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22 October 2012

"Public Consultation on Subsidiary Legislation for
Implementation of the new Companies Ordinance"
15/F, Queensway Government Offices
66 Queensway
HONG KONG

Dear Sirs

Re: Comments on Subsidiary Legislation for Implementation of the new Companies Ordinance - Phase One Consultation

We refer to the subject consultation launched in September 2012. We would like to set out below our comments on the consultation.

Companies (Non-Hong Kong Companies) Regulation ("the Proposed Regulation")

Non-Hong Kong Companies ("NHKCs") will be subject to Part 16 of the new Companies Ordinance ("the new CO") and certain parts of the new CO which are explicitly stated that they are subject to.

The Proposed Regulation covers certain filing requirements by NHKCs. We are not sure that whether other parts of the new CO that NHKCs may also subject to if the subject matter occurred in HK, in particular, the streamline requirements about the lost share certificates as stated in Sections 162 to 169 of the new CO ("the Sections") also apply to NHKCs or not.

Given over 70% of listed companies in HK are incorporated overseas and with share certificates issued in Hong Kong, it would be useful if the final subsidiary legislation would clarify if NHKCs having a place of business in Hong Kong would also be subject to other sections of the new CO apart from Part 16, in particular, the Sections if they are listed in Hong Kong and have certificates issued in Kong Kong.

Companies (Model Articles) Notice ("the Proposed Notice")

Sections 62 and 78 of the Proposed Notice state that no fee should be charged for issuing share certificates to members and registering any instrument of transfer respectively.

Under Listing Rule 13.59(2) and 13.60(1)(b), the issuer shall charge a fee of HK$5 for registering a transfer and HK$2.5 for each share certificate issued.

In view of the potentially conflicting requirements above, it would be useful if this can be clarified in the subsidiary legislation.

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Computershare
中央證券

Please feel free to contact us if you require further information.

Yours sincerely

JAMES WONG
Chief Executive Officer

JW/CW/mc

cc Ms. Ada Chung, Registrar of Companies, Companies Registry
By email: adachung@cr.gov.hk

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[redacted]

Date: 1 November 2012

Public Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance
Financial Services and the Treasury Bureau
15/F, Queensway Government Offices
66 Queensway
Hong Kong

Fax: 2869 4195 and email: co_rewrite@fstb.gov.hk

Dear Sir

Re: Public Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance - Phase One Consultation Document

I refer to the above consultation paper released in September 2012 and would like to set out my comments below for your consideration.

Chapter 1	I found the proposed regulations and the proposed drafting of C(SFR)R acceptable.
Chapter 2	I found the proposed regulations and the proposed drafting of C(DR)R acceptable.
Chapter 3	I suggest to add one more word to the list, that is "exchange" and "交易". I believe this would guard against any attempt to incorporate a company in Hong Kong that make people think that it (i) may relate to The Stock Exchange of Hong Kong Limited and/or Hong Kong Futures Exchange Limited; or (ii) is a "recognized exchange company" as defined under SFO. Please also see my mark up in Appendix 1.
Chapter 4	I found the proposed regulations and the proposed drafting of C(NHKCs)R acceptable.
Chapter 5	I found the proposed regulations and the proposed drafting of C(IPC)R acceptable.
Chapter 6	I found the proposed regulations acceptable. But I have some suggestions for improving the drafting of C(MA)N. Please see my mark up in Appendix 2.

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Chapter 7 I found the proposed regulations acceptable except that accounting standards issued or specified by The International Accounting Standards Board should also be a recognized body for the purpose of section 380(8)(a) of the new CO. Please see my mark up in Appendix 3.

I hope my comments above would be helpful to you.

Should you have any questions, please feel free to call me at [redacted] I have no objection for my name and comments to be referred to in other documents you publish and disseminate through different means after the consultation.

Yours faithfully

SUEN Chi Wai
Solicitor of HKSAR
HKICPA/FCCA

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Appendix 1

Annex 3 –List of Words and Expressions for the Proposed Companies (Specification of Names) Order

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chamber of commerce

kaifong

levy

savings

tourism board

tourist association

trust

trustee

受託

受託人

信託

旅遊協會

旅遊發展局

商會

街坊

徵費

儲蓄

總商會

exchange

交易

Appendix 2

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(d) in relation to any matter; and

(e) on any terms and conditions,

they think fit.

(2) If the directors so specify, the delegation may authorize further delegation of the directors' powers by any person to whom they are delegated.

(3) The directors may revoke the delegation in whole or in part, or revoke or alter its terms and conditions.

(as they think fit)

5. Committees

(1) The directors may make rules providing for the conduct of business of the committees to which they have delegated any of their powers.

(2) The committees must comply with the rules.

Division 2—Decision-making by Directors

6. Directors to take decision collectively

A decision of the directors may be taken—

(a) at a directors' meeting; or

(b) in the form of a directors' written resolution.

7. Calling directors' meeting

(1) Any director may call a directors' meeting.

(2) The company secretary must call a directors' meeting if a director so requests.

(3) A directors' meeting is called by giving notice of the meeting to the directors.

(4) Notice of a directors' meeting must indicate—

(a) its proposed date and time;

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(b) where it is to take place; and

(c) if it is anticipated that directors participating in the meeting will not be in the same place, how it is proposed that they should communicate with each other during the meeting.

(5) Notice of a directors' meeting must be given to each director, but need not be in writing.

(6) Notice of a directors' meeting need not be given to directors who waive their entitlement to notice of that meeting, by giving notice to that effect to the company not more than 7 days after the date on which the meeting is held. If such a notice is given after the meeting has been held, that does not affect the validity of the meeting, or of any business conducted at it.

8. Participation in directors' meetings

(1) Subject to the articles, directors participate in a directors' meeting, or part of a directors' meeting, when—

(a) the meeting has been called and takes place in accordance with the articles; and

(b) they can each communicate to the others any information or opinions they have on any particular item of the business of the meeting.

(2) In determining whether directors are participating in a directors' meeting, it is irrelevant where a director is and how they communicate with each other.

(3) If all the directors participating in a directors' meeting are not in the same place, they may decide that the meeting is to be regarded as taking place wherever any of them is.

suggest to regard the principal place of business as being the place where the meeting was held.
∴ the purpose of this is to avoid artificial / arbitrary means by which the directors may avoid the location of central management and control of the company.

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(3) The directors may appoint other directors as deputy or assistant chairpersons to chair directors' meetings in the chairperson's absence.

(4) The directors may terminate the appointment of the chairperson, deputy or assistant chairperson at any time.

(5) If neither the chairperson nor any director appointed generally to chair directors' meetings in the chairperson's absence is participating in a meeting within 10 minutes of the time at which it was to start, the participating directors must appoint one of themselves to chair it.

before the meeting, after the meeting or at any time during the meeting.

12. Voting at directors' meeting: general rules

(1) Subject to the articles, a decision is taken at a directors' meeting by a majority of the votes of the participating directors.

(2) Subject to the articles, each director participating in a directors' meeting has one vote.

(3) Subject to the articles, if a director or an entity connected with the director is in any way, directly or indirectly, interested in ~~an actual or proposed contract, transaction or arrangement~~ with the company—

a transaction, arrangement or contract, or a proposed transaction, arrangement or contract.

(a) that director and that director's alternate may not vote on any proposal relating to it; but

(b) this does not preclude the alternate from voting in relation to that contract, transaction or arrangement on behalf of another appointor who does not have such an interest.

13. Chairperson's casting vote at directors' meetings

(1) If the numbers of votes for and against a proposal are equal, the chairperson or other director ~~chairing the directors' meeting~~ has a casting vote.

appointed pursuant to article 11(3)

and if the director and the director's alternate did vote, such vote shall not be counted as a valid vote for the purpose of the relevant meeting.

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(2) But this does not apply if, in accordance with the articles, the chairperson or other director is not to be counted as participating in the decision-making process for quorum or voting purposes. under article 12 (3)

14. Alternates voting at directors' meetings

A director who is also an alternate director has an additional vote on behalf of each appointor who—

(a) is not participating in a directors' meeting; and

(b) would have been entitled to vote if they were participating in it.

15. Conflicts of interest

(1) If a director or an entity connected with the director is in any way, directly or indirectly, interested in a transaction, arrangement or contract, or a proposed transaction, arrangement or contract, with the company that is significant in relation to the company's business, and the director's or the entity's interest is material, the director must declare the nature and extent of the director's or the entity's interest to the other directors in accordance with section 536 of the Ordinance.

(2) A director must not vote in respect of the transaction, arrangement or contract or the proposed transaction, arrangement or contract in which the director or an entity connected with the director is so interested, and if the director does so, the vote must not be counted, nor must the director be counted in the quorum present at the meeting.

(3) Paragraph (2) does not apply to—

(a) any arrangement for giving any director any security or indemnity in respect of money lent by the director to or

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adopting that resolution must be taken reasonably in good faith.

17. Adoption of directors' written resolutions

(1) A proposed directors' written resolution is adopted when all the directors who would have been entitled to vote on the resolution at a directors' meeting have signed one or more copies of it.

(2) Paragraph (1) only applies if those directors would have formed a quorum at the directors' meeting.

(3) It is immaterial whether any director signs the resolution before or after the time by which the notice proposed that it should be adopted.

(4) The company secretary must ensure that the company keeps a written record of all directors' written resolutions for at least 10 years from the date of their adoption.

18. Effect of directors' written resolutions

(1) If a directors' written resolution has been adopted, it is as valid and effectual as if it had been passed at a meeting of the directors duly convened and held.

(2) Paragraph (1) does not apply in relation to any transaction, arrangement (not being an arrangement specified in article 15(3)) or contract in which a director is interested, unless the number of directors signing the resolution who are not interested in the transaction, arrangement or contract would have formed a quorum of directors if a meeting had been held for the purpose of considering the transaction, arrangement or contract.

See article 20 for comments

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19. Validity of acts of meeting of directors

The acts of any meeting of directors or of a committee of directors or the acts of any person acting as a director are valid as if the directors or the person had been duly appointed as a director and was qualified to be a director, despite the fact that it is afterwards discovered that—

(a) there was a defect in the appointment of any of the directors or of the person as a director;

(b) they or any of them were not qualified to be a director or were disqualified from being a director;

(c) they or any of them had ceased to hold office as a director; or

(d) they or any of them were not entitled to vote on the matter in question.

Indoor management rules

20. Record of decisions to be kept

The directors must ensure that the company keeps a written record of every decision taken by the directors for at least 10 years from the date of the decision.

21. Directors' discretion to make further rules

Subject to the articles, the directors may make any rule that they think fit about how they take decisions, and about how the rules are to be recorded or communicated to directors.

Division 3—Appointment of Directors

22. Appointment and retirement of directors

(1) A person who is willing to act as a director, and is permitted by law to do so, may be appointed to be a director—

(a) by ordinary resolution; or

company secretary

: to be consistent with article 17(4)

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(a) are deemed for all purposes to be directors;

(b) are liable for their own acts and omissions;

(c) are subject to the same restrictions as their appointors; and

(d) are deemed to be agents of or for their appointors.

appointed pursuant to Division 3

(3) A person who is an alternate director but not a director—

(a) may be counted as participating for the purposes of determining whether a quorum is participating (but only if that person's appointor is not participating); and

(b) may sign a written resolution (but only if it is not signed or to be signed by that person's appointor).

(4) No alternate may be counted as more than one director for the purposes mentioned in paragraph (3).

(5) An alternate director is not entitled to receive any remuneration from the company for serving as an alternate director except any part of the alternate's appointor's remuneration that the appointor may direct by notice in writing made to the company.

30. Termination of alternate directorship

(1) An alternate director's appointment as an alternate terminates—

(a) if the alternate's appointor revokes the appointment by notice to the company in writing specifying when it is to terminate;

(b) on the occurrence in relation to the alternate of any event which, if it occurred in relation to the alternate's appointor, would result in the termination of the appointor's appointment as a director;

(c) on the death of the alternate's appointor; or

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(d) when the alternate's appointor's appointment as a director terminates.

(2) Paragraph (1)(d) does not apply if the appointor retires by rotation at a general meeting and is then reappointed or is regarded as having been reappointed as a director at the same general meeting, and in such a case, the alternate director's appointment as an alternate continues after the reappointment.

(3) If the alternate was not a director when appointed as an alternate, the alternate's appointment as an alternate terminates if—

(a) the approval under article 28(1) is withdrawn or revoked; or

(b) the company by an ordinary resolution passed at a general meeting terminates the appointment.

Division 5—Managing Directors

31. Appointment of managing directors and termination of appointment

(1) The directors may—

(a) from time to time appoint one or more of them to the office of managing director for a period and on terms they think fit; and

(b) subject to the terms of any agreement entered into in any particular case, revoke the appointment.

(2) A director appointed to the office of managing director is not, while holding the office, subject to retirement by rotation. While holding the office, the director must also not be taken into account in determining the rotation of retirement of directors.

It may not be necessary to have a separate article to deal with MD

∴ MD is himself a director whose duties and responsibilities should not be different from other directors.

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(3) If the company has dispensed with the holding of annual general meetings, a director appointed to the office of managing director is not, while holding the office, required to retire from office at the first annual general meeting to be held under section 613(5) or 614(2) of the Ordinance.

(4) The appointment as a managing director is automatically terminated if the managing director ceases to be a director for any reason.

(5) The directors may determine a managing director's remuneration, whether by way of salary, commission or participation in profits, or partly in one way and partly in the other.

32. Powers of managing directors

(1) The directors may entrust to and confer on a managing director any of the powers exercisable by them on terms and conditions and with restrictions they think fit, either collaterally with or to the exclusion of their own powers.

(2) The directors may from time to time revoke, withdraw, alter or vary all or any of those powers.

Division 6—Directors' Indemnity and Insurance

33. Indemnity

(1) A director or former director of the company may be indemnified out of the company's assets against any liability incurred by the director to a person other than the company or an associated company of the company in connection with any negligence, default, breach of duty or breach of trust in relation to the company or associated company (as the case may be) if the indemnity does not cover—

(a) any liability of the director to pay—

Appendix 3

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legislation (i.e. the HKICPA). This displaces the need to stipulate the detailed disclosure requirements for financial statements in our legislation.

7.4 Schedule 4 to the new CO further stipulates that a company is required to state in its financial statements whether the financial statements have been prepared in accordance with the applicable accounting standards, and to give the particulars of, and the reasons for, any material departure from those standards[21].

The proposed subsidiary legislation

7.5 Pursuant to section 452(1), we propose to make a piece of subsidiary legislation, entitled the Companies (Accounting Standards (Prescribed Body)) Regulation ("C(AS(PB))R") to prescribe the HKICPA as the body for the issuance or specification of accounting standards.

The Regulation in detail

7.6 The proposed C(AS(PB))R comprises two sections. *Section 1* provides that the regulation will commence on the same day as the new CO. *Section 2* prescribes HKICPA as the body for the purpose of section 380(8)(a) of the new CO, which effectively means that financial statements must comply with the accounting standards issued or specified by the HKICPA.

or The International Accounting Standards Board ("IASB")

∴ IAS and IFRS, should be acceptable accounting standards for preparation of financial statements of Hong Kong companies

[21] Schedule 4 also retains a small number of public interest disclosure requirements derived from paragraphs 9(1)(c) and 15 of Schedule 10 and paragraph 5 of Schedule 11 of the existing CO.

HKGCC

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香港總商會1861

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Helping Business since 1861

7 November 2012

Mr Darryl Chan
Deputy Secretary for Financial Services and the Treasury
15/F, Queensway Government Offices
66 Queensway
Hong Kong

Dear Darryl,

Phase One Consultation Paper
on Subsidiary Legislation for Implementation of the New Companies Ordinance

We are grateful for the opportunity to respond to the above Consultation Paper, and set out our comments below.

1. Annex 1 - Companies (Summary Financial Reports) Regulation

As regards the Notification and Notice of Intent, etc (Part 3) of Annex 1, as set out in paragraph 7(6)(c) if a member does not give the company a notice of intent in response to the notification before the specified date, the member is to be regarded as having requested the summary financial report to be sent by the company in hard copy form. This logic is not in line with the Listing Rules requirements and the new Companies Ordinance (S833) which provide that if no response was received within 28 days, the shareholder is regarded as having agreed that the document may be sent by making it available on a website. Please note that the wording under paragraph 7(6)(c) is the same as the new Companies Ordinance S442.

To avoid ambiguity, it may be better to provide that if there is no response, the summary financial report shall be sent in hard copy form, or such other form as the member has selected or deemed selected previously.

2. Annex 2 – Companies (Directors' Report) Regulation

"Considering that it is not uncommon nowadays for companies to issue investment products which are not shares but will end up with the issue of shares," FSTB proposes to expand the scope of disclosure to cover equity-linked agreements entered into by a company. A definition of "equity-linked agreement" is set out in the Regulation. It means an agreement that will or may

result in the company issuing shares. It includes an option to subscribe for shares; an agreement for the issue of securities that are convertible into shares; an employee share scheme and share option scheme. However, it excludes agreements to subscribe for shares pursuant to a public offering or an offer made to the members of the company in proportion to their shareholdings.

We understand that one of the purposes of disclosing equity-linked agreements is to let the shareholder or potential shareholder understand the potential share dilution implications of such transactions. If that is the case, the exclusion of agreements for public offerings and pro rata subscriptions would seem to defeat the purpose. It may be worth re-considering whether this exclusion is necessary.

3. Annex 3 – List Words and Expressions for the Proposed Companies (Specification of Names) Order

No comments.

4. Annex 4 – Companies (Non-Hong Kong Companies) Regulation

No comments.

5. Annex 5 – Company Records (Inspection and Provision of Copies) Regulation

a) As set out in the Regulation, any request must be initiated by a written notice of inspection given to the company. But it is not clear how this notice will be communicated to the Company. Does it need to be signed and physically sent to the registered office? Can it be done by electronic means?

b) The lead time for giving the notice of inspection is normally at least "7 days". During the notice period for a general meeting, the lead time is shortened to at least "2 working days".

According to section 654 of the Companies Ordinance, "company records" mean any register, index, agreement, memorandum, minutes or other document required by the new Companies Ordinance to be kept but does not include accounting records.

In view of the fact that there may be several consecutive holidays during Lunar New Year, Easter and Ching Ming Festival, a period of 7 days is not sufficient.

We would suggest that all days be changed to business days in this Regulation. We note from the explanatory note that the intention is business days instead of calendar days, so this may merely be a drafting issue.

The current draft only allows a shorter than 7-day period of notice (if the company agrees) but does not allow any longer period even with agreement. We believe it would be useful to provide for flexibility to extend the period, with consensus.

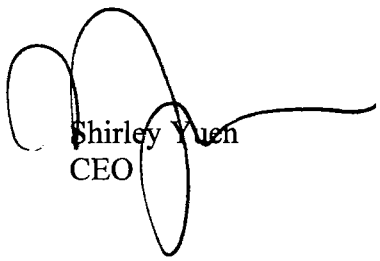
c) The company must allow at least two hours for the requestor to inspect the company records. According to paragraph 5(4), the starting time shall be any time at or after 9:00 a.m. and at or before 5:00 p.m. That means the latest time for completion of inspection shall be 7:00 p.m. This might be a bit late. We suggest that the latest starting time should be 4:00 p.m. instead of 5:00 p.m. so that the latest completion time is 6:00 p.m.

6. Annex 6

The quorum for general meetings in the Model Articles is not clear. We suggest that this be clarified by setting the quorum at two members, in accordance with S585 of the Ordinance.

We hope the above comments are helpful.

Yours sincerely,



Shirley Yuen
CEO

c.c Public Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance

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Date: 7 November 2012

Companies Bill Team
Financial Services Branch
Financial Services and The Treasury Bureau
Government of the HKSAR
Fax: 2869 4195

Dear Sir,

Re: Phase One Consultation Document for Consultation on the Subsidiary Legislation to be made under the New Companies Ordinance—Phase One

After review of the subsidiary ordinance's draft, I have no recommendation to make any change to the proposals.

Thank you,

Lam K K Lam, Arthur
Arthur Lam & Co. CPA

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Our ref CSM/20
Contact Catherine Morley
2826 7228

6 November 2012

Dear Sirs

First Phase Consultation on the Subsidiary Legislation to be made under the New Companies Ordinance

KPMG appreciates the opportunity to comment on the above consultation paper published by the Financial Services and the Treasury Bureau in September 2012. We congratulate the Government in reaching these final stages in the rewrite of the Companies Ordinance (CO) and for striving towards implementation in 2014.

Overall, we support the approaches taken in the various pieces of subsidiary legislation covered by this first phase consultation. However, we have set out in an appendix to this letter a number of detailed comments and some suggestions for amendments to address the issues identified for your consideration.

If you require any clarification of our comments or suggestions, please do not hesitate to contact us.

Yours faithfully

Comments on Annex 1: Companies (Summary Financial Reports) Regulation ("the Regulation")

1 Section 3: Form and contents of a summary financial report: general

Section 3(2) of the Regulation requires a summary financial report to include "all the information and particulars" contained in a company's statement of financial position and statement of comprehensive income, and consolidated statement of financial position and consolidated statement of comprehensive income. In this regard we have the following comments and recommendations:

(a) Mutual exclusivity of section 3(2)(a) and 3(2)(b)

According to section 379(2) of the Ordinance, if the company is a holding company, then the company will prepare consolidated financial statements, rather than company level financial statements. The wording in section 3(2)(a) and (b) of the Regulation therefore needs to be amended to indicate that a company must comply with either 3(2)(a) or 3(2)(b) whichever is consistent with the basis of preparation of the reporting documents under section 379 of the Ordinance.

(b) Inclusion of income statement if presented separately

As noted above, section 3(2) refers to the "statement of comprehensive income". In this regard we note that paragraph 81 of HKAS 1 permits an entity to present items of income and expense using a two statement format: a statement displaying components of profit and loss ("separate income statement") and a second statement beginning with profit or loss and displaying components of other comprehensive income ("statement of comprehensive income"). In order to ensure that a summary financial report includes a reasonable level of detail on key items of income and expense for the period, we recommend that section 3 includes an additional clause requiring that, if the reporting documents include a separate income statement in addition to a statement of comprehensive income, that the summary financial report shall also include that separate income statement.

(c) Inclusion of additional primary statements

As noted above, section 3(2) refers only to the statement of financial position and the statement of comprehensive income. However, in accordance with Hong Kong Accounting Standard (HKAS) 1, a complete set of financial statements includes the following primary statements in addition to those listed in section 3(2):

(i) a statement of changes in equity for the period
(ii) a statement of cash flows for the period

These primary financial statements also provide important information to a user of financial information which assists in assessing the performance of the company (or group, when prepared on a consolidated basis). We recommend that each of section 3(2)(a) and 3(2)(b) be expanded to refer also to these primary statements.

(d) Exclusion of the notes to the financial statements

For the avoidance of doubt, it would be useful if section 3 included a final sub-clause which stated that the required particulars to be included in the summary financial report under section 3(2) do not include the notes to those financial statements.

2 *Section 4: Form and contents of summary financial report: auditor's report and opinion*

Section 4(4) contains clear and comprehensive requirements on the impact on the summary financial report if the auditor's report for the financial year is "qualified or otherwise modified or includes a reference to any matter to which the auditor drew attention by way of emphasis without qualifying the report". These include the requirement to reproduce in full the wording of any such qualification, modification or emphasis of matter.

We therefore do not see that sections 4(1) to 4(3) are necessary, as each of section 4(1) to 4(3) is referring to a sub-set of the circumstances covered comprehensively by section 4(4). It is also confusing for the reader that such sub-sets are listed first in section 4 before the comprehensive version of the requirements is included in section 4(4).

We recommend that sections 4(1) to 4(3) are deleted on the basis that they are redundant and confusing. Instead, the section references included in section 4(1) to 4(3) (i.e. the references to sections 380(1), 380(2) and 383(1)) could be included as the final clause after the end of the text in 4(4) "for the avoidance of doubt" as to which statements by auditors are covered by this comprehensive requirement.

3 *Section 5: Form and contents of summary financial report: other matters*

(a) Section 5(1): post balance sheet events information

We note that section 5(1) requires a summary financial report to include "the particulars of all important events that have occurred since the end of that financial year and have affected the company and (if applicable) the group of companies to which the company belongs." In this regard we have the following comments:

We note that this wording is almost identical to item 1(c) of Schedule 5 to the Ordinance, which sets out the content of the business review which is to be included in the directors' report. Given that section 3(1)(c)(i) of the Regulation requires a summary financial report to include the full directors' report, it appears that section 5(1) of the Regulation is redundant and should be deleted to avoid confusion.

If, however, section 5(1) is not deleted, then the wording of this section should be amended to be consistent with item 1(c) of Schedule 5 to the Ordinance. In particular, the reference to events which have affected "the group of companies to which the company belongs" should be deleted as, taken literally, this wording would require the company to disclose events which affected its own parent and fellow subsidiaries i.e. events which are normally outside the scope of an entity's influence or knowledge.

(b) Section 5(7): disclosure of "any other information necessary"

Section 5(7) requires that a summary financial report must contain "any other information necessary to ensure that the report is consistent with the reporting documents for the financial year in question". This requirement appears too broadly worded as there is no indication as to how an entity should judge whether information (over and above that already specified to be included) which is contained in the full reporting documents needs to be reproduced in the summary financial report in order for the summary financial report to be "consistent" with the full reporting documents. Given this lack of clarity, we consider that section 5(7) is onerous and should be deleted. In our view it is sufficient protection for the reader of the summary financial report for the report to contain the statements set out in sections 5(4) to 5(6), which warn that the summary is only a summary and tell the reader how they may obtain the full reporting documents.

(c) Section 5(8): definition of "specified date"

Section 5(8)(a) defines the "specified date" as "the day immediately before the expiry of a period of 6 months after the date of the annual general meeting". This is a very confusing definition to follow and seems unnecessarily complex, since its only use appears to be in section 5(4) and 5(5), being the date by which a member may obtain free of charge a full copy of the reporting documents. Sections 5(8)(b) and (c) have similarly complex definitions. We recommend that the "specified date" is simplified to be, for example, within 12 months following the end of the financial year covered by those reporting documents. This would avoid the need to deal with the various scenarios of whether an annual general meeting is held or not, while still allowing a reasonable length of time for members to request the documents.

Comments on Annex 2: Companies (Directors' Report) Regulation ("the Regulation")

1 Section 4: Donations

Section 4 contains separate sections which both appear to exclude wholly owned subsidiaries of a company incorporated in Hong Kong from making disclosures of donations, together with a definition of a "wholly owned subsidiary". These sections appear to introduce unnecessary complexity and to give exemptions to entities which are wholly owned without any apparent reason as to why.

By comparison, we note that section 2(2) of the Regulation deals in straightforward terms as to how the requirements of sections 5 to 9 of the Regulation are to be interpreted in the case where a company which has subsidiaries. We do not see the need to treat donations differently and therefore recommend that the scope of section 2(2) is expanded to include section 4, and that section 4 itself is simplified to refer only to disclosures of donations in excess of $10,000.

2 Sections 4, 7 and 8 : Exemptions for companies falling with the reporting exemption

We note that companies which fall within the reporting exemption do not need to disclose the following information:

- Section 4(3): the amount of donations made;
- Section 7(2): the amount of dividends recommended by the directors; and
- Section 8(2): the reasons for a directors' resignation if the director has identified a disagreement with the board

None of these disclosures are onerous to make as the directors should have the information needed to make these disclosures readily to hand. Also each of these disclosures may provide information which is useful to the members who are not directors. We therefore do not support the proposed exemption for private companies from these requirements.

3 Section 9: Permitted indemnity provision

We note that section 9(1) deals with indemnity arrangements which exist at the time when the directors' report is approved, whereas section 9(2) deals with indemnity arrangements which exist at any time during the financial year. Since chronologically the date of approval must always follow the end of the financial year, it would make more sense for the reader if the order of these two sub-sections were reversed.

Comments on Annex 3: List of words and expressions for the Proposed Companies (Specification of Names) Order ("the Order")

We note that, as per paragraph 3.5 of the Consultation Paper, ten of the terms currently in the Schedule to the existing Cap. 32E will not be reproduced in the proposed Order as they are considered "obsolete or no longer necessary". These include the words "Mass Transit" and "Municipal". We would caution against deleting any words from the proposed Order, compared to the existing list, if the Administration would be concerned if that particular word was used in a company's name. This is because it is inevitable that the deletion of some, but not all, words from this list will send a strong signal to the market that the Administration now considers the use of those particular words to be acceptable.

Comments on Annex 4: Companies (Non-Hong Kong Companies) Regulation ("the Regulation")

1 Section 3: Particulars to be contained in application for registration

(a) Details of passports held
On several occasions in section 3, the requirements ask for the number and issuing country of "any passport held by the director". We presume that in this regard it would be sufficient for the director to supply the details of a single passport held by him or her, if they do not hold an ID card. If this is the case, then the wording should be clarified as currently, if taken literally, it appears to require the director to provide particulars of all passports that he or she holds.

(b) Definition of forename
Section 3(4) states that "forename" includes a "Christian" name. This seems a rather surprising statement in a piece of modern legislation. We recommend that section 3(4) simply states that "forename" includes a given name.

Comments on Annex 5: Company records (Inspection and provision of copies) Regulation ("the Regulation")

1 Section 7: Making company records available for inspection

Section 7 requires the company to specify a single location in Hong Kong at which the records may be inspected. However, in order to provide some further protection to members, we recommend that the location chosen by the company for inspection needs to be one which is reasonably accessible to members (which cannot be said for every location in Hong Kong). For example, the Regulation could specify that the "one place" in Hong Kong" should be reasonably accessible to members of the public using public means of transport .

2 *Schedule: Fees payable for copies of records*

The maximum fees payable are expressed in terms of amount payable per number of words or number of entries. Such a measure of fees payable seems out of date in modern legislation when the copies will be produced by electronic means or photocopying/printing. We recommend that fees for delivering copies should be re-expressed in terms of an amount payable per A4 page provided.

Comments on Annex 6A-6C: Model articles

We note that sections 81 to 85 of the main body of the New Companies Ordinance deal with specific matters which must be included in all articles. In order to minimise confusion for the user, we recommend that the Model articles (whether 6A, 6B or 6C) are complete in that they include all mandatory matters which articles should contain as well as the optional items.

Comments on specific articles (referenced to Annex 6A unless otherwise stated):

1 *Article 12 compared to article 15: Directors' interests*

Article 15 refers to directors being connected in any way, directly or indirectly, in a transaction, arrangement or contract where the transaction, arrangement or contract is "significant in relation to the company's business, and the director's or the entity's interest is material". By contrast, article 12 simply refers to the directors being "in any way, directly or indirectly, interested". We recommend that consideration is given to including a materiality concept into article 12 in order to be consistent with article 15.

2 *Article 15: Directors' other roles*

Article 15(4) refers to directors holding "any other office or place of profit under the company". Article 15(5) similarly refers to "the other office or place of profit". While the concept of "holding an office" is generally understood, we are not familiar with the concept of holding "a place of profit under the company". We recommend that the Administration re-consider this terminology to use a phrase more commonly understood.

This concern also applies to article 15 of Annex 6B and article 14 of Annex 6C.

3 *Articles 16-18 of Annex 6A useful for Annex 6B*

Articles 16-18 of Annex 6A deal with the concept of directors' written resolutions. We would recommend including such articles in Annex 6B for private companies as such an approach to directors' resolutions may also be an efficient means of reaching decisions in a private company.

4 *Article 20: Record of decisions to be kept*

Article 20 requires that records are kept of "every decision taken by directors" for at least 10 years. This wording in article 20 appears onerous as too broad in scope. We recommend that article 20 be amended to refer to "all decisions taken in the course of any meeting of the directors", since presumably article 20 is intended to supplement the requirement in article 17(4) to keep a written record of all directors' written resolutions.

If our recommendation concerning the inclusion of articles 16-18 of Annex 6A in Annex 6B is adopted, then the above concern relating to article 20 of Annex A would also apply to article 17 of Annex 6B.

5 *Article 26: Directors' remuneration*

Article 26 requires that the directors' remuneration must be "determined" by the company at a general meeting. We are unclear as to why the word "determined" is used in this context, instead of the word "approved".

This concern also applies to article 23 of Annex 6B and article 21 of Annex 6C.

6 *Article 42: Chairing general meetings*

Articles 42(1) and 42(2) seem contradictory. That is, article 42(1) states that the chairperson must chair the meeting, whilst article 42(2) allows for the possibility that the chairperson does not attend the meeting or is unwilling to act as chair. Consideration should be given to re-wording article 42(1) to give the chairperson the right to preside as chairperson at a general meeting of the company, rather than the obligation.

This concern also applies to article 34 of Annex 6B and article 34 of Annex 6C.

7 *Article 43: Attendance at meeting by directors*

Article 43 allows the Chairperson of a general meeting to permit other persons who are not members of the company, or otherwise entitled to exercise the rights of members, to attend and speak at a general meeting. In this regard we note from paragraph 6.11 of the Consultation Paper that one of the reasons for article 43 is to "cater for the situation where directors are not necessarily shareholders of the company and accordingly do not have an automatic right to attend and speak at a general meeting". We are concerned that article 43 may not be sufficient in this regard, as the ability of the directors to attend and speak to members of the company would depend on whether the chairperson is willing to permit it. We recommend that further consideration is given to including in the Model articles the direct right of the directors to attend and speak at a general meeting on any part of the business which concerns them as directors, irrespective of whether the chairperson is in agreement.

This concern also applies to article 35 of Annex 6B and Annex 6C.

8 *Article 89(4): Setting aside amounts before declaring dividends*

The wording in article 89(4) is rather confusing as to what the directors must do and what they may do. We recommend that the wording of article 89(4) is clarified and/or simplified to state what the directors may do at their discretion, and any limits on that discretion, in respect of setting aside amounts into reserves.

This concern also applies to article 67 of Annex 6B.

9 *Article 90: Calculation of dividends*

Parts (1) and (2) of Article 90 seem to repeat each other in certain key respects. We recommend that the two parts are combined into one part by retaining from part (1) only the words "Subject to the rights of persons, if any, entitled to shares with special rights as to dividend". These words would then be combined with part (2) to deal in a straightforward way with the apportionment of dividends proportionate to the amounts paid up on the shares.

ACCA

Companies Bill Team
Financial Services Branch
Financial Services and the Treasury Bureau
Government of the HK SAR
15/F, Queensway Government Offices
66 Queensway
Hong Kong

7 November 2012

Dear Sir

Subsidiary Legislation for Implementation of the new Companies Ordinance Phase One Consultation Document

Thank you for your letter dated 28 September 2012 inviting our views on the abovementioned consultation.

On behalf of ACCA (the Association of Chartered Certified Accountants), we would like to submit our views as below.

Chapter 1 Companies (Summary Financial Reports) Regulation

ACCA welcomes the switch to an "opt out" regime, which has potential environmental benefits as well as the potential to improve shareholder engagement. Those who may ignore a lengthy report may be more inclined to review the financial report in a summarised version.

We also welcome the electronic distribution for environmental and accessibility reasons. The benefits to shareholders and the environment must however be balanced against the administrative burden on the company of preparing information in two formats rather than one. It is therefore assumed that "electronic form" simply means a pdf version of the paper document which would otherwise be distributed, rather than any specific web-based delivery which might potentially differ in content, such as be more up-to-date, from the paper version.

Chapter 2 Company (Directors' Report) Regulation

According to paragraph 2.6(a) of the consultation document, the subsidiary legislation requires a directors' report to include directors' interest under certain arrangements entered into by the company or another company in the same corporate group and it is proposed to confine the directors' interests to those arrangements with the object of enabling directors of the company to acquire benefits by means of the acquisition of shares of a company or any other body

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corporate. However, with the rationale under (d) of the same paragraph, the definition of "shares" is proposed to expand to cover "equity-linked agreements". As such, we consider that directors' interest may need to extend to acquisition of "equity-linked agreements" instead of limited to acquisition of shares for the disclosure required in a directors' report, unless such arrangements are required to be disclosed elsewhere.

Chapter 5 Company Records (Inspection and Provision of Copies) Regulation

Under paragraph 5.5 of the consultation document, the term "company records" means any register, index, agreement, memorandum, minutes or other document required by the new Companies Ordinance to be kept by a company, but does not include accounting records. We consider that sufficient clarity needs to be provided to define clearly what accounting records mean.

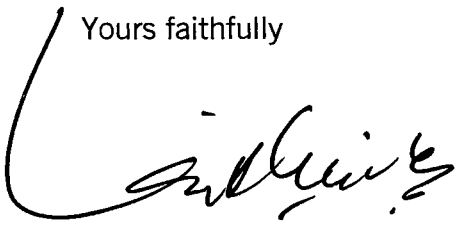
Chapter 7 Companies (Accounting Standards (Prescribed Body)) Regulation

We understand that the Hong Kong Institute of Certified Public Accountants (HKICPA) is the prescribed body for the purpose of section 380(8)(a) which stipulates that the financial statements of a company must comply with the applicable statements of standard accounting practices issued or specified by a body prescribed by subsidiary legislation. Though ACCA supports International Financial Reporting Standards (IFRS) as a tool of global standardisation, we understand that HKICPA is committed to IFRS convergence and hence we would not have any objection.

However, in view of Hong Kong's position as an international financial center, and the Stock Exchange of Hong Kong Limited also accepts the use of IFRS, we consider that consideration should be given to IFRS instead of merely the Hong Kong Financial Reporting Standards in the current situation.

Should you wish to clarify any of the above issues, please do not hesitate to contact us.

Yours faithfully



William Mak
Chairman

香港中華出入口商會
The Hong Kong Chinese Importers' & Exporters' Association

財經事務及庫務局
陳維民副秘書長：

感謝 貴辦邀請本會就新《公司條例》配套的附屬法例第一期諮詢內容提出意見！本會認為附屬法例的內容切合現時公司管理及營運，因此對於有關法例的訂立表示支持。

然而，對於諮詢文件第五章《公司紀錄(查閱及提供文本或副本)現例》5.11 提到索取公司紀錄文本或副本劃一收費，登記冊每 100 個記項 50 元、其他文件每 100 個字 2 元，本會認為此收費計算方式繁複，建議簡化有關準則，例如其他文件以每頁副本收費，省卻計算字數的工序。

以上是本會對新《公司條例》附屬條例第一期諮詢的意見，如對內容有任何查詢，請電 2544 8474 與本會秘書處丁妙雅小姐聯絡。

香港中華出入口商會
2012 年 11 月 8 日

香港中華總商會
The Chinese General Chamber of Commerce
於香港註冊成立的擔保有限公司
Incorporated in Hong Kong and limited by guarantee

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編號：RM(2012)11-38

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財經事務科
公司條例草案專責小組

敬啓者：

對“新《公司條例》附屬法例第一階段諮詢”的意見

月前端接 貴局來函，邀請本會就新《公司條例》附屬法例表達意見，本會特此召開專責小組會議進行討論。

本會認同香港公司的成立和運作提供了現代化的法律框架。新條例爲本港公司的成立和運作提供了現代化法律框架，有助提升企業管治和改善規管，強化香港作爲國際商業和金融中心的地位。

整體而言，七項附屬法例因應過去的條例作出適當簡化，有助減低中小企業的行政成本。本會認爲七項附屬法例內容恰當，謹此奉覆。

此致
財經事務及庫務局

香港中華總商會
2012 年 11 月 8 日

THE
HONG KONG
ASSOCIATION
OF
BANKS
香港銀行公會

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9 November 2012

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Companies Bill Team
Financial Services and the Treasury Bureau
15/F, Queensway Government Offices
66 Queensway
Hong Kong

Dear Sirs

First Phase Consultation on the Subsidiary Legislation to be made under the new Companies Ordinance

We refer to your letter of 28 September 2012 inviting the Association's comments on the subsidiary legislation to be made for the implementation of the new Companies Ordinance.

We support the policy intention of these proposals to enhance corporate governance standards in Hong Kong, and facilitate the administrative, technical or procedural matters under the new Companies Ordinance. We would like to provide specific comments and seek clarifications on certain sections of the proposed subsidiary legislation as set out in the Appendix.

If you have any questions or require any clarification, please contact Ms Ivy Wong of the Secretariat at 2521-1160.

Yours faithfully

Ronie Mak
Secretary

Enc.

Appendix

Comments of the Hong Kong Association of Banks on the First Phase Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance

Annex 1 – Companies (Summary Financial Reports) Regulation

1. Definition of "potential member"

   1.1 Under section 442 of the new Companies Ordinance (new CO) gazetted on 10 August 2012, a company may ask a member whether he prefers to receive a full set of reporting documents (comprising the director's report, financial statements and auditor's report), or summary financial statements. If the company invokes this section, it is required to notify "every member or potential member". According to section 437 of the new CO and it is repeated in Part 1 of the proposed Companies (Summary Financial Reports) Regulation, a potential member is defined as "*a person who is entitled, whether conditionally or unconditionally, to become a member of the company.*"

   1.2 We consider that the definition of "potential members" could be very broad. It appears to encompass derivatives such as option and forward contracts, where a party to the contract has the possibility to obtain the company's shares. It may also include agreements where the company's shares are used as contingent consideration in business / asset acquisitions. Additionally, as the definition does not require the company to be a party to these arrangements, such instruments issued by third parties would also fall into the scope. In other words, any contract written in any country, which is exchange traded or over-the-counter, where the company shares will / could be delivered, will result in a potential member. The potential population of such contracts (and hence potential members) is very large.

   1.3 In the absence of a legislative requirement to maintain a comprehensive/complete list of "potential members", we would like to seek guidance on how companies would be able to fully comply with section 442. In this connection, since section 442 refers to "every member *or* potential member", we would like to seek clarification on whether this could be read as a company can notify members only, but not potential members.

2. Section 3(2)

   We suggest that if a company is a holding company in a financial year, the summary financial report is only required to contain consolidated financial information mentioned in section 3(2)(b). For the company level information, investors may refer to the full set of accounts.

3. Section 7(6)

Section 7(6) specifies that if the notice of intent is received by the company less than 28 days before the specified date (section 7(6)(b)(ii)) or if the member does not give notice of intent (section 7(6)(c)), the member is regarded as having requested a copy of summary financial report for the financial year in hard copy form. We suggest the shareholders to receive the summary financial report in electronic form or by making it available on a website by default under the opt-out regime. Going electronic is not only environmental friendly, but will also be the general direction in future development.

Annex 2 – Companies (Directors' Report) Regulation

1. Section 6

1.1 An equity linked agreement is defined as:

(i) an agreement that will or may result in the company issuing shares; or

(ii) an agreement requiring the company to enter into an agreement described above.

1.2 Companies often have the obligation to deliver the shares of another entity within its group. For example, an unlisted Hong Kong company may provide its employees with options for shares of its listed parent company. We are unsure whether the unlisted company in this example is in scope of the disclosure requirement, since the shares that it may deliver are not its own. Accordingly, please clarify whether the "shares" refer only to the obligated company's own shares. That is, should part (i) of the definition of "equity linked agreement" be read as "an agreement that will or may result in the company issuing *its own* shares; or".

Annex 4 – Companies (Non-Hong Kong Companies) Regulation

1. Company records

Under the new CO, there is no need to show the address and the ID numbers of directors in the Annual Return of Non-Hong Kong companies thereby offering privacy protection to the directors. However, the requirement to file particulars of directors with the Registrar of Companies, which are available for public search, does not have a corresponding provision. Please clarify. Although Part 2, Division 7 of the new CO appears to offer privacy protection to directors upon an application being made by the company to withhold the details, we believe that this protection should be manifested in the Regulation, which is meant to clarify and help to implement this part of the Ordinance.

2. Interpretation of "place of business"

2.1 Non-Hong Kong companies are defined under the new CO as "*companies incorporated in a place outside Hong Kong that have established a place of business in Hong Kong*". Under section 774(1) of the new CO, "place of business" is defined as "*includes a share transfer office and a share registration office*".

2.2 In the last version of the Companies Ordinance however, definition of "place of business" includes "*a share transfer or share registration office and any place used for the manufacture or warehousing of any goods, but does not include a place not used by the company to transact any business which creates legal obligations*". We notice that currently there are still companies having physical presence or entering transactions with legal obligations in HK registered as non-HK companies. We thus would like to seek clarification on the registration requirements of those companies currently registered as non-Hong Kong companies under the requirement of legal obligations. Would they be required to terminate the registrations or would they remain status quo when the new CO becomes effective?

Annex 6 – Companies (Model Articles) Notice

Under the new CO, the memorandum of association will be abolished and it is specified that "*For existing companies, the provisions of their memorandum of association will be deemed to be articles.*"

As some companies, such as trustee companies, are required under existing legislations to have specific "objects" under their memorandum of association, please clarify whether the "objects" of these companies shall also be deemed to be articles automatically.

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The Institute of Certified Management Accountants

Fax

To:	Companies Bill Team, Financial Services Branch, Financial Services and the Treasury Bureau	**From:**	The Institute of Certified Management Accountants – Hong Kong Branch
Fax:	2869 4195	**Pages:**	3 pages
Phone:	—	**Date:**	9 Nov 2012

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

Dear Sir / Madam

First Phase Consultation on the Subsidiary Legislation to be made under the New Companies Ordinance

Please find attached the comments from our institute for the above mentioned subject.

Should there be any queries, please do not hesitate to contact us at 2574 1555.

Yours sincerely,

The Institute of Certified Management Accountants – Hong Kong Branch

CMA

致財經事務及庫務局

就新推行的《公司條例》中《公司（會計準則）規例》（第七章）修改辦法的建議

現行《公司條例》規定，公司帳目必須符合附表 10 的規定，披露當中詳列的項目。公司如依據第 141D 條擬備簡明帳目，則附表 11 所載的披露規定適用於其資產負債表。

公司帳目也須符合香港會計師公會所發出的報告準則，即《香港財務報告準則》、《私營企業香港財務報告準則》或《中小企財務報告準則》。

現行條例中附表 10 與附表 11 雖然細化了不同公司披露項目需適用的依據，但是不能避免其中相關規定分別與《香港財務報告準則》和《中小企財務報告準則》仍存在細小差異，這就無形增加了公司企業在披露財務報表時的準備工作量。在這樣的考量下，財經事務及庫務局建議將兩個附表廢除，本公會認為是合理并可取的。

《香港財務報告準則》是基於公會頒佈的《編報財務報表的框架》而制定的，該框架說明了通用目的財務報表提供的資訊中包含的各種概念，該準則附錄中介紹了它與《公司条例》頒佈的框架之間存在的若干差異及差異的原因，總體而言，兩者之間存在的差異是少量的而且微小的。

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www.cmaaustralia.org

對於中小企業而言，精簡財務報表的披露規定尤為有益。預計新的準則將使中小企業減少財務報表準備費用和審計費用，使得中小企業的財務報表的編制成本與財務報表使用者所得的利益之間取得一個合理的平衡。

我們認為，將披露規定標準精簡化，不但利於公司節約人力和財力成本，也是順應香港會計整體發展趨勢，是完全符合香港會計準側國際化進程。但我們也應當清楚地認識到，會計準則國際化是一個漫長的過程。尤其在經濟還未實現高度全球化之前，我們應允許會計準則與其他地區和國家仍存在若干差異。在進行相關規例修改時，需充分關注本港的發展動態，進一步加強香港的會計研究，以便隨時針對香港的發展情況制定修改適合本港的會計準則。另外，值得注意的是，隨著與內地經濟往來的日益密切，內地會計準則的制定與實施，也將影響香港的會計準則，所以我們還應注意與內地的會計準則的制定與發展相互協調。

澳洲管理會計師公會 - 香港辦事處

2012 年 11 月 9 日

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By Post and By Fax

Your ref.: CBT/7/6/1

9 November 2012

Companies Bill Team
Financial Services Branch
Financial Services and The Treasury Bureau
Government of the HKSAR
15/F, Queensway Government Offices
66 Queensway
Hong Kong

Attn: Mr. Darryl Chan

Dear Sirs,

First Phase Consultation on the Subsidiary Legislation to be made under the New Companies Ordinance

Thank you for your letter dated 28 September 2012. We have the following thoughts on the proposed legislation:

Annex 1 - Companies (Summary Financial Reports) Regulation

Section 3(2)(a)

We suggest that this sub-section make clear that the notes to the statements are not required to be disclosed in the summary financial report. Ordinarily the notes are considered part of the statements.

We also suggest that the section should refer to statements "... prepared under s379(1) ...", to make it clear that the summary financial report of a company which is a holding company does not need to contain information and particulars in respect of the company's statements of financial position and of comprehensive income.

Section 3(2)(b)

Same two comments as for Section 3(2)(a), *mutatis mutandis*.

Section 4(1)(a) & (b)

If auditors provide a qualified opinion in their report, these sub-sections appear to require that, as well as the auditor's statement of qualification, the summary financial report must contain a statement by the company itself that the financial statements do not present a true and fair view. In our view this is an odd and impractical requirement. The company's directors are primarily responsible for the company's financial statements, and will presumably often (if not invariably) disagree that they do not present a true and fair view. This will inevitably create practical difficulties of compliance, without providing any compensating benefits. We suggest this requirement be dropped.

In the main body of Section 4(1) we suggest " ... a true and fair view of ... the company **(or of the Group in the case of a company which is a holding company)** has not been given ...".

Section 5(1)

We would welcome a definition of "important events", and in particular an indication whether both adjusting and non-adjusting events are covered. Comparison could helpfully be made with the concept of "Events after the Reporting Period" in HKAS 10, which requires disclosure of material non-adjusting events.

Chapter 7 – Companies (Accounting Standards (Prescribed Body)) Regulation

It is understood that under this proposed provision the HKICPA will specify the accounting standards with which financial statements must comply. However, it is not clear whether it is intended that the HKICPA's jurisdiction in this respect would be all-encompassing and exclusive, or whether there would still be a role for financial reporting standards not issued by HKICPA, such as International Financial Reporting Standards. We would welcome clarification of this point.

We hope these comments are helpful to you in your task. If there are any matters that you would like to further discuss with us, please let us know.

Yours faithfully

Deloitte Touche Tohmatsu

Deloitte Touche Tohmatsu

The DTC Association

(The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies)

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Our Ref.: 20/02/05
Your Ref.: CBT/7/6/1

9th November, 2012 (Fri)

Mr. Darryl Chan
for Secretary for Financial Services and the Treasury
Companies Bill Team
Financial Services Branch,
Financial Services and The Treasury Bureau,
Government of The HKSAR,
15th Floor, Queensway Government Offices
66 Queensway Hong Kong
(Fax No. 2869 4195; Page Faxed: 1)

Dear Mr. Chan,

Financial Services Branch (FSB) Consultation on
"First Phase Consultation on the Subsidiary Legislation to be made under the New Companies Ordinance"

Thank you for your letter of 28th September, 2012 (Fri) consulting our members' view on the proposals at the attached consultation paper.

This is just to let you know that our Association members have not offered any particular suggestions on this issue on this occasion.

Looking forward to more substantive discussions with you in the future,

Yours sincerely

Pui-Chong LUND
Association Secretary

CLP 中電

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By Fax (2869 4195) and By Post

9 November 2012

Financial Services and the Treasury Bureau &
Companies Registry
15/F, Queensway Government Offices
66 Queensway
Hong Kong

Dear Sirs,

Response to New Companies Ordinance Phase One Consultation Document on Subsidiary Legislation for Implementation

We refer to the abovementioned Consultation Document issued on 28 September 2012 jointly by the Financial Services and the Treasury Bureau and the Companies Registry soliciting views on the subsidiary legislation to provide for administrative, technical and procedural matters in implementing the new Companies Ordinance.

Our comments are as follows :

1. Annex 1 – Companies (Summary Financial Reports) Regulation

   (i) Part 2 Section 4(5)
   A summary financial report should also contain a statement by the Auditors that it represents a true and fair view of the affairs of the company.

2. Annex 2 – Companies (Directors' Report) Regulation

   (i) Section 6(1)(b)(iii) and Section 6(2)(c)
   It is unclear whether the disclosure of any equity-linked agreement should be in respect of that particular reporting year or as a total package over the life of the agreement, or both.

   (ii) Section 7(2)
   Dividend recommendations by directors should not be excluded from simplified reports. Intended dividend payments can represent a significant cash outflow from a company and, as such, a highly relevant matter to the creditors.

   (iii) Section 8(2)
   Reasons for disagreements between directors, if any, should be included in simplified reports. These constitute exceptional and potentially significant matters to all persons dealing with a company.

CLP 中電

3. Annex 4 – Companies (Non-Hong Kong Companies) Regulation

(i) Part 5 Section 7(1)(k)
As the long term direction is to abolish par value system, it should not be necessary to request information on authorised capital.

(ii) Part 5 Section 7(2)
Since the composition of a partnership may change without the firm name being changed, it is inappropriate to use the firm name as a substitute for individuals' names, even if they are all joint company secretaries of a registered non-Hong Kong company.

(iii) Part 6 Section 10(1)
The date as specified in Section 9(1)(b) i.e. date when copies of the revised accounts are delivered to those entitled to receive them should also be referenced.

4. Annex 5 – Company Records (Inspection and Provision of Copies) Regulation

(i) Part 3 Section 6 and Section 7
In general, the use of "days" or "working days" could be more consistent. Also, Section 7(1)(b)(ii) specifies that in the relevant circumstances, the notification of the place for inspection should be given within 4 days after the date of receipt of the inspection notice. This may give rise to a practical problem in that, in Hong Kong, there can be 4-5 consecutive days' holiday.

The same issue applies to Part 4 Section 13(1).

(ii) Part 3 Section 7(2)
A company should also be offered the right to propose any reasonable date and/or time for inspection of records by an individual rather than only on the specified date by the individual.

5. Annex 6 – Companies (Model Articles) Notice

We recognise that these are only model articles and that, within the terms of the Ordinance, companies are free to amend these at their discretion. Nonetheless, we have the following observations :

(i) Provisions regarding written resolutions of shareholders should be added back as these govern the shareholders' rights and also because the articles are a contract between the company and its shareholders.

(ii) The indemnity and insurance provisions therein are limited to directors, whereas we believe that these should apply to all directors and officers, including the company secretary, of a company.

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(iii) It is stipulated that members may by special resolution direct the directors to take, or refrain from taking specified action. The requirement for a special resolution seems onerous as members are owners of a company. An ordinary resolution would be sufficient.

(iv) The requirement in Article 16(3) [Model Articles for a public company limited by shares] that a notice of a proposed directors' written resolution must indicate the time by which it is proposed that directors should adopt it is redundant or not relevant. This is because Article 17(3) specifies that it is immaterial whether the resolution is actually signed before or after that time.

(v) A director holding the title of Managing Director should also be subject to retirement by rotation.

(vi) A director, who is not a member of the company, should be entitled to attend and speak at any general meeting. He or she should not require the permission of the chairperson, as presently contemplated in the Model Articles.

(vii) The directors may also refuse to register the transfer of a share if the relevant stamp duty is not paid or any similar requirement under specific law has not been met.

For the Model Articles of a private company limited by shares and of a company limited by guarantee, we suggest to add back the provisions regarding alternate directors as this is a common arrangement even for small companies.

We welcome the opportunity to comment on the Consultation Document. We will be pleased to discuss any of our comments further and to elaborate any points on which our views are not sufficiently clear.

Yours faithfully,
For and on behalf of
CLP Holdings Limited

Peter W. Greenwood
Group Executive Director – Strategy

April Chan
Company Secretary

The Hong Kong Institute of Chartered Secretaries
Submission on Model Articles

9 November 2012

Part 1 – Private Companies Limited by Shares

GENERAL COMMENTS The Companies (Model Articles) Notice states that the Notice does not affect Table A under the First Schedule to the predecessor Ordinance insofar as it applies to any existing company. We recommend that it is also necessary to state that in case of conflicts between Table A adopted by the existing companies and the provisions of the New Companies Ordinance ("New CO"), the latter prevails. Also, for existing companies that do not adopt Table A or exclude certain provisions of Table A, is there any other Notice that stipulates that their existing articles are to be maintained insofar as they are not in conflict with the provisions of the New CO? This is to ensure that all existing companies need not go through the hassles to amend their articles in order to cater for certain new provisions of the New CO.		
PART 3 DIRECTORS AND COMPANY SECRETARY		
Article	Subject	Comments
Division 2 – Decision-making by Directors		
8(2)	Unanimous decisions	Under Article 8(2), the following statement may be added at the end to provide clarification: "If the agreement is in one or more counterparts and the counterparts bear different dates, then the resolution shall take effect on the date upon which the last director has

		consented to the resolution in writing."
11(2)	Quorum for directors ' meeting	We noted that pursuant to Article 7(2), Article 7(1) does not apply if the company only has one director and no provision of the articles requires it to have more than one director. However, for the sake of clarity, we suggest to add "Save where the Company has only one director," at the beginning of Article 11(2).
13(4)	Chairing of directors ' meeting	We suggest to : (i) replace " is not participating " by " shall not be present " (ii) add " or is unwilling to act " immediately after " it was to start, "
15(4)	Conflicts of interests	We suggest to add " and, if the company has only one director, the secretary of the company " immediately after " (other than the office of auditors" in Article 15(4).
Division 3 – Appointment of Directors		
20(1) to 20(4)	Appointment and retirement of directors	- Suggest to specify that "unless and until otherwise determined by an ordinary resolution of the Company, the Directors shall not less than one in number". - Suggest to mention whether a director need to hold any shares in the company; - To add provision that at least one director who is a natural person; - Suggest to add provisions relating the appointment of alternate directors and managing directors; and - Suggest to add provisions of rotation of directors.

22	Termination of directors' appointment	- For clarity purpose, suggest to replace "for more than 6 months " by " for a continuous period exceeding 6 months" in Article 22(e); - To add Article 22(f) "who is convicted of an arrestable offence"; - To add Article 22(g) "is removed from office by an ordinary resolution"
23(1)	Directors' remuneration	We suggest to replace " at a general meeting" by " by a members' ordinary resolution "
Division 5 – Company Secretary		
27	Appointment and removal of company secretary	- To add " The Company must have a secretary"; - Suggest to add "where the company has only one director, such director shall not be appointed as secretary of the company." - To extend the insurance and indemnity coverage to secretary and other officers of the company.
PART 4 DECISION-MAKING BY MEMBERS		
General Comments Part 4 covers the provisions on general meetings, which will be frequently referred which involve significant amount of practical issues. The current draft articles of Part 4 do not provide sufficient details. For example, there are too many articles where only the New CO section numbers are quoted, instead of spelling out the useful contents of the sections. The current draft set of		

Articles is not user friendly and would be difficult for a layman, including directors and members, to understand and use.		
Division 1 – Organization of General Meetings		
28	General Meeting	I. It is better to state explicitly the requirements of convening AGMs, instead of just quoting relevant section numbers of the New CO, e.g.: - to specify the deadlines for convening the first AGM and subsequent AGMs according to s.610. - s.611 – the requirements of holding AGM do not apply to dormant company. - s.612 – a company is not required to hold an AGM, if (a) everything that is required to be done at the meeting (by resolution or otherwise) is done by written resolution; (b) the company has only one member; (c) the conditions under s612(2)(b) are satisfied, i.e.: (i) the company has by resolution passed in accordance with s.613(1) dispensed with the holding of AGM, (ii) the company has not revoked the resolution under s614(1), or the company has revoked the resolution under that section but is not required to hold AGM under s614(2)(b); (iii) no member of the company has required the holding of the AGM under s.613(5). II. Suggest to add the context of s.569 as sub-paragraph (5) under Article 28 (about "Members' power to call general

		meeting when there is no director etc.") III. Suggest to add "in accordance with section 568 of the Ordinance" at the end of Article 28(4).
33	Quorum for general meetings	It does not actually describing the quorum of meetings, although it is supposedly related to quorum. Accordingly, please add contents under s.585, like: "(1) If a company has only one member, that member present in person or by proxy is a quorum of a general meeting; and (2) subject to paragraph (1) and save as herein otherwise provided, 2 members present in person or by proxy shall be a quorum."
36	Adjournment	Under Article 35(2), could it be changed from "….the members present **is** a quorum" to "….the members present shall be (or shall constitute, etc) a quorum"?
Division 2 – Voting at General Meetings		
37	General rules on voting	Article 37(3) states that the declaration by chairperson at a general meeting on the passing of a resolution is conclusive evidence of that fact, but according to s.590 of New CO, the section relevant to the above does not have effect if a poll is demanded in respect of the resolution before or on the declaration (and the demand is not subsequently withdrawn). It is better to insert such pre-requisite, i.e. no poll is demanded to this Art. 37 to avoid doubt.
40	Number of	I. Suggest to add the contents of s.593 as to voting on

	votes a member has	poll for clarity, i.e.: " On a poll taken at a general meeting of a company, a member entitled to more than one vote need not, if the member votes— (a) use all the votes; or (b) cast all the votes the member uses in the same way. " II. Please consider inserting an Article titled "Votes of Proxy" immediately after Article 40. relating to s.603(3), where " If the person has been duly appointed as a proxy by 2 or more members entitled to vote at the meeting and the members specify different ways to vote in their appointment of proxy, the proxy….."

It seems that the model Articles does not mention that decisions could be made by resolutions in writing. The following new Article may be added as Article 48A immediately after Article 48 to provide flexibility:

48A Resolution of Members in Writing

Subject to the provisions of the Ordinance, a resolution in writing signed by all the members for the time being entitled to receive notice of and to attend and vote at general meetings (or, being corporations, by their duly authorised representatives) shall be as valid and effective as if the same had been passed at a general meeting of the company duly convened and held. Such resolution in writing may consist of several documents, and each such document shall be certified by the Secretary to contain the correct version of the proposed resolution. If such documents bear different dates, then the resolution shall take effect on the date upon which the last member has consented to the

resolution in writing."		
Division 3 – Application of Rules to Class Meetings		
49	Class meetings	It does not provide practical references and only states that the articles re general meetings apply to class meetings, with any necessary modifications. Practitioners will prefer repetitive but clear guidelines under the Model Articles to brief statements which lead to frequent references to the body of the New CO. The following should be stated explicitly under the Model Articles, where a detailed section about class meetings is not created under the Model Articles: - s.566, 567, 568, 570 & 575 of the New CO do not apply to class meetings; - s. 585 & 591 of the New CO do not apply in relation to a meeting in connection with the variation of the rights attached to shares in a class; - provisions as to the quorum for a variation of class rights meeting and the demand of poll.
PART 5 SHARES AND DISTRIBUTIONS		
Division 1 – Issue of Shares		
As a company shall only issue no-par value shares, there should be a clause regarding the manner in determining the amount of issued shares. Therefore, the following new Article may be added as Article 50A: **" 50A Determination of amount of issued shares**		

Shares may be issued at such times, to such persons, for such consideration and on such terms as the directors may by resolution of directors determine. A share may be issued for consideration in any form, including money, a promissory note, or other written obligation to contribute money or property, real property, personal property (including goodwill and know-how), services rendered or a contract for future services."		
Division 3 – Share Certificates		
53	Certificate to be issued except in certain cases	We would suggest replacing " lodgement of transfer " with " lodgement of a proper instrument of transfer "
Division 4 – Transfer and Transmission of Shares		
57(2)	Transfer of shares	For the sake of clarity, we suggest to add " by the company " immediately after " No fee may be charged "
58(1)	Power of directors to refuse transfer of shares	The reasons for refusal of transfer could be more than the stipulated four reasons. We suggest to add a sub-clause to Article 58(1) as follows: "The directors may in their absolute discretion and without assigning any reason therefor, decline any transfer of share. " Article 58(1)(c) should state the <u>instrument of</u> transfer is ….. Also, we suggest that Article 58(1)(d) to be deleted as the limitation is unnecessary

60	Transmittees' rights	Suggest replacing "as the directors properly require" by "as the directors consider proper ". Sometimes, directors do not know what exactly are required from the transmittee as different jurisdictions have different legal requirements.
61(1)	Exercise of transmittees' rights	Replace "the person" by "the transmittee".
PART 6 MISCELLANEOUS PROVISIONS		
Division 2 – Administrative Arrangements		
75	Common seals	Suggest adding back a clause similar to Article 100(6) of the Model Articles for public companies limited by shares regarding official seal for use outside Hong Kong.
77	Auditor's insurance	Suggest extending the insurance to the secretary and other officers (indemnity and insurance clauses for directors are in place in Part 3).
OTHER GENERAL COMMENTS ➢ The new law requires a statement as to liability of the company to be stated in the articles. Should this be included under the Model Articles? ➢ As the management of the day-to-day business of a company is with the board of directors, is there a need to clarify that the extent of the reserved power of members to direct the directors to take or refrain from taking specified actions must not prejudice or contravene the board of directors power to perform its general duties to manage the company.		

- The current drafting could confuse the public that there cannot be partly paid shares being issued. This should be clarified.

Part 2 – Companies Limited by Guarantee

A.	**GENERAL COMMENTS**
	The Model Articles appear to be too concise and users would need to refer to the new Companies Ordinance ("CO") for details. Also, some essential clauses required by sections 83(1) and 84(2) (i.e. statements as to limited liability of members and members to undertake to contribute certain amount in the winding up of the company) are even not mentioned under the Model Articles, For complying with the CO, simplicity and user-friendliness purposes, we suggest incorporating the following requirements of the relevant provisions of the CO not mentioned under the Model Articles resulting in no cross-reference to the CO being needed. **Part 2: Directors and Company Secretary** ➢ Minimum number of directors of two (section 453(2)); ➢ Resignation of secretary (section 477); ➢ Director vicariously liable for acts of alternate (section 478); ➢ Avoidance of acts done by person in dual capacity as director and company secretary (section 479); and ➢ Minutes as evidence (section 482). **Part 3: Members** ➢ statement that the liability of its members is limited (section 83(1)) – this is a mandatory clause ➢ statement that the members undertake to contribute (amount) in winding up of the company (section 84(2)) – this is a mandatory clause ➢ business to be transacted at general meetings (which is spelt out in the

existing Table C)

- number of members with which the company proposes to be registered (there is no minimum number mentioned in the CO. Please clarify if the minimum number is one.)
- whether the proxy needs to be a member (section 596 (2))
- appointment of corporate representatives (section 606 – representation of body corporate at meetings)

Part 4: Miscellaneous Provisions

- Accounts and audit (which is spelt out in the existing Table C)
  - including laying financial statements, etc. before company in general meeting (section 429(1)), keeping accounting records (section 373) and appointing auditors (section 394)

B. SPECIFIC COMMENTS

Part 2: Directors and Company Secretary

Division 2 – Decision-making by Directors

Article	Subject	Comments
6.	Directors to take decisions collectively	Suggest replacing 'take' with "make".
7.	Unanimous decisions	(a) Suggest replacing 'take' with "make" in Articles 7(1) and 7(4). (b) Why should unanimous decisions be

		required in Article 7 for making decision? Suggest amending Articles 7(1) and 7(2) to "decision by majority of all eligible directors" so as to be in line with the majority rule of decision making at board meeting. (c) Suggest amending Article 7(4) if majority rule applies to Articles 7(1) and 7(2).
Division 3 – Appointment of Directors		
11.	Meetings where total number of directors less than quorum	Suggest replacing 'take' with "make".
14.	Conflicts of interest	(a) Suggest replacing "liable to be avoided" with "voidable" in Article 14(6). (b) Articles 14(4) to 14(9) contradict to Article 37(a) of Table C which disqualifies a director if he holds any other office of profit under the company without consent of the company in general meeting. Please clarify.
16	Record of decisions to be kept	Suggest replacing 'taken' with "made".
18	Appointment and retirement	(a) Suggest adding and stating clearly on

	of directors	the appointment on first directors, "The first directors shall be the persons named as directors in the incorporation form signed by the founder members submitted in respect of the incorporation of the company" (section 453(3)); and (b) Suggest adding "A retiring director shall be eligible for re-election" (Article 40 of Table C).
20	Termination of director's appointment	Suggest adding one more condition – "without the consent of the company in general meeting holds any other office of profit under the company" (Article 37(a) of Table C).
Part 3: Members		
Division 1 – Becoming and Ceasing to be Member		
Article	Subject	Comments
26.	Application for membership	Suggest adding "The founder members shall be the first members of the company." (section 112(1))
Division 2 – Organization of General Meetings		
Article	Subject	Comments

28(1)	General meeting	Suggest elaborating the requirements of the CO instead of just quoting the section numbers of the CO for holding the first annual general meeting and subsequent annual general meeting, which is common under existing Articles, so that cross-reference to CO is not required.
29.	Notice of general meeting	Suggest adding the manner in which notice to be given: in hard copy form or in electronic form or available on a website (section 572). Also to add clause to specify MSN, emails, Facebook, etc. also constitute electronic means for clarity purpose.
29(4)(g)	Notice of general meetings	Reference to section 596(3) is irrelevant as limited by guarantee company should not have share capital. Please amend.
33.	Quorum for general meetings	Quorum is not stated, need to specify: "2 members present in person or by proxy is a quorum of general meeting. If the company has only one member, that member present in person or by proxy is a quorum of general meeting." (section 585)
36(2)	Adjournment	"...the members present is a quorum." denotes singular too? Please clarify. If not, then at least two members is required

		to form a quorum.
Division 3 – Voting at General Meetings		
Article	Subject	Comments
39(1)(a)	Demanding a poll	Suggest deleting 39(1)(a) as in practice and pursuant to Article 39(2)(b) and (c), the chairperson of the meeting and members cannot demand a poll until they are present at the meeting.
39(1)(b)	Demanding a poll	Suggest adding "or on the declaration of the result on a show of hands." after 'either before' in Article 39(1)(b) (section 592).
40	Number of votes a member has	There is no purpose of appointing more than one proxy as company limited by guarantee has no share capital which means that a member is entitled to 1 vote only. As such, suggest deleting Articles 40(2) and 40(3) and adding "or on a poll taken" after 'show of hands' in Article 40(1).
41(2)	Votes of mentally incapacitated members	Subject to the articles, proxy may vote on both show of hands and on a poll (section 588). So the proxy of committee, receiver, guardian or other person should not be restricted to vote on a poll only. Suggest

		amending Article 41(2) to that effect.
45(1)(b)	Effect of member's voting in person on proxy's authority	Suggest amending Article 45(1)(b) to "exercise, in relation to that resolution, the voting right the member is entitled to exercise." (section 605(1)(b)(ii))
46(2)(a)& (b)	Effect of proxy votes in case of death, mental incapacity, etc. of member appointing the proxy	The requirement that 'not less than' 48/24 hours has the effect of requiring notice of termination to be received by the company earlier than 48/24 hours and renders this article void if section 604(7) (notice required of termination of proxy's authority) applies. Please clarify.

47(1)	Amendments to proposed resolutions	The existing Companies Ordinance and the CO do not have provisions allowing a member to propose another ordinary resolution to amend a proposed ordinary resolution to be passed at general meeting for which notice has already given. Besides, it is also not a common or current practice to have the proposed resolution amended after notice of the meeting is given. The time required for lodgment of such proposed resolution of "at least 48 hours before the meeting" is too short and even not practical for the company to accommodate the amendment as notice and proxy form are required to be sent out again for the proposed resolution. As such, suggest deleting Article 47(1).
47(2)	Amendments to proposed resolutions	The existing Companies Ordinance and the CO do not have provisions allowing the chairperson to propose any amendment to a special resolution proposed to be passed at a general meeting. Please clarify if it is in order.
Part 4: Miscellaneous Provisions		
Division 2 – Administrative Arrangements		
Article	Subject	Comments

49(2).	Company seals	Suggest amending Article 49(2) to “A common seal must be a metallic seal having the company’s name engraved in it in legible form (section 124(2)).

Part 3 – Public Companies Limited by Shares

A. GENERAL COMMENTS

We have commented on the Model Articles of Private Companies Limited by Shares, including certain general comments. Please kindly review the same. We would only supplement the following additional observations.

B. SPECIFIC COMMENTS

Part 1 : Interpretation

- Under the definition of "partly paid", the reference to "no" part, should read "a" part

Part 2: Directors and Company Secretary

- What is the effect of failure to provide subsequent notice within a seven day's period? Would this result in all resolutions being voided? What is the effect of matters already implemented? Is the seven days' notice to be done away altogether? (Article 7(6).

Part 4: Shares and Distributions.

- It is unclear as to how lien over partly paid shares (Articles 66 and 67) interacts with forfeiture of shares (Articles 73 to 76) where calls on shares are not satisfied. It would be useful to clarify the coverage of these articles and their intended applications.

From: Frances Chan [redacted]
Date: 11/11/2012 21:47
To: '"co_rewrite@fstb.gov.hk"<co_rewrite@fstb.gov.hk>
Cc:
Subject: First Phase Consultation on Subsidiary Legislation

Dear Sirs

I apologize for my delay in submission of my comments for consideration and hope that they will still be taken into consideration. My comments or feedback are set out below for your consideration:

1. Companies (Directors' Report) Regulation

a) The following requirements under existing Section 129D(3) of the Companies Ordinance seem not included in the above Regulation. Although Section 390(2) of the New Companies Ordinance already requires a directors' report to contain particulars of any other matter that is material for the members' appreciation of the state of the company's affairs, particular inclusion of the following subjects to the Regulation should serve as a good reminder to auditors and the directors when preparing the directors' report:

Section 129D(3)(c): state the amount, if any, which the directors propose to carry to reserves within the meaning of the Tenth Schedule;

Section 129D(3)(f): if significant changes in the fixed assets of the company or of any of its subsidiaries have occurred in the financial year, contain particulars of the changes.

b) In Section 8 of the Regulation, suggest to also include reason for removal of directors.

c) Section 543(2) of the New Companies Ordinance requires the directors' report for any year in which the management contract is in force must include-
a) a statement of the existence and duration of the contract; and
b) the name of every director and shadow director interested in the contract, and the nature and extent of the interest.
The Regulation seems not having explicit reference to the above requirement.

2. List of Words and Expression for the Proposed Companies (Specification of Names) Order

Noted that under Hong Kong legislations, certain words cannot be incorporated without consent from the relevant governing authority - for example, the word "Bank" or " B A N K" cannot be used without prior approval from the HKMA. As company formation is a first step of the registration and to facilitate registrants to be well informed of the requirement, can there be any inclusion on this List regarding these cases.

3. Companies (Non-Hong Kong Companies) Regulation

a) The definition of "Residential address" in Part 2, Section 3(4) of the Regulation excludes an address at a hotel unless the person concerned has no other permanent address. I propose that the relevant form reporting this address would provide a box to tick for confirming the same.

4. List of Words and Expression for the Proposed Companies (Specification of Names) Order

Noted that under Hong Kong legislations, certain words cannot be included in a company name unless with consent from the relevant governing authority - for example, the word "Bank" or " B A N K" cannot be used without prior approval from the HKMA. As company formation is a first step of the registration and to facilitate registrants to be well informed of the requirement, can there be any inclusion on this List regarding these cases.

5. Model Articles for Private Companies Limited by Shares

Coverage of the Articles is comprehensive but the document seems very lengthy. Our clients are normally MNCs and their private limited companies in Hong Kong are generally solely owned - they often request for the simplest version of the Articles of Association and may not like the model one. For joint venture cases (ie the companies are owned by different groups of shareholders), clients would execute shareholders' agreement with specific terms and conditions for the general management and administration of the companies and would adopt these terms and conditions in their own Articles of Association. Accordingly, the model Articles would be good for reference purpose but not much companies would be happy to adopt the

same as their own Articles.

a) Article 4 Members' reserve power

This Article fits in the need of certain of our clients because they would like to specify certain duties and powers of their directors or designate different duties and powers to each individual director who are taking different role in the company.

I believe the special resolution is a suggestion and the members can opt to approve by ordinary resolution instead because special resolution would require filing at the Companies Registry and the information thereof will become public. Some clients would like to make the designation of powers to specific director(s) known to the public. However, the requirement to file special resolution may cause confusion if there are changes in directorate. Possibility of causing confusion to the public should be taken into account.

b) Article 5 Directors may delegate

It is my current understanding that individual directors cannot appoint another person (by Power of Attorney or other means) to attend meeting of directors of the company and make decision on their behalf at the meeting because the appointment of directors is personal. If your office agrees with this understanding, I would suggest to specify clearly this position in this Article 5.

c) Article 6 Committees

Suggest to also empower the directors to determine on the composition, structures, appointment / resignation / removal of members thereof and proceedings of meetings etc of these committees.

d) Article 9 Calling directors' meeting

Suggest to specific the no. of days required for calling a directors' meeting and give the flexibility to shorten the notice period.

e) Article 11 Quorum for directors' meetings

Subsection 2 grants flexibility for directors to fix the quorum requirement for a directors' meeting other than 2. However, it seems to be a good thing if prior notice can be given when circulating the notice to directors' meeting so that all directors entitled to attend the meeting know the "other than 2" quorum requirement for any particular meeting in advance.

f) Article 12 Meetings where total number of directors less than quorum

I encountered a client case where the HK company is owned by two different groups of shareholders. They are in dispute and the remaining director who represents one group of shareholders refused to take instruction from shareholder of the other group or also disappears. In such situation, the company is in a management deadlock position. Is it possible to give any reference in the Article covering such situation.

g) Article 13 Chairing of directors' meeting

Subsection (4) requires that the participating directors must appoint one of them to chair the meeting if the chairperson does not appear within 10 minutes of the time of the meeting. Suggest to replace the word "must" with "may" because the late in joining the meeting may be caused by traffic jam or other reason which may be known to the directors or subsequently be accepted by the other directors and 10 minutes seem not enough.

h) Article 14 Chairperson's casting vote at directors' meetings

Just to share with you that certain of our clients do not prefer chairperson having the second or casting vote.

i) Article 20 Appointment and retirement of directors

It seems to me that the rule in Article 20(4)(a) of requesting directors to retire at the forthcoming AGM if they are appointed by directors under Subsection (1)(b) seems not that preferred by our clients who are mostly MNCs with solely owned situation.

Offer for re-appointment of directors at AGM seems not included in the model Articles.

j) Article 33 Quorum for general meetings

Quorum requirement is not stated.

k) Article 36 Adjournment

Subsection (4) states that the chairperson must adjourn a general meeting if directed to do so by the meeting. So, how directors can so direct - simple majority or what?

l) Article 50 All shares to be fully paid up

Section 142(2)(d)(i) of the New Companies Ordinance indicates that issued shares can be partly paid up. Article 50 stipulates that all shares must be fully paid up and the model Articles therefore do not provide for partly paid situation.

With no par value under the new law, the public may not be too aware how to handle the partly paid situation. Since the model Articles intend to be a reference material to the public, it seems appropriate to also provide for partly paid situation in the model Articles.

k) Article 54 Contents and execution of share certificates

The message for all shares to be fully paid us is reiterated in Article 54(1)(b) and the reference in Article 54(1)(c) stating that share certificate must specify the amount paid up on them seems not necessary.

Article 126(1) of the New Companies Ordinance states that

"A company with a common seal may have an official seal-
(a) for sealing securities issued by the company; or
(b) for sealing documents creating or evidencing securities issued by the company."

If so, the reference to "common seal" in Article 54(2)(a) may need to read as "official seal"?

m) Article 56 Replacement share certificates

I guess that the reference "indemnity" in subsection (2)(c) of this Article should refer to the situation for lost share certificate. Suggest to make this clearer.

n) Articles 66 Allotment of shares + Article 67 Procedure for declaring dividends

I note that these two Articles (may be more in the model Articles) require approval by "general meeting". Please also reflect the situation where the company has only one member.

o) Article 72 Waiver of distributions

Subsection (1) requires the waiver to be documented in a "deed". I trust that if members agree, this document can be just a letter issued by the relevant shareholder.

p) Article 73 Capitalization of profits

Subsection (3) refers to shares "issuable in fractions. With no par value for shares, I wonder if the issuance of fractional shares will still be required.

q) Article 75 Company seals

Certain clients may want a general authority given by the directors for a particular director to affix common seal on specific type of documents so as to minimize the need of passing resolutions every time when the common seal is used. Can the Article expand to cover this situation?

r) Article 76 No right to inspect accounts and other records

Noted that Section 375 of the New Companies Ordinance allows directors to obtain copies of accounting records. This is important for cases where the HK company has different groups of directors appointed by their representing shareholders. Suggest to insert this reference in this Article 76.

s) Article 78 Winding up

Section 285 of the existing Companies Ordinance requires unclaimed assets to be paid to Companies Liquidation Account ("CLA") as operated by the Official Receiver's Office. In the meantime and unless with court order, CLA does not accept unclaimed assets if they are not in cash form. In view of the wordings set out in Article 78(2), it appears that there will be a change of the liquidation law empowering liquidators to place the other-than-cash unclaimed assets to be set under trust arrangement.

RE definition of "required sanction", suggest to amend "..sanction of a special resolution of the company or any other sanction required by the Ordinance."

t) Place of profit

This phrase has not defined in the model Articles and I wonder why this phrase is used instead of say "place of business" etc.

6. Model Articles for Private Companies Limited by Guarantee

In general terms, this model provides a good reference material but I am afraid that our clients cannot simplify adopt this model but need to bring quite some modifications to cater for their different types of membership and attendance/voting requirements and use their own terminology (eg Board of directors will be termed as Executive committee and directors will be called executive committee members etc).

This model contain similar articles as that of the companies limited by shares and my comments and recommendations set out in Section 5 may also apply here. In addition, I would like to bring your attention to the following:

a) Article 3 Members' reserve power

Since most companies limited by guarantee are those non-profit or charitable organizations, size of its members will be much bigger than the private company limited by shares (of course, up to not more 50 in order to qualify as "private company"). Controls of companies limited by guarantee are mainly exercised by their Executive Committee, powers of executive committee members would normally be determined by the Executive Committee. It may also not be easy to obtain "special resolution" of members.

b) Division 3 Appointment of Directors

Clients normally prefer executive committee members to have rotation requirement who may offer themselves for re-election. You may therefore take this into account.

Please feel free to ring me at [redacted] should you have queries.

Regards
Frances Chan

香港董事學會
The Hong Kong Institute of Directors

12 November 2012

"Public Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance"
15/F, Queensway Government Offices
66 Queensway
Hong Kong

Dear Sirs

Re: Subsidiary Legislation for Implementation of the New Companies Ordinance Phase One Consultation Document

The Hong Kong Institute of Directors ("HKIoD") is pleased to forward our response to the captioned paper.

HKIoD is Hong Kong's premier body representing directors to foster the long-term success of companies through advocacy and standards-setting in corporate governance and professional development for directors. We are committed to contributing towards the formulation of public policies that are conducive to the advancement of Hong Kong's international status.

In developing the response, we have consulted our members and organised focused discussions.

Should you require further information regarding our response, please do not hesitate to contact me on tel no. 2889 9986.

With best regards

Yours sincerely
The Hong Kong Institute of Directors

Dr Carlye Tsui
Chief Executive Officer

cc: Dr Kelvin Wong, Chairman of Council, HKIoD
Mr Henry Lai, Deputy Chairman, HKIoD & Chairman, Corporate Governance Policies Committee

香港董事學會有限公司 The Hong Kong Institute of Directors Ltd
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Issued on: 12 November 2012

CO Rewrite
Subsidiary Legislation for Implementation of the New Companies Ordinance
Phase One Consultation Document

In connection with the captioned Consultation Document, The Hong Kong Institute of Directors ("HKIoD") is pleased to give its preliminary views and comments.

* * *

With the passage of the Companies Bill, the making of subsidiary legislations under the new CO becomes an important part of the CO Rewrite process. We look forward to working closely with the Administration and other stakeholders throughout the process.

In this submission, we limit ourselves to an observation relating to Chapter 6 concerning the Companies (Model Articles) Notice. We may have further comments on Chapter 6 and other Chapters of the Consultation Document at a later stage.

Concerning standard articles
Many existing companies have adopted standard articles of associations. Once the new CO comes into effect, the standard articles of association would remain those companies' articles of association.

We acknowledge that under the new CO, the memorandum of association is abolished. For existing companies, the provisions of their memorandum of association will be deemed articles. This we do not think will create too many issues.

Our concern is, owners of many companies adopting standard articles of association may not have fully understood the meaning and effect of that adoption. When the new CO comes into effect, they may inadvertently confuse themselves to believe the new model articles to be prescribed under the new CO to be their company charter. This confusion could also arise when a new company is set up or a shelf company is bought close to the date of the implementation of the new CO. Our concern here might seem far-fetched, but we would rather err on the side of caution.

HKIoD believes all company owners (and their directors) must have a good handle on their charter documents, be able to access them and should know what provisions are currently in force. FSTB and the Companies Registry, on the other hand, can consider some appropriate ways to educate and remind company owners and their directors of existing companies about the meaning and effect of adopting standard articles under the old and new CO.

<END>

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Hong Kong Institute of
Certified Public Accountants
香港會計師公會

By email < co_rewrite@fstb.gov.hk > and by post

16 November 2012

Our Ref.: C/CB, M85964

Financial Services and the Treasury Bureau
15th Floor, Queensway Government Offices
66 Queensway
Hong Kong

Dear Sirs,

Public Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance (Phase 1)

The Hong Kong Institute of Certified Public Accountants has considered the above consultation paper and our comments on the draft subsidiary legislation are set out in the appendix to this letter.

If you have any questions on this submission or wish to discuss it further, please feel free to contact me at the Institute on 2287 7084.

Yours faithfully,

Peter Tisman
Director, Specialist Practices

PMT/ML/ay
Encl.

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Appendix

Annex 1 Companies (Summary Financial Reports) Regulation

Section 3: Form and contents of a summary financial report ("SFR"): general

(a) Mutual exclusivity of section 3(2)(a) and 3(2)(b)

Section 3(2)(a) and (b) of the Regulation should be revised to clearly indicate that a company must comply with either 3(2)(a) or 3(2)(b) whichever is consistent with the basis of preparation of the financial statements under section 379 of the new Companies Ordinance ("new CO").

(b) Inclusion of income statement if presented separately

It is recommended that section 3 include an additional clause requiring that, if the financial statements include a separate income statement in addition to a statement of comprehensive income (please refer to *Hong Kong Accounting Standard (HKAS) 1 (Revised) Presentation of Financial Statements*, paragraph 81), the SFR shall also include that separate income statement.

(c) Exclusion of the notes to the financial statements

For the avoidance of doubt, it would be useful if section 3 were to clarify that notes to financial statements are not required to be included in the SFR.

Section 4: Form and contents of SFR: auditor's report and opinion

Section 4(1)(a) already requires an SFR to contain a statement, if such a statement is contained in the auditor's report, that, "in the auditor's opinion, the financial statements ... have not been properly prepared in compliance with the Ordinance, and in particular, a true and fair view of the financial position and financial performance of the company has not been given". Sections 4(1)(b) and 4(1)(c) are confusing and seem to be redundant as they also require a SFR to contain a statement that a true and fair view has not been given of the financial position and financial performance of the company or of the company and its subsidiary undertakings. Other than including a statement to this effect from the auditor's report, which, as we note, is already required by section 4(1)(a), it is not clear how such a statement could be made, who would be in a position to make it and why it should be necessary.

We recommend, therefore, that sections 4(1)(b) and 4(1)(c) be deleted to avoid overlap and uncertainty. If this is done it would seem that sections 4(1) and 4(1)(a) could be combined into one and read: "If an auditor's report of a company contains a statement... a true and fair view of the financial position and financial performance of the company, or of the company and its subsidiary undertakings, has not been given, a summary financial report for that financial year must contain that statement."

Section 5: Form and contents of SFR: other matters

(a) Section 5(1): post balance sheet events information

We are concerned that the current draft of section 5(1) of the Regulation may have the effect of expanding the scope of disclosure, whether intentionally or inadvertently, by requiring an SFR to contain all important events which have affected "the group of companies to which the company belongs". Taken literally, this would require the company to disclose events that have affected its parent/ holding company or fellow subsidiaries. Such events are commonly outside the scope of an entity's influence or knowledge.

We note that section 5(1) is almost identical to paragraph 1(c) of Schedule 5 to the new CO, which sets out the content of the business review to be included in the directors' report. If the intention of section 5(1) of the Regulation is to cover the same information as required by paragraph 1(c) of Schedule 5 to the new CO, we are of the view that, as section 3(1)(c)(i) of the Regulation requires an SFR to include the full directors' report, this already serves the purpose. We also note that Schedule 5 to the new CO clearly states that a reference to a company means the company and the subsidiary undertakings included in the annual consolidated financial statements (and not the group to which the company belongs).

It is recommended, therefore, that section 5(1) be deleted to avoid overlap and uncertainty.

Furthermore section 5(1) requires an SFR to include "the particulars of all important events that have occurred since the end of that financial year and have affected the company and (if applicable) the group of companies to which the company belongs." Schedule 5, paragraph 1(c), also refers to "particulars of important events affecting the company that have occurred since the end of that financial year". It would be helpful, in this context, if a definition of "important events" were to be provided and, in particular, an indication whether both "adjusting events" and "non-adjusting events" (please refer to *HKAS 10 Events after the Reporting Period*) are to be covered. One option would be to adopt the concept in HKAS 10, which requires disclosure of material non-adjusting events.

(b) Section 5(7): disclosure of any other information necessary to ensure consistency with the reporting documents

Section 5(7) requires that an SFR must contain "any other information necessary to ensure that the report is consistent with the reporting documents for the financial year in question". This section appears to be too broadly worded as there is no framework for an entity to judge whether information, over and above that already specified in the Regulation, which is contained in the full reporting documents, needs to be reproduced in the SFR in order for the SFR to be "consistent" with the full reporting documents. Given this lack of clarity, it is recommended that section 5(7) be removed. We consider that sufficient notice is given to readers of an SFR for the report to contain the statements required under sections 5(4) to 5(6), that the SFR is only a summary and that members, who wish to do so, may obtain a full copy of the reporting documents.

(c) Section 5(8): definition of "specified date"

Section 5(8)(a) defines the "specified date" as "the day immediately before the expiry of a period of 6 months after the date of the annual general meeting". This is a confusing definition to follow and seems unnecessarily complex, since it applies only in sections 5(4) and 5(5), being the date by which a member may obtain, free-of-charge, a full copy of the reporting documents. Sections 5(8)(b) and (c) have similarly complex definitions.

It is suggested that the "specified date" is simplified to be, for example, within 12 months following the end of the financial year covered by those reporting documents. This would avoid the need to refer to the annual meeting date, which may vary from year to year, and to deal with the various scenarios depending on whether or not an annual general meeting is held. We consider that a 12-month period allows reasonable length of time for members to request the documents.

Section 7: Form and contents of notification

Section 7(6)(c) of the Regulation provides that sending an SFR in hard copy form by post is the default position. Since this is the case, section 7(3)(b)(i), which asks a member or potential member to indicate that s/he wishes to receive a copy of the SFR in hard copy form, appears to be redundant. We suggest that the notification should make it sufficiently clear that if a member or potential member wishes to receive a copy of the SFR in hard copy form by post, s/he does not have to take any action in response to the notification.

Annex 2 Companies (Directors' Report) Regulation

Section 4: Donations

Sections 4(1) and (2) have the effect of exempting wholly owned subsidiaries of a company incorporated in Hong Kong from making disclosures of donations, together with a definition of a "wholly owned subsidiary" by cross-reference to the relevant section in the new CO. These sections appear to introduce unnecessary complexity and to give exemptions to entities which are wholly owned subsidiaries of a company incorporated in Hong Kong. We would like to understand the reason for this exemption.

By comparison, section 2(2) of the Regulation provides how the requirements of sections 5 to 9 of the Regulation are to be interpreted in the case where a company has subsidiaries. Therefore, unless there are reasonable justifications for an exemption to be given to wholly owned subsidiaries of a company incorporated in Hong Kong, we recommend that, in order to improve clarity and consistency, the scope of section 2(2) be expanded to include section 4. As such, section 4 can be simplified to refer only to disclosures of donations in the total amount of not less than $10,000.

We should like to seek clarification as to why it is not proposed to retain the requirement to disclose the issue of debentures and arrangements for enabling directors to acquire benefits by means of the acquisition of debentures. We understand that such information continues to be of interest to, for example, insolvency practitioners.

Annex 3 Companies (Specification of Names) Order

Paragraph 3.5, chapter 3 of the consultation document, proposes that ten of the terms in the schedule to the existing Cap. 32E will not be included in the proposed Companies (Specification of Names) Order. Though there may be justification for the inclusion of individual words or terms, overall, the list to be included in the proposed Companies (Specification of Names) Order, comes across as being somewhat random, as much by what is omitted as by what is included. This suggests to us that, in principle, it would be preferable to rely on the general powers of the Registrar, under the CO, to not to allow names that could be contrary to the public interest (because, e.g., they are misleading or deceptive) or to require approval for names that give the impression that the company is connected to the government or an agency of the government.

However, if the list is to be retained, some members consider that the terms "Municipal" and "市政" should be retained in the proposed Order because they could, inappropriately, give the impression that a private entity has some relationship with the government.

Annex 4 Companies (Non-Hong Kong Companies) Regulation

No specific comments.

Annex 5 Company Records (Inspection and Provision of Copies) Regulation

Section 7: Making company records available for inspection

Section 7 requires the company to specify any one place in Hong Kong at which the records may be inspected. However, in order to provide some further protection to members and the public, the location chosen by the company for inspection should be required to be one that is reasonably accessible, e.g., capable of being easily accessed by public transport.

Schedule: Fees payable for inspection of records

The maximum fee payable for inspection of each register is $50. However, this amount will not be sufficient to cover the administrative costs of the company to accommodate a request, such as the time cost of providing a staff to oversee the inspection, which, under the regulation, may be for two hours or more per document. It is suggested that consideration be given to raising the maximum inspection fee or providing more flexibility in relation to charging under the regulation.

Schedule: Fees payable for copies of records

The maximum fees payable are expressed in terms of the amount payable per number of words or number of entries. This seems to be an outmoded basis for calculating the fees payable, which needs to be updated given that the copies will be produced by electronic means or photocopying/ printing. It is recommended that fees for delivering copies of company records be re-expressed in terms of an amount payable per A-4 page provided.

Annex 6 Companies (Model Articles) Notice

It is noted that the memorandum of association is abolished under the new CO. For companies formed before the commencement date of the new CO, the provisions of their memorandum of association will be deemed to be articles. There are other deeming provisions in the new CO which affect the articles. For example, section 98(4) provides that a condition or an altered condition which states the amount of share capital with which the company proposes to be registered or is registered, or the division of the share capital of the company into shares of a fixed amount, to the extent it relates to share capital, is to be regarded as deleted and not to be regarded as a provision of the company's articles.

We understand that, notwithstanding these revisions to the articles under the new CO, existing companies may rely on the deeming provisions and they will not have to physically amend their articles/ adopt revised model articles, as appropriate, and file the changes or the revised articles with the Companies Registry, on the basis that this may be onerous for them. The intention is to minimise the administrative burden on existing companies. Nevertheless, we suggest that companies whose articles have been amended by the deeming provisions could at least be required to include a rider on their filed documents to the effect that there are some deemed revisions to the memorandum and articles under the new CO. This could be supplemented by, and cross-referred to, information issued by the Companies Registry. We also recommend, therefore, that the Companies Registry consider issuing explanatory materials, e.g., notices, pamphlets, etc. to educate and explain the position clearly to the public, in particular, the deemed changes to the articles of existing companies under the new CO, and to include such materials prominently on the Companies Registry's website for public information.

Annex 6A Schedule 1 Model Articles for Public Companies Limited by Shares

Article 12 compared to article 15: Directors' interests

Article 15 refers to directors being connected in any way, directly or indirectly, in a transaction, arrangement or contract and states that, where the transaction, arrangement or contract is "significant in relation to the company's business, and the director's or the entity's interest is material, the director must declare ..." By contrast, article 12 simply refers to the directors being "in any way, directly or indirectly, interested in a contract, transaction or arrangement ...". We recommend that, for consistency, the concept of materiality also be introduced into article 12.

Article 15: Directors' other roles

Article 15(4) refers to directors holding "any other office or place of profit under the company". Article 15(5) similarly refers to "the other office or place of profit". While the concept of "holding an office" is generally understood, the concept of holding "a place of profit under the company" is not familiar terminology. It is recommended this term be defined or replaced with a more clearly understood term.

Article 20: Record of decisions to be kept

Article 20 requires that records are kept of "every decision taken by directors" for at least 10 years. This wording in article 20 appears to impose an onerous obligation, which is too

broad in scope. It is recommended that article 20 be amended to refer to "all decisions taken in the course of any meeting of the directors", since presumably, article 20 follows article 19 on matters in relation to a meeting of directors.

Article 26: Directors' remuneration

Article 26 requires that the directors' remuneration must be "determined" by the company at a general meeting. We suggest that it may be more appropriate to use the word "approved" in this context.

Article 42: Chairing general meetings

The wording of articles 42(1) and 42(2) seem somewhat inconsistent with each other. Article 42(1) states that the chairperson of the board of directors "must preside as chairperson" at the annual meeting, whilst article 42(2) allows for the possibility that the chairperson does not attend the meeting or is unwilling to act as chair. Consideration should be given to revising the wording of article 42(1) to give the chairperson the right to preside as chairperson at a general meeting of the company, rather than the obligation.

Article 89(4): Setting aside amounts before declaring dividends

The wording in article 89(4) is rather confusing as to what the directors must do and what they may do. We recommend that the wording of article 89(4) be clarified or simplified to state what the directors may do at their discretion, and any limits on that discretion, in respect of setting aside amounts into reserves.

Annex 6B Schedule 2 Model Articles for Private Companies Limited by Shares

Since written resolutions would also be commonly used by private companies, it is suggested that simplified procedures regarding written resolutions also be provided in the model articles for private companies.

Chapter 7 Companies (Accounting Standards (Prescribed Body)) Regulation

We have no specific comments on the draft regulation provided to the Institute subsequent to the meeting between representatives of the Companies Registry and the Institute.

THE
LAW SOCIETY OF HONG KONG
香 港 律 師 會

Practitioners Affairs

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CL/12/1067618

13 November 2012

Public Consultation on Subsidiary Legislation for
Implementation of the new Companies Ordinance
15/F, Queensway Government Offices
66 Queensway, Hong Kong

Dear Sirs,

Re: New Companies Ordinance
Consultation on Subsidiary Legislation for Implementation of the New Companies Ordinance
-- Phase One

I attach the Law Society's submissions on the captioned Consultation. Thank you for granting the extension of time to allow the Law Society's Council to review the submissions today.

The Law Society has no objections to our submissions being posted onto your website as we will be posting them onto our own website.

Yours sincerely,

Joyce Wong

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Director of Practitioners Affairs
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Encl.

THE LAW SOCIETY OF HONG KONG 香港律師會

The FSTB and Companies Registry Consultation Paper

Subsidiary Legislation for Implementation of the new Companies Ordinance – Phase One

Law Society's submissions

1. Companies (Summary Financial Reports) Regulation

General observation

Generally, subject to our comments below, we agree with the proposal to clarify and explain in more detail the forms and contents of summary financial report and various notices (i.e. notice of intent, notice of revocation and notice of cessation of statutory election) in the subsidiary legislation.

Regulation 2

We suggest the expression "*reporting documents*" (defined in clause 2(2)) be moved into the definitions section (clause 2(1)). It is not easy to find it in its current location.

Regulation 2(1)

The definition of "*potential member*" is vague and it would be difficult to clearly determine whether a person is a potential member or not. Also, a company may have difficulties in practice to ascertain whether a person is a potential member or not as the person's name may not appear in its register of members and the company may not be notified of the existence of the potential member (e.g. a person may become a potential member because he/she has entered into a private arrangement with a shareholder to acquire shares of the company and the company may not be informed of such private arrangement).

Regulation 2(2)

Please add the word "*and*" at the end of subsection (b) as follows:

*"the directors' report for the financial year; **and**"*

Regulation 4(1)

We would suggest adding the phrase *"to the effect"* as follows:

*"If the auditor's report of a company contains a statement **to the effect** that, in the auditor's opinion, the financial statements for a financial year of the company have not been properly prepared in compliance with the Ordinance ...."*

Regulation 4(2)

We would suggest adding the phrase *"to the effect"* as follows:

*"If the auditor's report of a company contains a statement **to the effect** that, in the auditor's opinion, the information in a directors' report for a financial year..."*

Regulations 4(3)(a), (b) and (c)

We would suggest adding the phrase *"to the effect"* and the word *"or"* as follows:

(a) *"a statement **to the effect** that, in the auditor's opinion ---"*

(b) *"a statement **to the effect** that the auditor has failed to obtain all the information or explanations that, to the best of the auditor's knowledge and belief, are necessary and material for the purpose of the audit; **or**"*

(c) *"(if the financial statements of the company do not comply with section 383(1) of the Ordinance or the Companies (Disclosure of Information about Benefits of Directors) Regulation (L.N. of 2012)) a statement **to the effect** that giving the particulars that are required to be, ..."*

Regulation 5(1)

We would suggest changing the wording from "important events" to *"material events"* to be consistent with the wording used in other parts of the subsidiary legislation and other CO subsidiary legislation.

Regulations 7(3)(a)(ii), 7(3)(b)(ii):

We suggest the words are amended to read *"if the company has decided to give an option to receive the copy in electronic form..."* as the company has only actually "given" the option when it sends out the notification.

Regulation 7(3)(b)

We suggest the words *"specified in paragraph (a)"* are not required.

Regulation 7(3)(c)

We suggest the words are amended to read "*the person does not wish to receive a copy of the reporting documents or the summary financial report at all.*"

Regulation 7(4)

The use of the words "*may be*" is confusing when read in light of regulation 10 as it is unclear whether the notice of intent must be given by completing and returning the card or document - or whether other forms are possible. In addition, the words "*that is*" in regulation 7(4) are not in our view, required.

Regulations 8(1)(c)(i), 8(2)(c)(i)

We would suggest adding the word "*and*" at the end of the sentences.

Regulation 8(2)

We would suggest an explanation be provided on a "*notice of cessation of statutory election*" together with the purpose it serves in the subsidiary legislation.

2. Companies (Directors' Report) Regulation

General observation

Generally, subject to our comments below, we agree with the proposal to clarify and explain in more detail the information to be contained in the directors' report in the subsidiary legislation.

Regulations 3(1)(b) and 3(2)(b)

The current proposal confining the directors' interests required to be reported on to those arrangements with the object of enabling directors to acquire benefits is narrow - we would suggest also including those arrangements which actually result in any directors acquiring benefits.

We would suggest clarifying that disclosure is required if any one or more directors are acquiring benefits. Also, we would suggest more guidance is given as to what are meant by benefits.

We would suggest amendments to be made to regulation 3(1)(b) as follows:

"*whose objects are, or one of whose objects is, to enable directors* ***or any one or more directors*** *of the company to acquire* ***benefits or such arrangements resulting in directors or any one or more directors of the company acquiring benefits*** *by means of the acquisition of shares in the company or any other body corporate*"

Similar amendments should be made to regulation 3(2)(b).

Regulations 4(1)(b) and 4(2)(b)

We would suggest including the phrase "*(or equivalent amount in other available currencies)*" after $10,000.

Regulation 6

Given the purpose of disclosure under regulation 5 and regulation 6 are essentially the same, disclosure under regulations 6(1)(a), (b)(iii), (c) and (d), which already covered those information required under regulation 5, should be adequate. On the other hand, the requirement for public disclosure of the terms of equity-linked agreements under 6(1)(b) could be harmful to the interest of the company where commercially sensitive, confidential information of the company is involved. To ensure the company's interest is not otherwise jeopardized, a qualification similar to that provided under section 390(2)(b) of the new Ordinance ("*the disclosure of which will not, in the directors' opinion, be harmful to the business of the company*") could be added to 6(1)(b).

Regulation 6(3)(c)

Please consider replacing the sentence in 6(3)(c)(i) with: "*an agreement relating to the company's offer of shares to the public that will or may result in an issuance of shares in the company*", and replacing the sentence in 6(3)(c)(ii) with "*an agreement relating to the company's offer of shares to its members in proportion to their shareholdings that will or may result in an issuance of shares in the company*". Such agreements would have been disclosed in the company's prospectus.

3. Companies (Specification of Names) Order

We have no comments on the "List of Words and Expressions for the Proposed Companies (Specification of Names) Order".

4. Companies (Non-Hong Kong Companies) Regulation

General observation

Generally, subject to our comments below, we agree with the proposal to prescribe the detailed requirements and matters in relation to non-Hong Kong companies in the subsidiary legislation.

Regulation 3

Please consider whether to add a requirement for an email address of the directors / company secretary / authorized representative to facilitate electronic communications with the parties.

For comprehensiveness, we suggest adding the words "*of the director*" at the end of 3(1)(d)(ii)(A) and (B) and adding the words "*of the company secretary*" at the end of 3(1)(e)(ii)(A) and (B).

Clarification is required on whether the "address" required under 3(2)(a) is correspondence address and please add "*in Hong Kong*" after the word "address" in 3(2)(a).

Regulation 4(1)(d)

For clarity, we would suggest changing the words "that comply with any of the laws or rules that may be chosen by the company" to:

"***that complies with any of the law or rules referred to in subparagraph (ii) as may be chosen by the company***".

Regulations 4(1)(d)(ii), 4(1)(e)(ii)

For clarity, we would suggest including the phrase "*which the company is subject to*" in the two sub-sections as follows:

"*the law of any other jurisdiction where the company is registered as a company, or the rules of any stock exchange or similar regulatory bodies* ***which the company is subject to*** *in that jurisdiction...*"

Regulations 4(1)(e)(i), 9(1)(a)

Please include the word "*and*" at the end of the sentences.

Regulation 5(2)(a)

Please replace "names" with "*name*".

Regulation 9(3)

The supplementary note should specify what material revisions have been made to the original accounts.

Regulation 9(4)

We remain concerned that "*every agent*" of a non-Hong Kong company could potentially be punished for a technical "permission" of contravention, even though an agent cannot control or compel the actions of the company/its directors to comply with the Ordinance (e.g. the director's notification to the agent that the company's accounts have been revised under section 790; the company's provision of the required revised accounts in time will be necessary for complying with regulation 9).

As it is the company's directors and officers who should be primarily responsible for ensuring the company's compliance (and who will already be caught as "*responsible person*" under the lowered offence threshold in the new Ordinance), it seems excessive to

punish an agent especially where it has not knowingly / willfully permitted the breach. It also seems unfair to impose such onerous punishment and obligations on *"every agent"* (which is not specifically defined and could be broadly interpreted) of non-Hong Kong companies when agents of Hong Kong companies are not punished under the Ordinance.

It is noted that sections 352(4) and 353(5) of the new Ordinance state that an officer of a Hong Kong company / a non-Hong Kong company will commit an offence if the officer *"knowingly and wilfully authorizes or permits"* the omission of an entry required to be made under section 352(2) / section 353(2). A similar threshold should also apply in determining the liability of the agents of non-Hong Kong companies, given that the agents will not be in a position to comply with the Ordinance without the assistance of the company/its directors (the co-operation of which cannot be compelled); it would be unfair to punish the agents if they have not *"knowingly and willfully authorized or permitted"* the breach - clarification in this regard would be appreciated.

5. Company Records (Inspection and Provision of Copies) Regulation (CR(IPC)R)

General observation

Members' right to inspect the records of a Hong Kong company (with ancillary matters such as timing of inspection and taking of copies) is an often-litigated area of Hong Kong corporate law. We agree with the Government's proposal to spell out the relevant provisions in the new subsidiary legislation.

Interpretation

Definition of "company records"

(a) Incorrect Citation of the Companies Ordinance

We note that reference should be made to section 645 rather than section 654 of the CO;

(b) Accounting Records

The definition of "company records" specifically excludes accounting records. Access, inspection and making copy of accounting records has frequently been a problematic area, and perhaps it should also be dealt with in the subsidiary legislation.

In particular, under the current regime, directors have the right to inspect books of accounts of the company (section 121(3) of the CO) and they often do so prior to approving accounts presented to the board to ensure that the accounts present a true and fair view of the state of the company's affairs. In this regard, directors may engage accountants and auditors to access accounting records who may inspect and make copy of documents and raise questions. This could possibly strain the financial personnel/management of the relevant company (in particular, in periods close to the financial year-end when such access rights are often requested).

Under the Companies Bill, courts will be delegated powers to order the manner in which directors could inspect accounting records, but there is no regulation which provides guidance on the extent and manner in which directors may access accounting records. Individual directors who disagree with the board could possibly abuse its power of access, justified by their fiduciary duty towards the company and shareholders as a whole to ensure that the accounts are absolutely accurate

(c) Agreement and Memorandum

The definition also includes agreement and memorandum. We note:

(i) access to these items do not seem to be covered in the existing CO

(ii) depending on the nature of operations of the company, this would permit members and others requesting inspection the right to access documents which may be highly confidential (or subject to confidentiality undertaking with agreement counterparties)

(iii) it is not clear whether this would only cover entered agreements or it would also cover (as memorandums) tender/bid documents, term sheets, etc.

(iv) further, the interests of shareholders of a company may not be aligned with the interests of the company as a whole - while the directors have a fiduciary duty to act in the interest of the company and all its shareholders as a whole (and are permitted to act for individual shareholder nominating them where there is no competing interest) in examining commercial documents, the shareholders could be self-interested and could use documents accessed for its own interests adverse to those of the company

Regulation 5(1)

For clarity, the regulation should also state that the inspection notice may be served on a company pursuant to section 827 of the CO or a registered non-Hong Kong company pursuant to section 803 of the CO.

Regulation 5(2)

The inspection notice should also identify the person making the request, the capacity under which the request is made, the person (if different) to carry out the inspection, his contact phone number and communication details. Such information can establish the requester's right to inspect and facilitate the giving of response by the company to the requester.

Regulation 5(3)

The notice of inspection must specify a date which is not a "general holiday".

We suggest including provisions to deal with consequences if a date which is a general holiday is specified in the notice (i.e. would the notice by invalidated or would the next non-working date be deemed to be the date for inspection?);

Similarly, provisions to deal with situations where the specified time is not within the 9-5 p.m. prescribed time should be included.

Finally, could the company and party requesting access have flexibility as to when they wish to inspect documents other than those prescribed in the regulation for practical reasons?

Regulation 5(5)

The definition of "request for inspection" seems to have a number of incorrect cross-references

Regulation 6(1)

Both working days and calendar days are used in prescribing the notice period. This is inconsistent and unless there is justification the regulation should be amended as there should be consistency in how days are counted.

Regulation 7(1)

The company's obligation to notify place of inspection arises only after payment of the HK$50 inspection fee, but the company's notice must reach the requester within a specified deadline. There could be a time gap between making of the inspection request and fee payment. The deadline for the company's response does not take account of such time gap. A possible solution is to allow fee payment on the date of, but before the time of, inspection.

We repeat our observations on Regulation 691 on the notice period.

Regulation 7(5)

Section 657(4) of the CO contemplates the subsidiary legislation will provide for empowering provisions for the making of ancillary directions by the court, as to the time, duration and manner of inspection.

Regulation 8(1)

The company must inform the requester of the most recent date (if any) on which "alterations" were made to the company records. The word "alterations" does not necessarily include entries (i.e. information added) if literally construed.

For clarity, we suggest adding the word "***entries or***" before the word "alterations".

Regulation 9(5)

Section 657(4) of the CO contemplates the subsidiary legislation will provide empowering provisions for the making of ancillary directions by the court regarding the circumstances in which and the extent to which copying is permitted. We note the absence of such empowering provisions for ancillary directions in the regulations.

Regulation 13(2)

The company must inform the requester of the most recent date (if any) on which "alterations" were made to the company records.

We repeat our comments on Regulation 8(1) above.

Regulations 14(2) & (4)

(a) When the company keeps its records in electronic format only, it should be permitted to give to the requester copy of records in such format and it will be up to the requester to generate hard copies.

(b) If electronic copies are requested and given, then should the obtaining of such copies be subject to the same costs as obtaining hard copies?

(c) Counting number of words in documents and number of entries for charging purposes seem impractical – count pages instead?

Regulation 14(3)

We suggest that this provision be clarified to the effect that if the company keeps the relevant records in hard copy form only and the person requests an electronic copy, the company is not obliged to (but may) provide an electronic copy, *failing which* it must provide a hard copy. The current drafting suggests that nothing needs to be provided at all in this situation, which is not the legislative intent.

Regulation 16

Persons requesting copies are liable also for any "reasonable costs" incurred by the company – does this include staff costs? Should this require receipts of expenses or records of time spent?

Provisions dealing with contraventions of provisions of the regulation

We note contraventions of the provision would cause "every responsible person" to be liable where "responsible person" do not appear to be a defined term and seems to cover employees and other persons who may be conversant with the CO

6. Companies (Model Articles) Notice (C(MA)N)

Schedule 1 – Model Articles for Public Companies Limited by Shares

Interpretation

Article 1(1)

Definition of "partly paid". The definition says: *partly paid*, in relation to a share, means that no part of the price at which the share was issued remains unpaid;

The word "no" should be deleted.

Article 3

We have reservations about vesting in the members a power to direct the directors to take, or refrain from taking specified action. This power is too extensive and runs counter to the principle that the affairs of the company are managed by the directors, each of whom owes a duty of care to the company to exercise their directors' powers in good faith. Shareholders do not owe a duty of care to the company.

Article 10(2)

This is identical to Article 11(2) in Schedule 3 to the UK Companies (Model Articles) Regulation 2008 (the "UK Model Articles"). However, we are concerned that this article permitting the sole director (or any number of directors, being a number lower than that specified in the quorum provisions) of a public company to appoint other persons as directors to make up a quorum. The appointment of persons to the board of a company is a significant matter and should not normally be taken as a purely "procedural" to satisfy the quorum requirement. It is also doubtful whether additional directors so appointed can be removed with ease afterwards (at least until such additional directors are specifically removed by shareholders' resolution, or are required to step down at the next following annual general meeting under Article 22(5)(a)).

While allowing directors to appoint further directors to make up a quorum would not be unreasonable as a matter of expediency for private companies, we query whether it may be an appropriate default article for Hong Kong public companies. We note in this connection that in Hong Kong, a substantial number, if not majority, of locally-incorporated public companies are listed companies or companies that have issued securities to the public or otherwise have a "public" element in their corporate profile.

That said, we see no problem allowing a sole director to call a general meeting for the purpose of appointing additional directors either to make up a quorum or for any other purpose.

We request clarification on whether a director, having an interest in the matter to be discussed at the board meeting, can be counted towards the quorum of that meeting. Article 18(2) seems to suggest that directors having an interest in a transaction cannot constitute a quorum.

Article 15(2)

We refer to paragraph 6.10(c)(ii) (see page 24 of the Consultation Paper), and do not see any compelling reason to preclude a director from voting on a transaction between the subject company and another entity in which the director is "connected" only to the extent that he takes part in the management of that entity (but does not own any interest in it). In

particular, in the case of a person holding multiple independent non-executive directorships, allowing him to vote on a transaction for one of the companies of which he is a director would not necessarily give rise to any conflict issues. Indeed, precluding him from voting (even against the proposal) may be counter-productive from a shareholders' protection perspective.

We appreciate that this provision is only a "default" article and can be disapplied or modified. However, in this instance we believe it is more appropriate for the default position to be permissive rather than prohibitive.

Article 15(3)

From the list of matters on which directors are by default allowed to vote regardless of conflict of interests issues, the Government proposes to remove "the subscription or agreement to subscribe for shares or other securities of the company or to underwrite any such securities". This proposal as highlighted in paragraph 6.10(c)(ii) (see page 24 of the Consultation Paper), fails to provide any explanation.

We note that an equivalent to this exists in Article 16(4)(b) of the UK Model Articles and believe this would be helpful for Hong Kong public companies, particularly those conducting (a) a top-up placing where the substantial shareholder whose shares are being placed out is also a director, or (b) a rights issue solely or partly underwritten by a substantial shareholder who is also a director.

We propose that subscription of securities of the company should be retained as a default matter in this article.

Article 16

Formal procedures are prescribed for the making of a proposal for the passing of directors' written resolutions, which include the giving of written notice with prescribed contents. Full compliance with such formal procedures should not be a condition for valid passing of directors' written resolutions. In practice, directors' written resolutions are drafted and then circulated for approval and signing by the directors, without going through the notice formalities.

Article 17(4)

Section 657(a)(i) contemplates the making of subsidiary legislation to regulate the keeping of company records. The obligation to maintain written records of directors' written resolutions for specified period should be imposed under subsidiary legislation, not the articles.

We note the draft subsidiary legislations under consultation does not cover record keeping.

Article 20

We repeat our observations on Article 17(4) above.

This article speaks of "every decision taken by the directors". If "decision" is literally construed, the obligation imposed is not capable of full compliance because in reality, not every decision made by the directors collectively is reduced into written. To avoid compliance difficulty, "decision" should be defined in Article 1 to mean a decision taken in accordance with Article 6.

Article 25(e)

A director who has been absent from board meetings without permission for more than 6 months will have his office terminated automatically. We disagree. The termination should not be automatic and should require a resolution of the board to that effect.

Article 26(3)

We propose adding contractual flexibility by providing "unless otherwise specified in the appointment", a directors' remuneration accrues from day to day.

Article 27

We propose adding "***or any of its subsidiaries***" at the end of this provision, which would be of practical benefit to a public company.

Article 36(2) and (3)

These are superfluous. The relevant matters are provided for in ss.565 and 567(1) of the revised Ordinance.

Article 44(2)

It would be useful to specify "the member or members present is a quorum", rather than "members" in the plural. For a company (including a technically "public" company) that is very closely held (e.g. by two persons), problems have arisen in practice that the company could be permanently deadlocked if one or more members persistently absent themselves from general meetings and only one of them is willing to attend. If, exceptionally, the possibility of deadlock is actually foreseen and intended by the parties, this default position can be amended with ease.

Our proposal has recent judicial support in the Court of First Instance decision of *Koo Shing Sun v Hung Wing San, Tony [2012] HKCU 1959*, where Harris J. said, in paragraphs 7 and 12, that the word "*members*" in the existing equivalent provision (Article 56 of Table A) is "*infelicitous drafting*" and that "*the Regulation should refer to member singular rather than plural and the Regulation should have been drafted generally in a way which was consistent with business being conduct by only 1 member, or his proxy, of a company*".

Article 89

We suggest inserting an equivalent of Article 70(4) of the UK Model Articles, namely, "unless the members 'resolution to declare or directors' decision to pay a dividend, or the

terms on which shares are issued, specify otherwise, it must be paid by reference to each member's holding of shares on the date of the resolution or decision to declare to pay it".

This would help clarify (i) that the company technically has the power and discretion to pay dividends on a non-pro-rata basis; (ii) that notwithstanding this, the circumstances of such distribution are restricted to those specified; and (iii) the cut-off date for determining members' entitlement.

Without this provision, Article 90 suggests that the only possibility of a non-pro-rata dividend is if the relevant share carry special rights to dividend, and the record date for dividend entitlement would remain an open question.

Schedule 2 – Model Articles for Private Companies Limited by Shares

Article 2(3)

Under article 2(1)(b), the number of members of a private company is limited to 50.

Employee shareholders are not counted towards the limit of 50. There is provision for this in Article 2(3) but the reference there to "paragraph (1)(a)" is incorrect. It should be "paragraph (1)(b)".

Article 4

We have reservations about vesting in the members a power to direct the directors to take, or refrain from taking specified action. This power is too extensive and runs counter to the principle that the affairs of the company are managed by the directors, each of whom owes a duty of care to the company to exercise their directors' powers in good faith. Shareholders do not owe a duty of care to the company.

Article 9(2)(c)

We suggest removing this from the notice requirement. Under this provision, omitting to anticipate or make an inaccurate anticipation of whether the directors would be in the same place could be used as a ground to establish deficient / insufficient notice and potentially jeopardise the validity of board decisions. This would be very inconvenient for private companies and we believe the shareholders' protection benefits afforded by this provision are not proportionate to the potential adverse consequences.

Article 17

As noted above, obligation to maintain written records of decisions for specified period should be imposed under subsidiary legislation, not the articles.

This article speaks of "every unanimous or majority decision taken by the directors". If "decision" is literally construed, the obligation imposed is not capable of full compliance. To avoid compliance difficulty, "decision" should be defined in Article 1 to mean a decision taken at a meeting of the directors or a decision taken in accordance with Article 8.

Article 18(2)

As noted above, obligation to maintain written records of decisions for specified period should be imposed under subsidiary legislation, not the articles.

Article 20(2)

For clarity, there should be added at the end "until terminated pursuant to the articles or the Ordinance".

Article 22(e)

A director who has been absent from board meetings without board permission for more than 6 months will have his office terminated automatically. The termination should not be automatic and should require a resolution of the board to that effect.

Article 23(3)

Our observation on Article 26(3) above is repeated.

Article 67

Our observation on Article 89 above is repeated.

Schedule 3 – Model Articles for Companies Limited by Guarantee

Article 2(3)

Under article 2(1)(b), number of members of a private company is limited to 50.

Employee shareholders are not counted towards the limit of 50. This is provided for in Article 2(3) but the reference there to "paragraph (1)(a)" is incorrect. It should be "paragraph (1)(b)".

Article 3

We have reservations about vesting in the members a power to direct the directors to take, or refrain from taking specified action. This power is too extensive and runs counter to the principle that the affairs of the company are managed by the directors, each of whom owes a duty of care to the company to exercise their directors' powers in good faith. Shareholders do not owe a duty of care to the company.

Article 8(2)(c)

Our observation on Article 9(2)(c) above is repeated.

Article 17

As noted above, obligation to maintain written records of decisions for specified period should be imposed under subsidiary legislation, not the articles.

As noted in the above, to avoid compliance difficulty, "decision" should be defined in Article 1 to mean a majority decision taken at a meeting of the directors or a decision taken in accordance with Article 7.

Article 18

We suggest inserting an equivalent to Article 20(2) of Schedule 2 (a provision that unless otherwise specified in the appointment, a directors appointed by members' resolution is to hold office for an unlimited period of time).

Articles 20(e) & (f)

A director, who has been absent from board meetings without board permission for more than 6 months or has failed to disclose existence of conflicting interest of material significance, will have his office terminated automatically. The termination should not be automatic and should require a resolution of the board to that effect.

Article 21(3)

We propose adding contractual flexibility by providing "unless otherwise specified in the appointment", a directors' remuneration accrues from day to day.

7. Companies (Accounting Standards (Prescribed Body)) Regulation

We have no comments.

The Law Society of Hong Kong
13 November 2012
1060099

pwc

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BY EMAIL: co_rewrite@fstb.gov.hk

Financial Services and the Treasury Bureau and the Companies Registry
15/F, Queensway Government Offices
66 Queensway
Hong Kong

19 November 2012

Our Reference: DCPH/NIDD
Your Reference:

Dear Ladies and Gentlemen

Phase 1 - Public Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance

We welcome the invitation to provide views on the proposed Regulations, Order and Notice (the 'proposed secondary legislation') for implementation of the new Companies Ordinance (the 'new CO').

We set out below our specific comments on the proposed secondary legislation.

Chapter 1 & Annex 1 – Companies (Summary Financial Reports) Regulation

We understand that relevant companies are permitted to send Summary Financial Reports (SFRs) to members and that sending SFRs is the default position should members not provide a notice of intent. It thus seems unnecessary to ask in section 7(3)(b) of the draft Regulation whether a member wishes to receive an SFR. We believe that the notice of intent could be simplified so that a member is told that they will receive a hard copy SFR unless the member takes positive action to opt-in to receive full financial reports. Additionally, the member should indicate whether he wishes to receive either the full financial reports or the SFR electronically.

The equivalent subsidiary legislation in the UK (SI 2008/374 "Companies (Summary Financial Statement) Regulations 2008") allows for companies to send SFRs once they have ascertained that the person does not wish to receive the full financial reports. In effect, the UK Regulation only requires the question in section 7(3)(a) of the draft Regulation to be asked, that is whether the member opts-in to receive full financial reports. They would otherwise get the SFR.

We also note that in the UK, the ascertainment of members' wishes can take place as a separate consultation before the relevant year end or can be done at the same time as sending out the full financial reports for the current year with a copy of the related SFR for that year. In both cases, the company tells the member that they'll get the SFR in future unless they opt-in to receive the full financial reports. The difference between the two is the cost of a separate ascertainment exercise and its postage vs the cost of supplying both the full financial reports and SFRs in the first year but dealing with the ascertainment as part of the normal routine for sending out the AGM papers etc.

The draft Regulation appears only to provide for the consultation on members' wishes to be a separate exercise rather than one which can be combined with the normal routine of sending out AGM papers. We recommend that companies are given a similar option as in the UK to make the ascertainment of members' wishes part of the normal AGM routine.

We have a question on the drafting of section 3 of Part 2 of the draft Regulation. We believe that section 3(2)(a) and (b) should be constructed as alternatives. As currently drafted, it seems that a company must include information from both its company financial statements and its consolidated financial statements. If a company prepares and publishes its consolidated financial statements, its SFR should only be required to include the information under section 3(2)(b). If a company only prepares and publish its own financial statements then its SFR should only have to comply with section 3(2)(a); it cannot comply with section 3(2)(b), as drafted.

Chapter 2 & Annex 2 – Companies (Directors' Reports) Regulation

We have only the following drafting comment in respect of this proposed Regulation.

Section 6(3) - The definition of 'equity-linked agreement' refers in a number of its sub-sections to 'shares'. Unlike section 3, the meaning of 'shares' is not specified and it seems that it cannot be deduced from that section, as section 3(4) restricts the meaning solely to section 3. To avoid confusion we recommend that the meaning of 'shares' in section 6(3) should be clarified.

Chapter 3 & Annex 3 – Companies (Specification of Names) Order

We understand that a number of terms in the existing Order are not proposed to be included in the new Order as they are considered obsolete or no longer necessary. We appreciate that the Registrar has other powers that it is believed may be adequate to prevent misuse of names and terms that have previously appeared on the prescribed list but we consider it is preferable to retain the terms from the existing terms so that it is not perceived that it is now acceptable to use them.

We note that the proposed list of terms set out in Annex 3 is considerably shorter than those in the equivalent subsidiary legislation in the UK (SI 2009/2615 "The Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulation 2009"). Naturally, some of the UK sensitive terms and expressions are not relevant in a Hong Kong context but, nonetheless, there are a substantial number that would seem relevant and whose use, we believe, should be controlled. For example, those that are descriptors of financial institutions. We recommend that the proposed list set out in Annex 3 is reconsidered and extended.

Chapter 4 & Annex 4 – Companies (Non-Hong Kong Companies) Regulation

We have the following comments on the drafting of the Regulation.

Part 2 – Sections 3(d)(ii)(C) and 3(e)(ii)(C) – It would be useful for clarity for non-Hong Kong residents to specify that the identity card is a Hong Kong identity card, if that is what is intended.

Part 2 – Section 4(1)(e) – We wonder whether the reference to paragraph (c) should be to both paragraphs (c) and (d), as both these paragraphs deal with 'laws or rules' relating to the publication of a company's accounts.

Part 6 – Sections 8 to 10 – We are unsure as to the applicability of these sections of the Regulation when the non-Hong Kong company's accounts were not prepared in accordance with the new CO in the first place. The non-Hong Kong company's accounts would have been prepared in accordance with the laws and rules of the place of its incorporation. If the company's directors were to revise the original accounts they would do so in accordance with those laws and rules not section 790 of the new CO.

Chapter 5 & Annex 5 – Company Records (Inspection and Provision of Copies) Regulation

We note that fees payable for copies of company records set out in Part 2 of the Schedule to the Regulation do not reflect that we are in a digital age. The fees are set by reference to the number of entries and words, which are reflective of an era when the only way to make copies was in handwriting. Draft section 14 in Part 4 provides the right for the copy to be in electronic or hard copy form. As such, copies can now be made by electronic or digital devices and thus it would seem sensible to charge fees by the 'page'. It would also avoid imposing a burden of counting entries or words on, say, a photocopy or digital picture to establish the fees payable.

Chapter 6 & Annex 6 – Companies (Model Articles) Notice

We have no comments on the proposed Model Articles set out in Annex 6.

Chapter 7 – Companies (Accounting Standards (Prescribed Body)) Regulation

The consultation paper did not include a copy of the proposed Regulation and our comments are therefore based on the description contained in paragraph 7.6. We have no concerns about the Regulation commencing on the same day as the new CO. We agree that the HKICPA should be the appropriate body for the purpose of section 380(8)(a) of the new CO.

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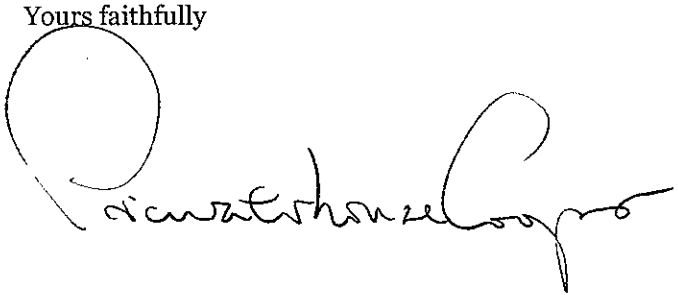
Should you have any question in relation to this letter, please do not hesitate to contact Dennis Ho (dennis.ho@hk.pwc.com) or Nigel Dealy (nigel.dd.dealy@hk.pwc.com) at this office.

We apologise for the lateness of this response to the Phase 1 consultation and hope that it does not cause you undue inconvenience.

Yours faithfully



HONG KONG BAR ASSOCIATION

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22nd November 2012

Secretary for Financial Services
and the Treasury
Companies Bill Team
Financial Services Branch
15/F Queensway Government Offices
66 Queensway
Hong Kong.

Attn: Mr. Darryl Chan

Dear Sirs

First Phase Consultation on the
Subsidiary Legislation to be made under the
New Companies Ordinance

I refer to your letter of 28th September 2012 inviting the views of the Hong Kong Bar Association on the subsidiary legislation to be made for the implementation of the new Companies Ordinance.

Please find enclosed a copy of the Comments of the Bar Association dated 22nd November 2012 for the consideration of the Financial Services Branch, which has been endorsed at the Bar Council Meeting held on 15th November 2012.

Yours sincerely,

Kumar Ramanathan SC
Chairman

Encl.

Hong Kong Bar Association's comments on
First Phase Consultation on the Subsidiary Legislation to be made under the New Companies Ordinance

1. The Hong Kong Bar Association ("the Bar") has previously given its comments on various matters of principle in the Companies Ordinance Rewrite exercise. The new Companies Ordinance has since been enacted. The present consultation focuses on the subsidiary legislation under the new Companies Ordinance, which concerns mainly issues of detailed drafting and practice. The Bar only wishes to draw attention to the following matters.

Annex 1 Companies (Summary Financial Reports) Regulation

2. The Bar has in its July 2007 comments indicated its support for expanding the scope of summary financial reports to unlisted companies but noted that the contents of such summary financial reports should be consistent with the disclosure obligations of unlisted companies and should not simply copy those designed for listed companies under the Companies (Summary Financial Report of Listed Companies) Regulations.

3. The Bar notes that the draft Annex 1 substantially reproduces the Companies (Summary Financial Report of Listed Companies) Regulations save for the requirements for business review and business projection (which the Bar objected to in its July 2007 comments). The Bar understands that most of these requirements are based on and tally with the revised disclosure obligations of the unlisted companies. To that end the Bar has no objection to their inclusion.

Annex 2 Companies (Directors' Report) Regulation

4. The Bar has 2 observations in this regard.

5. First (and this is outside the scope of Annex 2), the Bar notes that its objections to the requirement of a business review in the directors' report for all companies (listed and unlisted) in its July 2007 comments have only been partially taken on board (in relation to exemption by special resolution). The Bar reiterates its concerns as to the desirability of introducing such a requirement to all companies alike and to cater for exemption only by shareholders' agreement.

6. Secondly, the Bar has no objection to the proposed definition of "equity-linked agreement". The Bar has previously indicated that the definition should preferably be with reference to the effect or likely effect of diluting existing shareholders' interests, and notes that the proposed definition ("will or may result in the company issuing shares") should be sufficient for that purpose.

Annex 5 Company Records (Inspection and Provision of Copies) Regulation

7. The Bar has no objection in principle to formalizing the procedures for requesting and carrying out inspection of "companies records" (as defined in s.654 of the new Companies Ordinance which do not include accounting records).

8. However the Bar notes that the proposed Regulation allows the requestor to dictate the date of inspection ("specified time"), which can be no more than 2 working days from the giving of notice (depending on circumstances). The company is obliged to permit inspection on such "specified date" (regulation 7(2)(a)), and failure to do so will have serious consequences in that the company and each of its responsible persons will have committed an offence and be liable to a fine (regulation 7(3)-(4)). The Bar is concerned that the lack of flexibility to permit the company to extend the time in a case where proper cause is shown, coupled with the serious consequences of any failure to comply, may create an unreasonable burden on the company and may be open to abuse in the context of shareholders' disputes.

Annexes 3, 4, 6 and 7

9. The Bar has no comment on the same.

Hong Kong Bar Association

22nd November 2012