a claim under the predecessor Ordinance, then it seems that it will still be possible for a claim to be brought under the new provisions. A query is raised whether this is the intention. In practice of course, the only circumstances in which this would occur is where the conduct consisted only of a breach of the company's constitution and a claim can therefore be brought under section 14.8(4)(c).	We will consider the comment further in consultation with the Law Draftsman.

Clause No.	Respondents' Comments[Note]	Our Response
Clause 14. 9	It would be preferable for the member / creditor right (currently in section 14.9(2)) to appear before the Financial Secretary's right (currently in section 14.9(1)). This reflects the importance of the rights in practice and would be consistent with the order used in section 14.3.	We will consider the comment further in consultation with the Law Draftsman.
Court's general powers to order and direct		
Clause 14.18(2)(b)	The following wordings are proposed - Without limiting subsection (1), the Court of First Instance may do any or all of the following under paragraph (a) or (b) of that subsection - (a)... (b) give directions concerning the conduct of the proceedings or application;	We will consider the comment further in consultation with Law Draftsman.
Striking off/deregistration procedures		
Clause 15.1 to 15.3	Clarification is sought on how the striking off procedures in Part 15 would apply where a non-Hong Kong company has replied to the Registrar's letter(s) stating that it is not carrying on business or is not in operation. Furthermore, clarification should also be made on whether the deregistration procedures in section 291 of	We note the concern. A provision will be added to cover the situation where a company has replied to the Registrar's letter that it is not carrying on business. Transitional arrangements will be added if before the commencement of Division 1, the Registrar has commenced the striking off procedures pursuant to section 291(1)

Clause No.	Respondents' Comments[Note]	Our Response
	the predecessor Ordinance would continue to apply as if they had not been repealed if, before the commencement of Part 15, the Registrar has sent a letter to a company pursuant to section 291.	or (5) of the predecessor Ordinance, section 291(2), 291(3) and 291(6) would continue to apply in relation to the striking-off as if it had not been repealed.
Deregistration		
Clause 15.6	The extension of the voluntary deregistration procedure to public non-listed companies is not supported as a number of these are large commercial undertakings with a significant public interest dimension e.g. Hong Kong Electric and Hong Kong Land.	We share the concern and would not extend the voluntary deregistration procedure to public companies.
Clauses 15.7 and 15.8	A company may apply for voluntary deregistration if, inter alia, it has no outstanding liabilities. In this connection, we consider it desirable for some checking mechanism to be in place.	Names of companies applying for voluntary deregistration will be published in the Gazette Notice. Parties to whom the companies have outstanding liabilities may lodge objection to deregistration if necessary.
Dissolved company and related matters		
Clause 15.9	The criteria for determining whether a property or right is "properly available" to satisfy liabilities (e.g. if it is permitted in accordance with law) should be set out in section 15.9(4).	The sub-clause means the Government is only required to satisfy the liabilities out of the property itself. It is not necessary to set out the criteria for property being "properly available".
Clause 15.14	Clarification should be made that the liabilities of directors etc., of a company which has been dissolved under section 291, 291A	The liability of the directors under sections 291 and 291AA of the CO is saved under section 23 of Cap. 1.

Clause No.	Respondents' Comments[Note]	Our Response
	or 291AA of the predecessor Ordinance are to continue and may be enforced as if the company had not been dissolved.	
Clause 15.16	Section 15.16 requires directors of "a company dissolved under *this Part*" to keep the company's books and records for at least 6 years after the date of the dissolution. Accordingly, it is assumed that directors of a company dissolved under section 291, 291A or 291AA of the predecessor Ordinance would continue to be subject to the 5-year record keeping requirement under section 292(3) of the predecessor Ordinance. If that is the effect intended, it is suggested that the requirement be set out in section 15.16.	The obligation under section 292(3) of the CO to keep books and records for 5 years is saved under section 23 of Cap. 1.
Restoration of company		
Clause 15.24	In practice, cases arise where it is necessary to restore a company after a longer period than six years following the dissolution of the company. Apparently the existing 20-year period during which an application can be made to restore or reinstate a company to the register has not created any major legal or administrative problems. It is suggested maintaining the status quo.	Our statistics show that at least 95% of the applications for restoration are made within six years of dissolution of the company. Nevertheless, to allow for exceptional cases, we will maintain the status quo 20-year period.
Clause 15.29(6)	Proposed wording – There may be deducted from the amount payable under	We will consider the comment further in consultation with the Law Draftsman.

Clause No.	Respondents' Comments[Note]	Our Response
	subsection (5) the Registrar's reasonable costs in connection with the disposition or dealing to the extent that the costs have not been paid to the Registrar in complying with a condition for restoration under section 15.19 or pursuant to a direction under section 15.26.	
Alignment of offences provisions of non-Hong Kong companies with those of Hong Kong companies		
Part 16 Offence Provisions	The extension of the Part 16 offence provisions to "agents" of non-Hong Kong companies seems to frustrate the objective of equal treatment as it may subject the non-Hong Kong companies to potentially more onerous obligations than those of Hong Kong companies. Since the offence provisions in Part 16 already capture the company and its officers (which is broadly defined in the CB), further extension of the punishments to the "agents of the company" seems unnecessary.	We will take into account the current section 340 of the CO and consider the comment further in consultation with the Law Draftsman.
Name of non-Hong Kong company		
Clauses 16.4(3) and 16.5(6)	Clarification is sought on the application of the Ordinance in following scenario: if the translation of the company's domestic name was previously registered pursuant to Clause 16.4(3), which name would be regarded as the company's "corporate name" after it informs the Registrar (pursuant to Clause 16.5(6)) of its decision not to use the previously registered translation name for carrying on business in Hong Kong? In such	A non-Hong Kong company is required to exhibit its Corporate Name or Approved Name at its place of business in Hong Kong. A company having a place of business in Hong Kong should file a return under s.16.5(5)(c) in the circumstances.

Clause No.	Respondents' Comments[Note]	Our Response
	scenario, would the company be required to register another translation name if its domestic name is neither in Chinese or Roman script?	
Clauses 16.4(3), 16.5 and 16.6	It is understood that the translation name of a non-Hong Kong company should be a "certified translation" of its domestic name. On the other hand, it appears that this may not be the case where the company has registered the translation name of its domestic name pursuant to Clause 16.4(3) but later adopts an additional Chinese/Roman script domestic name under Clause 16.5(1), or if a name ceases to be the company's domestic name as envisaged under Clause 16.5(3). It seems that in these scenarios, Clauses 16.5(8) and 16.6(7) may not apply and that the company's translation name on the Register could be different from the certified translation of its domestic name.	For the first scenario, Clause 16.6(2) applies to the effect that the new domestic name shall be a corporate name. For the second scenario, a company having a place of business in Hong Kong should file a return under Clause 16.5(5)(c) in the circumstances.
Clauses 16.5(5) and 16.5(6)	Clauses 16.5(5) and 16.5(6) require a company to give notification to the Registrar within one month "after the date of a decision"/"after the date of the decision" of the events specified therein. As the exact date of the "date of a decision" may be subject to different interpretations and in case the specified event does not occur after the decision date, it should be considered replacing the references to "the date of the decision" in those sections with "the date of the addition"/"the date of the replacement"/"the date of the cessation" (as the case may be).	The provision will be revised to the effect that the one month period be counted from the effective date of the change/cessation instead of the date of decision.

Clause No.	Respondents' Comments[Note]	Our Response
Clauses 16.7 and 16.9(5)	Clause 16.9(5) provides that the Registrar would enter a company's approved name in the Register "as the name, in relation to the corporate name, under which the registered non-Hong Kong company is to carry on business in Hong Kong" and that a "fresh certificate of registration containing the corporate name and the name so entered" will be issued. It seems this means that the corporate name for which notice is served under section 16.7 would still be deemed as the company's "corporate name" even if it gives a misleading indication of the company's activities or is the same as another company's name. It is wondered if this is the effect intended.	It would be clearly set out in the certificate of registration that the approved name is the name under which the company is to carry on business in Hong Kong.
Striking off procedures for non-Hong Kong company		
Clauses 16.21, 16.23, 16.25	Clarification is sought on how the striking off procedures in Part 16 and Clause 16.21 would apply where a non-Hong Kong company replies to the Registrar's letter(s) stating that it no longer has a place of business in Hong Kong.	We will consider revising the CB to cover the scenario where the company gives a reply that it no longer has a place of business in Hong Kong.
Transitional arrangements		
Clause 16.32(4)	Under Clause 16.32(4), if, before the commencement of Division 8 of the Ordinance, a letter was sent to a non-Hong Kong company under section 291(1) of the predecessor Ordinance, then section 339A(2) and provisions in the	This Clause follows the wording of the current section 339A(2) of the CO which provides generally for application of the provisions of the CO relating to the striking off of defunct companies with necessary adaptations. Any of the provisions relating to striking

Clause No.	Respondents' Comments[Note]	Our Response
	pre-amended Ordinance relating to striking-off of defunct companies will continue to apply as if they had not been repealed. Provisions should be included to clarify whether this means that the provisions in the predecessor Ordinance in relation to the restoration of deregistered companies would continue to apply to such companies (including the provision that applications to restore such companies may be made within 20 years of the dissolution).	off that currently apply under section 339A(2) of the CO will also apply by virtue of Clause 16.32(4).
Other communication to and by company		
Clauses 18.8 and 18.11	Whilst sections 18.8(2)(a) and 18.11(3)(a) allow a document to be sent "in electronic form", sections 18.8(2)(b)(i) and 18.11(3)(b)(i) require the document to be sent "by electronic means". It therefore appears that a document will be regarded as sent if it is sent by electronic means but not "by other means while in electronic form". Further, as Clause 1.2(3)(c) states that a document is sent by electronic means "if it is sent or supplied in the form of an electronic record to an information system", it appears that the document will not be regarded as sent if it is sent via other electronic formats (e.g. on a CD).	Clauses 1.2(3)(b)(ii) and 18.8(2)(b)(ii) provide that a document is sent if it is sent by hand or by post while in electronic form (e.g. on a CD).
Clauses 18.8(3), 18.11(4), 18.13(6)	For clarity purposes, it should be considered replacing the words "has not revoked the agreement" with "is not to be regarded as having revoked the agreement".	We will consider the comment further in consultation with the Law Draftsman.

Clause No.	Respondents' Comments[Note]	Our Response
Clause 18.11(3)(a)(ii)	For clarity purposes, it should be considered replacing the words "so agreed" in section 18.11(3)(a)(ii) with "has agreed, generally or specifically, that the document or information may be sent or supplied to the company in electronic form".	We will consider the comment further in consultation with the Law Draftsman.
Clauses 18.11(3)(a)(ii) 18.13(3)(c) & 18.13(4)	Clarification should be provided on whether a corporate shareholder can be deemed to have agreed to receive electronic communications from the company of which it is a shareholder.	Shareholders' express consent to receive notification by electronic means is required.
Sending documents to a lost contact member		
Clause 18.12	The CB should provide that if documents sent to the last known address of the investor has been returned by the post office as undeliverable, a company may have discretion to withhold sending further documents until such time that the investor has updated his/her address.	We note the suggestion and will consider providing an exemption to a company from sending documents or supplying information to the other person if the company has been notified that the other person cannot be contacted at his last known address.
Communication by means of website		
Clause 18.13(3)(c)	Clarification is sought on whether a corporate shareholder can be deemed to have agreed to receive electronic communications from the company of which it is a shareholder.	Shareholders' express consent to receive notification by electronic means is required. The Listing Rules contain a similar requirement.

Clause No.	Respondents' Comments[Note]	Our Response
Clauses 18.13(4)(c)(ii) and (5)(c)(ii)	The reference to "similar class" is unclear.	"Similar class" refers to the class of documents which is of similar nature to the subject documents e.g. documents relating to AGM is of a similar class of documents relating to EGM.
Clause 18.13	Although section 18.13 permits a company to send a document to its members by making it available on a website, it should be confirmed whether this is applicable to all documents, such as a scheme document for a Scheme of Arrangement or a Prospectus as well.	Under clause 18.1, the definition of "document" is not exhaustive. It is wide enough to include a scheme document or other documents sent or supplied for the purposes of an applicable provision under the CB, thus the documents can be sent by companies to their members by means of website. However, since a prospectus is not covered in the CB, the Clause is not relevant.
Joint holders of shares or debentures		
Clause 18.15	● Currently, for joint holders of the listed companies, only one address is being recorded, that being the address provided by the holders themselves. The address should belong to the joint holders together. When corporate communication documents are being sent, a copy would be sent to the registered address, and it is considered to be sent to both holders together. Such practice should still satisfy Section 18.15(2), albeit not exactly the way as described in the clause. ● Clause 18.15(3) also states that "subject to anything in the	Provisions in 18.15(2) and (3) can be varied by different provisions in the company's articles.

Clause No.	Respondents' Comments[Note]	Our Response
	company's articles, anything to be agreed or specified by the holders for the purposes of this Division must be agreed or specified by all the joint holders." This clause has the implication that for joint holders, all documents to be agreed or specified must be signed by both holders in order to be considered as valid. As the method of sending certain documents whereby no commercial value is involved would not affect the interests of the joint holders in terms of voting rights and commercial value, the provisions in section 18.15(3) can be relaxed such that anything to be agreed or specified can be done so by any of the joint holders.	
Member's right to demand hard copy		
Clause 18.17(1)	The reference to "request"' requires clarification on how such a "request" is to be made by members - see Listing Rule 2.07(3)(b) which indicates requests can be made by email.	The making of request by members should follow the general provisions on electronic communications to company under clauses 18.8 and 18.11 if the requests are made by email.
Clause 18.17 (2) & (3)	The stated requirements seem very impractical. The requirement stated in section 18.17(2) would potentially deter companies from going ahead with electronic communications. Furthermore, it is suggested that section 18.17(3) be removed in its entirety.	We agree that Clause 18.17(3) should be removed and a similar change has been effected in the Companies (Amendment) Bill 2010. However, we consider the time limits set out in 18.17(2) reasonable and sufficient for a company to send or supply a document or information in hard copy form to its members.