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》（第九和第十章）修改辦法的建議

第九章 公司（修訂財務報表及報告）規例修改辦法及建議

擬議規例主要根據現行第 32N 章制訂， 并略加修訂，使之與新《公司條例》第九部有關帳目及審計的條文一致。例如， 以“財務報表”取代“帳目”一詞，並以“財務狀況表”及“全面收益表”分別取代“資產負債表”及“損益表”等。

本公會認為統一條文用語，使之更標準化，規範化是完全符合法例公文的基本要素。將報告文件的規定修訂至與新《公司條例》下的規定一致，也將使參照新條例辦法更為有效。因此，本公會贊成財經事務及庫務局的修訂建議，認為此項修訂是合理並可取的。

第十章 公司（披露董事利益資料）規例修改辦法及建議

該章節“薪酬、退休利益等”條款的修改建議為，繼續沿用非現金利益的估計金錢價值須計入薪酬內這項披露規定，另外，建議訂明這些非現金利益的性質亦須以披露。

本公會認為披露董事非現金利益的估計金錢價值和性質符合公司董事關於利益分配的知情權，使披露董事利益資料更為透明化。因此，此項修改無可爭議。

關於惠及董事的貸款等條款的修改建議中指出，爲了減省披露資料，將現行規定中“高級人員”修改為僅限“惠及董事，與董事有關的實體或受其控制的法人團體”。此項修訂符合精簡披露利益資料的要求。

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CMA

經對比現行規定和財經事務及庫務局提出的若干修訂建議，本公會認為修訂建議均符合《公司條例》規範化的要求，綜上所述，本公會對以上修訂建議並無異議。

澳洲管理會計師公會 - 香港辦事處

2012年12月10日

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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 December 2012

Dear Sir

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

Thank you for your letter dated 2 November 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 8 Companies (Trading Disclosures) Regulation

ACCA agrees to the proposals set out in the consultation document.

However, we would like to suggest that companies should also be required to display their details on their web sites as well. Nowadays, a company's web site is as much an instrument of communication as a letter or invoice. We therefore consider it necessary to ensure corporate transparency on the company's website.

Chapter 9 Companies (Revision of Financial Statements and Reports) Regulation

We note that under section 24, Part 6 of the Companies (Revision of Financial Statements and Reports) Regulation, Annex 9 to the consultation document, a company is required to send to members the revised financial statements. We note that it is not explicitly stated in the proposed subsidiary legislation whether electronic copy is allowed under this circumstance. We consider that the same mode of delivery, i.e. by hard copy or by electronic copy should be followed in the same manner according to the members' intent on receiving the original reporting documents or summary financial report according to the provisions of the new Companies Ordinance.

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On the other hand, we share the same view with the industry that there is room for future improvement to the drafting of section 408 of the new Companies Ordinance regarding offences relating to content's of auditors' report. We welcome the proposal in paragraph 9.9 of the consultation document regarding a review to address the industry concerns about the provision.

Chapter 11 Companies (Residential Addresses and Identification Numbers) Regulation

We support the proposals to enhance protection of the privacy of personal information in documents for registration on condition that the relevant authorities and other persons with legitimate right should be able to gain access to those private details.

However, with regard to the list of specified persons under section 12 of the Companies (Residential Addresses and Identification Numbers) Regulation in Annex 11 of the consultation document, we do not consider that there is a case for allowing members of the company to access withheld information of directors. Where a company is a family-based company and / or there are only a few members, such a legal provision may not be required since invariably other members would be able to get access to such information from other sources. In larger companies, there is an argument for keeping withheld information away from members per se. As such, we suggest "members" should be removed from the list under section 12 specifying the specified persons referred to in section 58(3) of the new Companies Ordinance.

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

Yours faithfully

William Mak
Chairman

THE
HONG KONG
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OF
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11 December 2012

email: co_rewrite@fstb.gov.hk

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

Dear Sirs

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

We thank you for your letter of 2 November 2012 inviting the Association's comments on the five pieces of subsidiary legislation covered by the second phase of the consultation.

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 on certain sections of the proposed subsidiary legislation as follows:

Chapter 8 - Companies (Trading Disclosures) Regulation

1. Displaying of a company name by electronic means is a modern idea. However, the requirement for displaying the company name for at least 20 continuous seconds once in every four minutes would be too long for an office or place of business sharing by large group of companies. It is proposed to consider relaxing the display period for every single company name or providing more options for such display.

Chapter 10 - Companies (Disclosure of Information about Benefits of Directors) Regulation

2. We fully support retaining the special disclosure arrangements for authorized financial institutions (AFIs) as set out in Section 13 of the Regulation. Providing loans, quasi loans and credit facilities on an arm's length basis is within the ordinary course of the business of an AFI. Requiring AFIs to comply with Section 11(2) of the Regulation without the special disclosure arrangements would entail unnecessary inclusion of a substantial amount of details in AFIs' financial statements. The special disclosure requirements assist in ensuring that AFIs' financial statements are transparent and achieve the same overall level of external disclosure as non – AFIs.

3. The proposed subsidiary legislation creates new disclosure obligations in respect of transactions, arrangements and contracts of material interest. We would suggest definitions be given to clarify the scopes of such activities, in particular, we are seeking more guidance on the terms "transaction", "arrangement" and "contracts of material interest".

4. The existing Companies Ordinance requires the AFI to enter the particulars of individual transactions into a statement which will be made available for inspection by the general public for two weeks before the Annual General Meeting and one week thereafter. Under the new subsidiary legislation, AFI is required to keep a register setting out the particulars of individual transactions involving quasi-loans or credit transactions for inspection by its members throughout the year. It is considered that provision of loans to directors by an AFI is in its ordinary and usual course of business, yet details of the transactions contained in the register are, to a certain extent, private and confidential to individuals. It is important to strike a right balance between the effective disclosure and privacy protection. Accordingly, extension of inspection period is considered to be unnecessary.

Chapter 11 - Companies (Residential Address and Identification Numbers) Regulation

5. The attempt to offer protection to company officers from disclosing their residential addresses and identification numbers on payment of a fee is welcomed. It appears however that the Regulation, which is meant to provide detailed explanation to implement the new legislation, is not detailed enough as to the ways how in practice the request for withholding the information is to be made and how the requested information is to be withheld. It is suggested the Regulation should empower the Registrar of Companies to issue further guidance notes in consultation with market participants in this regard.

6. Further, if any member of a company can apply for access to withheld or protected information, this could be regarded a policy too relaxed from the perspective of a listed company with a substantial number of shareholders. If this is allowed, the Registrar of Companies is expected to act as a gatekeeper to ascertain if a request is reasonable.

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

THE
LAW SOCIETY OF HONG KONG
香 港 律 師 會

Practitioners Affairs

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11 December 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: Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance
-- Phase Two

I attach the Law Society's submissions on the captioned Consultation.

The Law Society has no objections to its submissions being posted onto your website as the document will be posted onto our own website.

Yours sincerely,

Joyce Wong

Joyce Wong
Director of Practitioners Affairs
e-mail: dpa@hklawsoc.org.hk

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 Two

Law Society's submissions

The FSTB and Companies Registry Consultation Paper on Subsidiary Legislation for Implementation of the new Companies Ordinance – Phase Two (Consultation Paper)

The Law Society's Company Law Committee reviewed the Consultation Paper which covers five remaining pieces of draft subsidiary legislation required to implement the new Companies Ordinance (Ordinance). We have the following comments:

1. Companies (Trading Disclosures) Regulation

Regulation 3(2): The following words should be added to the end of this regulation

"*....and it is indicated clearly on or next to the electronic device that such a request may be made*".

2. Companies (Revision of Financial Statements and Reports) Regulation

General

It is confusing to refer to provisions in the Ordinance and in the Regulations both as "sections".

We recommend referring to provisions in the Regulations as "paragraphs" or "regulations" so that they can be readily distinguished from provisions in the Ordinance. For the purposes of this submission we refer to sections in the Ordinance as "*section*" and sections in the Regulations as "*Regulation*".

Part 2 – Contents of Revised Documents

Section 430(1) provides that if a company is required to hold an annual general meeting, the company must send a copy of the reporting documents for the financial year to every member at least 21 days before the date of the meeting.

Section 449 provides that if a copy of any financial statements has been sent to a member and it subsequently appears to the directors the financial statements did not comply with the Ordinance; the directors may cause the financial statements to be revised. Consequential revisions may be made to the summary financial report or directors' report.

However, the Regulations do not require the revised financial statements and reports be sent to the members at a reasonable time before the annual general meeting is held. In fact, Regulation 22(1) and Regulation 24(2) only provide that the revised documents be sent to the members within 28 days after the date of revision. Regulation 25(3) deals with communication made available on a website and simply provides that the notification of revision be made during the period beginning on a date falling within 28 days after the date of revision and ending on the date of the following general meeting.

We are of the view that the lack of clear requirement to send the revised reports to the members well in advance of the annual general meeting may create uncertainty and unfairness to members. Members may not have adequate time to fully understand the changes made before they are required to resolve on the approval of the revised reports. We suggest that the Regulations be amended to provide that the revised reports be sent or notified to members not less than 3 business days before the date of the general meeting.

Regulation 2(1)

It is confusing to have "*audit report*" and "*auditor's report*" defined as they are in the Regulations.

We suggest amending "*audit report*" to read "*revised auditor's report*".

Regulations 3(4), 5(2) and 6(2)

The Regulations set out the required contents of the revised documents. Regulations 3(4), 5(2) and 6(2) all provide that the revised documents must contain a statement as to the material revisions to the original documents. Indeed section 449 of the Ordinance provides that only those aspects of the financial statements that did not comply with the Ordinance and necessary consequential revisions can be made to the documents after the documents have been sent to the members.

We are of the view that in order to help the members fully comprehend the revisions and ensure good corporate governance, the revised documents should also contain an explanation why the original financial statements did not comply with the Ordinance. We therefore suggest that the Regulations be amended accordingly.

Regulations 10(2) and 11(2)

The language of Regulations 10(2) and 11(2) is unclear and difficult to understand.

We suggest the words are changed to read:

Regulation 10(2)

Without limiting subsection (1),

(a) where a copy of the original financial statements has not yet been sent to a member under section 430(1) of the Ordinance; or

(b) where a copy of the original financial statements has not yet been sent to a member under section 430(3) of the Ordinance,

the revised financial statements are, as from the date of revision, the financial statements of the company for the relevant financial year for the purposes of that section and sections 429(1), 435(1) or 662 of the Ordinance (as the case may be).

Regulation 11(2)

Without limiting subsection (1),

(a) where a copy of the original financial statements has not yet been sent to a member under section 430(1) of the Ordinance; or

(b) where a copy of the original financial statements has not yet been sent to a member under section 430(3) of the Ordinance,

the revised directors' report is, as from the date of revision, the directors' report of the company for the relevant financial year for the purposes of that section and sections 429(1), 435(1) or 662 of the Ordinance (as the case may be).

3. Companies (Disclosure of Information about Benefits of Directors) Regulation

Regulation 3(2)

It is unclear why the amount to be disclosed under Regulation 3(2) should be restricted to emoluments paid or receivable for a person accepting office as a director when under Regulation 3(1) the amount to be disclosed relates to emoluments paid or receivable by directors in respect of their qualifying services.

Regulation 5(2)

We note the reference to a "*person's*" retirement or "*person's*" office in the Regulation.

Please clarify who the Regulation is referring to other than a director.

Regulation 9(1)

We suggest the words are changed to read:

"In this Part, a reference to a payment to a director includes – (a) all relevant sums paid to or receivable by an entity connected with the director; and (b) all relevant sums paid to or receivable by a person made at the direction of, or for the benefit of, the director or an entity connected with the director."

4. Companies (Residential Addresses and Identification Numbers) Regulation

General

Should an applicant who applies for access to withheld or protected information be required to promptly notify the Registrar if any information submitted to the Registrar has changed before the withheld or protected information is released to him?

Should the Registrar be required under the Regulation to respond to an application within a prescribed period as both the Ordinance and the Regulation are currently silent on this point?

Regulation 1

Replace "*Ordinances*" with "*Ordinance*".

Regulations 8(1)(c) and 12(1)(c)

Both Regulations list out the classes of persons to whom, upon an application made to the Registrar, the Registrar may disclose withheld or protected information ("*permitted applicant*"). Both lists include "*a member of a company*" and "*a public body*".

Regulations 8(1)(c) - A member of a company

We are concerned that applications could lead to potential abuse by members, in particular members of a listed company, seeking withheld or protected information without legitimate reasons.

We note the Registrar *may* disclose withheld or protected information to a permitted applicant (other than the data subject or a member of a company) if, and only if, the permitted applicant provides the Registrar with written confirmation that he needs the information for the performance of his functions and that the information would be used only for that purpose. A member of the company only needs to confirm that he is a member of the company concerned.

Sections 52 and 59 deal with cases where service of documents at the correspondence address given by a director is not effective or where disclosure is necessary or expedient

for the enforcement of a court order. FSTB should clarify the rationale for allowing a member of a company to have access to withheld or protected information about the company's directors.

Regulation 12(1)(c) - Public body

It is unclear how a public body as defined in Regulation 2 would make an application under the Regulations and who within the public body could have access to the information" e.g. Is the Legislative Council entitled to make an application? If so, who within the Legislative Council is entitled to have access to the information? Will the Legislative Council act through a public officer?

5. Companies (Unfair Prejudice Proceedings) Rules

Rule 4(3) – Presentation of Petition

For the sake of clarity, we recommend that "*return day*" be defined and the sub-rule be revised as follows:

"(3) The Court is to fix a hearing for a day (the "return day") on which, unless the Court otherwise directs, the petitioner and any respondent (including the company) must attend before the Registrar or a judge of the Court for directions to be given in relation to the procedure on the petition".

Rule 5 – Service of Petition

We recommend that this rule should set out the details for the service of the unfair prejudice petition. In this regard, (a) the Winding-up Rules will not apply to an unfair prejudice petition that does not include a prayer to wind up the company; and (b) section 356 of the Companies Ordinance does not contain sufficient details on how a document will be considered to be served effectively.

Can a provision could be adopted which is similar to Rule 25 of the Winding-up Rules?

We recommend that the following sub-rule (3) be added to Rule 5:

"(3) Every petition shall, unless presented by the company, be served upon the company at the registered office, if any, of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if any such can be found, by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at such registered office or principal place of business, or by serving it on such member, officer, or servant of the company as the court may direct."

Rule 6(b) – Return of petition

The Judiciary's Practice Direction 3.1, Part II, paragraph 5.6.6(b) (which currently applies to unfair prejudice petitions under section 168A of the Companies Ordinance) provides for filing of particulars of claim, defence and reply. Given that a petitioner should have the

right to the last word, **we recommend that Rule 6(b) should also include delivery of the reply (if any).**

Rule 8 – Service of order, etc.

We recommend that Rule 8(1) should be revised in the following manner to set out the details as to how the order should be served (similar to the provision in Rule 36(1)(b) of the Winding-up Rules):

"(1) Unless the Court otherwise directs, the petitioner must cause an office copy of the order to be served upon the company by prepaid letter addressed to it at the registered office of the company (if any), or if there is no registered office at its principal or last known principal place of business, and on the Registrar of Companies."

The Law Society of Hong Kong
11 December 2012
1060114

HKGCC

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Helping Business since 1861

11th December, 2012

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

Dear Mr Ho,

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

The Hong Kong General Chamber of Commerce welcomes this opportunity to present its views to the Financial Services and the Treasury Bureau ("**FSTB**") and the Companies Registry on the Phase Two Consultation Document on Subsidiary Legislation for Implementation of the new Companies Ordinance. We set out below our comments on the draft subsidiary legislation.

1) Chapter 8 – Companies (Trading Disclosures) Regulation (the "C(TD)R")

In general, we support the proposals regarding the use and disclosure of a company's registered name in all "communication documents" and "transaction instruments". However, we have two specific comments on the proposals under the C(TD)R.

First, with regard to section 3(2) of the C(TD)R, we believe it is overly-prescriptive to provide that a company's registered name that is displayed through an electronic device must be on display for at least 20 continuous seconds in every 4 minutes. If the company shares rented office space with a number of other companies, it may not be possible for them to control the frequency with which their name will be displayed.

Secondly, we are concerned by section 7 of the C(TD)R and the extension of the offences to include "responsible persons" – i.e. officers (directors, the secretary and managers) and shadow directors – and indeed under section 7(2) anyone else who contravenes the relevant provisions. Under the existing Companies Ordinance (the "**Existing CO**"), the offences under section 93 are only applied to the company itself and to an officer him/herself who commits the offence, not to every responsible person. We are in favour of retaining the existing liability regime.

2) Chapter 9 – Companies (Revision of Financial Statements and Reports) Regulation (the "C(RFS&R)R")

We note that the proposed C(RFS&R)R is largely based on the existing Companies (Revision of Accounts and Reports) Regulation (Cap.32, sub. Leg. N) ("**Cap.32N**") with necessary modifications to align with the applicable provisions on accounts and audit in the new Companies Ordinance (the "**New CO**"). At the outset, we would like to state that we agree with the general principle outlined in

paragraph 9.6 of the Consultation Document that the obligations and arrangements concerning the original reporting documents as provided in the New CO should apply equally to reporting documents that are being revised.

The proposal to retain the ways in which financial statements and reports may be revised – either by wholesale replacement or by supplementary notes – is sensible. In addition, we support the standardisation of definitions and alignment of requirements.

Overall, we appreciate that the FSTB has taken this opportunity to simplify and improve the presentation of the equivalent provisions under Cap.32N. The provisions are now presented in the C(RFS&R)R in a clearer and more succinct way than Cap.32N.

Finally, we note from paragraph 9.9 of the Consultation Document that the FSTB is reviewing section 408 of the New CO (Offences relating to contents of auditor's report) to address industry concerns and to bridge potential implementation gaps. We agree that section 408(2) in particular is ambiguous and potentially extremely broad in its application. We therefore welcome the decision to review and improve the drafting.

3) ***Chapter 10 – Companies (Disclosure of Information about Benefits of Directors) Regulation (the "C(DIBD)R")***

We note that the proposed C(DIBD)R is largely based on the disclosure requirements set out in the Existing CO with necessary modifications to align with changes under the New CO. We support the commitment to facilitating compliance and improving corporate transparency by defining key terms. We welcome and agree with the changes in relation to emoluments, retirement benefits, payment for termination of services, and payment to third parties for making a director's services available. These will promote consistency across financial statements and improve accountability by assisting shareholders to make comparisons between the remuneration packages of listed companies.

We agree with the proposal to remove the requirement for disclosure of information about "specified dealings" in favour of officers (as opposed to directors). Company officers, for example the company secretary, will require the cooperation of management if they propose to enter into "specified dealings" and we believe that this constraint provides sufficient protection to shareholders and other stakeholders. The proposed refinement of the detailed disclosure requirements in this area is also welcomed.

We support the proposal to modify the requirement in the Existing CO so that authorised financial institutions ("**AFIs**") disclose the particulars of their "specified dealings" with directors in a register identical to that which is used by all other companies. We believe that this will promote transparency and better shareholder oversight. We also agree that AFIs should continue to enjoy simplified disclosure requirements in their financial statements in relation to "specified dealings" because of the nature of their businesses.

Finally, we have reviewed the proposed changes in relation to transactions, arrangements and contracts between the company and a director (direct or indirect). We believe that this is a sensible measure and brings director disclosure requirements into line with other key jurisdictions.

4) ***Chapter 11 – Companies (Residential Addresses and Identification Numbers) Regulation (the "C(RAIN)R")***

We note that the purpose of the C(RAIN)R is to improve the protection of privacy of personal information in documents for registration. We welcome and support this change. However, it is not clear from the C(RAIN)R precisely what information needs to be included in an application made for the purposes of sections 49(3), 51(3) or 58(3) of the New CO. In addition, it is not clear from the C(RAIN)R itself if any fee will be payable for making this application (although we note that paragraph 11.11 of the Consultation Document indicates that a fee will be prescribed).

5) Chapter 12 – Companies (Unfair Prejudice Proceedings) Rules

We have reviewed the proposed rules against the existing High Court Rules and Practice Directions and did not notice any gap. In addition, we have had regard to the corresponding rules under English law and did not notice any substantive differences. The draft rules appear fine to us, therefore.

We hope you will find our comments helpful.

Yours sincerely

Shirley Yuen
CEO

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

香港個人資料私隱專員公署
Office of the Privacy Commissioner
for Personal Data, Hong Kong

Your Ref:
Our Ref: PCPD(O)115/156 pt. 16

13 December 2012
CONFIDENTIAL
(By Email and Post)

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

Attention: Mr. Louis Leung
(AS for Financial Services & the Try (Financial Services)(6)1)

Dear Louis,

Re: Subsidiary Legislation for Implementation of the new Companies Ordinance – Phase Two Public Consultation

I refer to your email dated 6 November 2012 regarding the captioned matter.

2. Your attention is drawn to our letter dated 15 February 2011, to which your Bureau provided a reply on 8 March 2011. We note that both Chapters 10 ("C(DIBD)R") and 11 ("C(RAIN)R") in your Phase Two Consultation Document have issues regarding personal data privacy protection that warrant the attention of this Office.

3. Please find enclosed our submissions regarding the captioned matter. Should you have any queries, please contact the undersigned at 3423 6612.

Yours sincerely,

(Jeffrey Lau)
Legal Counsel
for Privacy Commissioner for Personal Data

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PCPD's Submissions in response to Public Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance – Phase Two Public Consultation

This submission is made by the Office of the Privacy Commissioner for Personal Data ("PCPD") in response to the public consultation carried out by the Financial Services and the Treasury Bureau in November 2012 on "Subsidiary Legislation for Implementation of the new Companies Ordinance". The comments below made by the PCPD are solely from the perspective of protection of personal data privacy.

Companies (Disclosure of Information about Benefits of Directors) Regulation ("C(DIBD)R")

2. The C(DIBD)R aims to prescribe the particulars to be disclosed in the notes to financial statements in respect of the following:-

(a) Directors' emoluments, retirement benefits, payments in respect of termination of services and consideration for directors' services;
(b) Loans, quasi-loans and other dealings in favour of directors;
(c) Directors' material interests in transactions, arrangement or contracts.

3. The above information to be disclosed, when combined with the name of the director concerned, will constitute "personal data" of the individual director within the definition of the Personal Data (Privacy) Ordinance ("PDPO"). Insofar as the information is of a financial nature, it is generally regarded as sensitive from the personal data privacy perspective. The PCPD appreciates that the disclosure of information will serve the purpose of promoting openness and transparency of the company as well as allowing the members of the company to have a better understanding of the affairs of the company in which they have invested. As regards the level of details of the information to be disclosed, the PCPD submits that it should not be excessive. It should only be limited to the extent necessary for the purpose. A balance has to be struck between members' right to know and the directors' right of privacy.

4. Under section 17 of the C(DIBD)R, the directors are required to disclose their "material interest" in transactions, arrangements or contracts which is "significant in relation to the company business". However, there are no clear definitions on "material interest" and "significant in relation to the company business". The determination is vested in the directors of company under sections 17(5) & (6). The PCPD considers that it is undesirable and suggests that more clearly defined situations should be specified which trigger the disclosure requirement.

Companies (Residential Addresses and Identification Numbers) Regulation ("C(RAIN)R")

5. The C(RAIN)R aims to stipulate the detailed and procedural matters relating to the application for withholding personal information and the application for disclosure of any withheld or protected personal information.

6. The PCPD appreciates that personal data privacy will be much enhanced by removing unrestricted public access to the residential addresses and identification numbers (i.e. the withheld or protected information as the case may be) of directors and officers of the companies or other persons who are required to report the said information pursuant to the requirements under the existing Companies Ordinance.

7. From the perspective of personal data privacy protection, the PCPD's views below will focus on the circumstances under which access to the withheld or protected information is permitted under the C(RAIN)R.

Sections 3 and 4

8. Section 3 of the C(RAIN)R concerns the application to withhold residential address or identification number from public inspection. The Registrar of Companies is conferred under section 3(1)(b) and (3) an unfettered discretion to specify any information to be supplied for an application. Section 4 further provides the residual power of the Registrar to require an applicant to supply additional information and documents for the purposes of determining the application. Insofar as the information to be specified or required by the Registrar may contain personal data of the applicant, Data

Protection Principle ("DPP") 1(1)(b) and (c) of the Personal Data (Privacy) Ordinance ("PDPO") requires a data user to collect only personal data which is necessary for the purpose and the data collected should be adequate but not excessive for the purpose. The PCPD submits that in order to be consistent with the requirement of DPP1(1)(b) and (c), it is desirable that the items of information to be required for the application be clearly spelt out in the section. While the PCPD understands that there may be justifiable reasons to retain a catch-all provision to cover any unforeseeable situations, the PCPD suggests that Section 4 be amended to restrict that the additional information and documents to be required by the Registrar should be "reasonably necessary" for the purpose.

Sections 6, 7, 10 and 11

9. With regard to the provisions that an application for the disclosure of withheld or protected information must contain any information specified by the Registrar and the residual power to obtain additional information and documents, the PCPD repeats its comments in paragraph 8 above.

Sections 8 and 12

10. Sections 8(1)(c) and 12(1)(c) permit the Registrar to disclose to members of the company the withheld or protected information. The disclosure is subject to the production of a written statement by the member confirming his/her membership under sections 8(5) and 12(5). In effect, it will confer on the members of a company the right to unrestricted access to the withheld or protected information. The PCPD considers that the reasons for applying for disclosure of the withheld or protected information should be specified for the Registrar's determination of whether or not the application should be entertained.

11. Sections 8(6), (7) and (8) provides for the written statement to be given by the liquidators, trustees, public officers and public bodies to support the application to the Registrar for disclosure of the withheld information. The statement has to confirm that the information is required for the performance of their functions and that the information would be used only for the purpose. However, it is not necessary to specify the relevant laws pursuant to which the specific functions are performed. Similar provisions are

contained in sections 12(6), (7) and (8) where an application is made for the disclosure of the protected information. The PCPD suggests that revision be made to require the aforesaid applicants to specify the relevant laws pursuant to which their functions are performed. In addition, the written statement to be given by the applicants under sections 8(6), (7), (8), and (9) has to confirm that the information is "reasonably necessary" for the purpose. For the same reasons, similar revision is suggested for sections 12(6), (7), (8) and (9).

12. Sections 8(1) and 12(1) stipulate the persons to whom the Registrar may disclose the withheld and protected information. While this is apparently meant to be an exhaustive list, the PCPD reminds that under Part VIII of the PDPO, specific exemptions are provided for the disclosure of personal data for a new purpose (i.e. a purpose other than the original collection purpose or its directly related purpose) without the prescribed consent of the data subject.

13. The consultation document does not go into details the reasons why the scheduled persons listed in the Schedule are required to obtain the withheld or protected information for the purpose of performing their functions. Without these reasons, the PCPD is unable to assess whether the access to the information is necessary. To safeguard any abusive access to the withheld or protected information, the PCPD suggests that a mechanism be built-in for the Registrar to determine whether or not to supply the information after considering the reasons supplied in the application.

Office of the Privacy Commissioner for Personal Data
13 December 2012

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Public Consultation on Subsidiary Legislation
for Implementation of the new Companies
Ordinance
15/F, Queensway Government Offices
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Our ref CSM/20
Contact Catherine Morley
2826 7228

13 December 2012

Dear Sirs

Second 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 November 2012.

Overall, we support the approaches taken in the various pieces of subsidiary legislation covered by this second 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. In particular, we have noted our strong concerns over the practical implications for the audit arising from Part 4 of the draft Companies (Disclosure of Information about Benefits of Directors) Regulation, which proposes to move the disclosure of certain directors' interests in transactions, arrangements and contracts from the Directors' Report to the notes to the financial statements.

In addition, we note that section 16 of the draft Companies (Revision of Financial Statements and Reports) Regulation is closely based on section 408 of the new Ordinance. In this regard, we note that concerns have previously been expressed by the Hong Kong Institute of Certified Public Accountants (HKICPA) in respect of the wording of section 408 and its practical impact on the profession. We would like to reiterate that we share the concerns raised by the HKICPA and believe that section 408 (and consequently section 16 of the Regulation) should be deferred for further study.

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

Yours faithfully

Comments on Annex 10: Companies (Disclosure of Information about Benefits of Directors) Regulation ("the Regulation")

1 *Section 2: Definition of "retirement benefits" and Section 4: Information about directors' retirement benefits*

In addition to setting out a more conventional interpretation of retirement benefits in parts (a)(i) and (a)(ii) of the definition of "retirement benefits" in section 2 of the Regulation, part (a)(iii) of that definition effectively states that the term "retirement benefits" "includes any lump sum, gratuity, periodical payment or other like benefit, any other property, or any other benefit whether in cash or otherwise … given or to be given on, or in anticipation of, or in connection with any change in the nature of the person's service". Similarly, part (a)(iii) of the definition of "retirement insurance scheme" effectively states that a retirement insurance scheme "means a scheme for the provision of medical, accident or life assurance coverage … on or in connection with any change in the nature of a person's service".

In this regard, the words "any change in the nature of a person's service" seem much broader than the generally accepted concept of "retirement". For example, it would seem to include an expansion in the active role of a director to include additional board committee responsibilities such as being asked to act as chair person.

On the other hand, the requirements set out in section 4 of the Regulation concerning the information to be disclosed appear unduly narrow. That is, it appears from section 4(1)(a) that the only amount discloseable is "the excess of the retirement benefits paid over the retirement benefits entitled", where the "retirement benefits paid" is defined in section 4(2)(a) as a reference to retirement benefits paid "under any retirement benefits scheme". This would appear to mean that only excessive amounts paid out of a scheme would be discloseable, a much narrower concept than the definition of "retirement benefits" set out in section 2.

Taken together, we are therefore concerned that the new wordings of sections 2 and 4 of the Regulation (as compared to the existing section 161) will cause unnecessary confusion as to which amounts should be disclosed as retirement benefits payable to directors or past directors. We therefore recommend that the wordings of sections 2 and 4 are revisited to ensure that the requirements of this Regulation are clearly stated and result in an appropriate level of disclosure.

2 *Section 11: Information about loans, quasi-loans and other dealings*

Section 11 in general covers the disclosure of information relating to loans, quasi-loans and other dealings in favour of directors of a company, or its holding company, and their controlled bodies corporate and connected entities. However, we note that the exemption from disclosure set out in section 11(5) applies only to loans or quasi-loans made by a company or its subsidiary undertaking "to an employee of the company or the subsidiary undertaking", or to credit transactions entered into "for an employee of the company or the subsidiary undertaking". This reference in section 11(5) to "employee", rather than "director" introduces uncertainty as to which directors would be entitled to this exemption i.e. it raises the question as to whether this exemption is open to all directors or only to executive directors.

To avoid this confusion, we recommend either that the word "employee" is replaced with the word "director" or that an interpretation sub-section is added to section 11(5) to explain the reference to "employee" in this context.

3 *Part 4 (sections 16-17) Disclosure of Directors' Material Interests in Transactions, Arrangements or Contracts*

We note that the wording of section 383(1)(e) requires the notes to the financial statements to include information relating to "material interests of directors in transactions, arrangements or contracts entered into by the company or another company in the same group of companies" and that Part 4 of the Regulation is intended to provide the detailed requirements pertaining to this requirement. However, we are concerned that in reproducing the disclosure requirement found currently in section 129D(3)(j) for this purpose, the proposals in the Regulation have extended the meaning of "group of companies" beyond those companies which the auditor has been appointed to report upon. Further details of our concerns are as follows:

As stated in section 17 of the Regulation, the information required to be disclosed relates to transactions entered into between a director of the company (or his/her connected entities) and any one of the following parties:

(a) the company
(b) a holding company of the company
(c) a subsidiary undertaking of the company
(d) a subsidiary undertaking of the holding company

Transactions covered under category (a) and, in the case of consolidated financial statements, category (c), will be within the scope of the statutory audit on the basis that the transactions would be recorded in the relevant company's books and records that are subject to audit.

However, the transactions covered by categories (b) and (d) are between two parties neither of whose books and records are within the scope of the auditor of the company's audit procedures.

We are also concerned that the mitigating effect of the words in section 129D(3)(j) of the existing Ordinance, which refers to "a contract of significance in relation to the company's business", has been materially impacted by the separation of the text in section 129D(3)(j) into separate sub-clauses in section 17 of the Regulation. That is, it appears that instead of "the company" in this phrase being understood as the reporting entity, as is currently the case, it appears that "a company" and "the company" in 17(4) and 17(5) refer to whichever of the companies identified in 17(1)(a) to (d) is party to the transaction in question. For example, it appears that under section 17(4) the significance of a transaction between, for example, a director and the company's holding company (under 17(1)(b)), would need to be judged with respect to the significance of that transaction to that holding company. This, again, would be requiring the auditors of the financial statements to consider matters relating to a company, which is not the company which the auditor has been appointed to report upon.

To address the above concerns, we strongly recommend that the Regulation should be modified as follows:

- sections 17(4) and 17(5) should be clarified such that it is clear that the "significance" of any given transaction is to be judged with reference to the company for which these financial statements are being prepared (i.e. the reporting entity); and/or

- the scope of Part 4 of the Regulation (as set out in section 17(1)) should be limited to only transactions, arrangement or contracts entered into by the company (i.e. category (a) only), in the case of companies which are not preparing consolidated financial statements, and the company and its subsidiary undertakings (i.e. categories (a) and (c) only) in the case of companies preparing consolidated financial statements.

If the above disclosures are considered insufficient to address the matters currently covered by section 129D(3)(j), then we recommend that the Companies (Directors' Report) Regulation, as referred to in section 388(1)(b) of the Ordinance, should be expanded to include the additional disclosures.

Comments on Annex 11: Companies (Residential Addresses and Identification Numbers) Regulation ("the Regulation")

We support the policy objective outlined in paragraph 11.3 of the Consultation Paper, which seeks to put in place a regime which strikes a balance between protecting privacy and the need for public access to certain personal information. However, we note that by including "a member of the company" in the list of persons who may obtain the withheld information, the Regulation may provide very little practical protection, since almost any member of the public may become a member of a publicly listed company. Since members will have access to the published correspondence address, we would recommend that the inclusion of members in the lists of persons who may request direct access to the withheld information be reconsidered as to whether it is consistent with the policy objective.

Deloitte.
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By Post and By Fax

Your ref.: CBT/7/6/1

14 December 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,

Consultation on the Subsidiary Legislation to be made under the new Companies Ordinance (the "Ordinance") – *Phase Two*

Thank you for your letters dated 2 November 2012 and 6 December 2012. We have the following thoughts on the proposed legislation:

Chapter 9 - Companies (Revision of Financial Statements and Reports) Regulation

This Regulation deals with revisions to financial statements as described in Section 449 of the Ordinance. We would note that in practice, for purely clerical or typographical errors that arose as part of the printing of the financial statements, companies may decide to simply replace the relevant page(s) of the financial statements without following the approach set out in Section 449 and the related Regulations. We would recommend clarifying whether such corrections are indeed within the scope of the Ordinance.

Sections 15 & 16

The Companies Registry ("CR") has agreed to hold further discussion with Hong Kong Institute of Certified Public Accountants ("HKICPA") to review section 407 and 408 of the new Companies Ordinance to improve the wordings of these sections in light of the comments provided by relevant stakeholders and Legislative Council. We believe section 407 and 408 bear critical importance to the accounting profession and we strongly support the discussion between CR and HKICPA to be held. We hereby provide our comments on Sections 407 and 408 as set out in the appendix.

Chapter 10 – Companies (Disclosure of Information about Benefits of Directors) Regulation

Division 2, Part 2 – Information to be Contained in Notes to Financial Statements

Information about directors' emoluments, retirement benefits, payments made or benefits provided in respect of termination of directors' services, consideration provided to or receivable by third parties for making available directors' services are conventionally included in the notes to the financial statements as Hong Kong Accounting Standard 24 "Related Party Disclosures" ("HKAS 24") already requires such disclosures. We suggest dropping these detailed requirements in the Regulation in order to avoid the creation of duplicative and potentially inconsistent requirements.

Division 2, Part 4 – Information to be Contained in Notes to Financial Statements

Information about material interests of directors in transactions, arrangements or contracts are required to be disclosed under HKAS 24. We suggest dropping those requirements in the Regulation to the extent that they duplicate the requirements already in the accounting standard. Any other proposed requirements in the Regulation (not covered by HKAS 24) should we suggest as a matter of practicality be required to be disclosed in the directors' report rather than in the notes to the financial statements.

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

APPENDIX

Companies Ordinance sections 407 and 408 – offences relating to content of auditor's report

In our view (and we believe that of the accountancy profession generally) they are deeply flawed. We make the following points for your consideration.

The new offences address a non-existent problem
There are already adequate criminal sanctions for the auditor who is fraudulent or dishonest. There are also already adequate sanctions in the civil law and the profession's disciplinary processes for the auditor who is negligent. Sections 407 and 408 appear directed towards a third category – the auditor who deliberately omits information from his audit report but is neither negligent nor dishonest. We seriously doubt that any such category of problem case exists.

The offences criminalise the exercise of professional judgment
Liability under the offences could be triggered by the auditor, in the exercise of his professional judgment, simply changing his mind as to whether the financial statements agree with the accounting records or as to whether he has all the information necessary for the audit, and deciding to give an unqualified audit report. Hence a perfectly honest professional judgment which turns out with the benefit of hindsight to be wrong could give rise to criminal liability. Such an outcome is objectionable in principle and out of step with many hundreds of years of law and tradition concerning professional advisors.

The offences risk criminalising mere negligence
The *mens rea* - knowledge or recklessness - applies only to the act of causing a necessary statement to be omitted. It does not apply to the rest of the *actus reus* of the offence: namely (1) the auditor having an opinion that adequate accounting records have not been kept, (2) the auditor having an opinion that the financial statements are not in agreement with the accounting records in a material respect, or (3) the auditor failing to obtain all the information or explanations that to the best of his knowledge and belief are necessary for the purpose of the audit. There will be a substantial temptation for the prosecution, working with the benefit of hindsight, to say (for example) that the auditor must have known that he had failed to get all the necessary and material information, and deliberately decided not to mention it in his audit report. It will adduce expert evidence that any competent auditor would have known that material information was missing, and ask the court to draw an inference about the defendant auditor's subjective state of mind. The effect of this is that an auditor's criminal liability will in effect be determined by an objective standard, and his subjective knowledge or lack of knowledge will not be given much independent consideration.

Imposing criminal liability for professional judgments will distort the judgment itself
Even though the maximum fine on conviction is modest, the damage inflicted on an auditor who is convicted will be enormous. Conviction will likely be a career-ending event for the individual. Audit firms are asked virtually on a daily basis by clients and regulators to certify that they and their staff do not have criminal convictions, and the damage to them of being unable to do so will also be serious. Inevitably, faced with such a threat, auditors will be forced to skew their professional judgments in favour of increased qualification of audit reports. That will cause inconvenience and damage to corporates in Hong Kong, and will push Hong Kong's audit practice out of alignment with that of other developed economies.

The analogy with the position of directors is false

It has been argued that it is justifiable to impose criminal liability on auditors because company directors can be criminally liable. That is a false analogy. Company directors are fiduciaries who hold and manage and usually share in the profits of the assets of others. Legally they are held to a high standard of probity, but only a very basic level of skill and knowledge is expected of them.

The bargain with independent professional advisors, including auditors, has traditionally been very different. They are not fiduciaries and they do not profit from the assets of others. They offer independent advice for a fee. They must attain a high level of skill and care in their work, and they can be sued if they fail to do so, but they are traditionally not subject to criminal liability except in the case of dishonesty. The offences would be a break with that long tradition. So far as we are aware, no other profession in Hong Kong is subject to criminal liability in respect of its work, except in cases of dishonesty.

Summary

In our view this legislation is misconceived and dangerous. It seems to have no up-side, because it does not tackle any real problem, but it has several serious down-sides, including:

- Auditors increasingly qualifying audit reports of Hong Kong companies out of an abundance of caution to avoid the possibility that they could later be threatened with criminal liability;
- Loss of confidence in Hong Kong companies and corporate governance;
- Loss of competitiveness for Hong Kong as a place to establish;
- Divergence of Hong Kong auditing practice from international standards;
- Diminished attractiveness of auditing as a career;
- Difficulties recruiting bright graduates into the profession;
- Damaged competiveness of Hong Kong's accountancy profession; and
- Blighted careers and lives of those convicted, even though they are morally innocent.

Proposal

In our respectful submission the implementation of this legislation should be further deferred to give time for further consultation and amendment. Alternatively, the implementing subsidiary legislation and guidelines must make clear that these offences should not be used to penalise an auditor for a bona fide professional judgment, even if with the benefit of hindsight that judgment turns out to have been wrong.

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December 14, 2012

By email: co_rewrite@fstb.gov.hk

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 the Implementation of the new Companies Ordinance Phase Two Consultation Document

The Canadian Certified General Accountants of Hong Kong Association ("CGA-HK") is pleased to respond to the consultation paper Rewrite of Companies Ordinance ("Consultation Paper") as follows:

(1) Companies (Trading Disclosures) Regulation (Annex 8):

We agree to the proposal draft except for the following:

Sub-Clause 3(1): the requirement of displaying a company's registered name on the outside of its office may not be practical to numerous professional firms which provide registered office services to their clients. We suggest that Clause 3(1) be amended as "*A company must display continuously its registered name in legible characters prominently on the outside of or at the entrance of--…..*"

Sub-Clauses 5(3) and 5(6): we have reservations for a company to be permitted to display or state its name in a translated name without registering the translated name with the Companies Registry. This would confuse and mislead the public that the translated name is properly registered since the translation can be changed from time to time without restriction.

In addition, it would further puzzle the public if the company has been exempted from section 93(2) or the company does not disclose properly the company's status of limited liability.

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(2) Companies (Revision of Financial Statements and Reports) Regulation (Annex 9)

We support the proposal.

(3) Companies (Disclosure of Information about Benefits of Directors) Regulation (Annex 10)

We support the proposal

(4) Companies (Residential Address and Identification Numbers) Regulation (Annex 11)

We support the proposal

(5) Companies (Unfair Prejudice Proceedings) Rules (Annex 12)

We have no particular comments on the rules.

If there are any questions, we should be pleased to provide our view further.

Yours faithfully,
On behalf of CGA-HK

Dr. Raymond Yeung (signed)
Professional Affairs Committee

About CGA Association
CGA-Hong Kong is the Hong Kong branch of the Certified General Accountants Association of Canada (CGA Canada). CGA Canada, one of the three recognized professional accounting bodies in Canada with members and students over 675,000 worldwide.

The Hong Kong Institute of Chartered Secretaries
Submission on Subsidiary Legislation for Implementation of the
New Companies Ordinance – Phase Two Consultation Document

9 December 2012

Part 1 – Companies (Trading Disclosures) Regulation

GENERAL COMMENTS

We welcome the regulation allowing for a company to disclose its company name at its registered office or place of business through an electronic device where such registered office or place of business is shared by six or more companies. We also consider it appropriate to extend the disclosure requirement of the company's name on the company's website, communication and transaction instruments in electronic form. These are consistent with our era of electronic communication and environmental protection in reducing paper and carbon footprint.

Article	Subject	Comments
3(2)(a)	Electronic Device	Under Article 3(2), we submit that instead of at least 20 continuous seconds, the company's name should be displayed for at least 15 continuous seconds during a four minute period. This should be sufficient notice. We further submit that the company's name could either be static or in motion during the display period. This should be clarified under the regulation.

Part 2 – Companies (Residential Addresses and Identification Numbers) Regulation

GENERAL COMMENTS We welcome the regulation which is consistent with the Personal Data (Privacy) Ordinance, Chapter 486 to enhance protection of the privacy of personal information on documents for registration with the Companies Registry.		
	Class of Persons	The regulation specifies the class of persons who could apply for disclosure of the withheld or protected information. We would recommend that this be extended to the officers of the company, that is, the directors and company secretary. A newly appointed company secretary may need to have access to such information for reconciling the company's own records.

From: Frances Chan [redacted]
Date: 17/12/2012 9:51
To: "'co_rewrite@fstb.gov.hk'"<co_rewrite@fstb.gov.hk>
Cc:
Subject: My comments on the Phase 2 Consultation on Subsidiary Legislation

Dear Sirs

I apologize for my late in submission of my following comments for your consideration:

After reading Annex 11, Companies (Residential Addresses and Identification Numbers) Regulation, I have the following comments:

1. Part 2 (3)(1)(a) – Not sure from reading this subsection if the "correspondence address" can allow overseas addresses. Suggest to state clearly in this regard.

2. Noted that "liquidator" and "trustee" are defined as those registered under the Companies (Winding Up and Miscellaneous Provisions) Ordinance and under the Bankruptcy Ordinance respectively. I am not clear when reading that Part 3 (8) and Part 4 (12) if liquidator of companies within and outside the group of the subject company is also empowered to apply to your Registry for the withheld or protected information. Your office may wish to specify if only liquidator or trustee of the subject company is entitled if appropriate. Similarly, I presume that trustee should refer to the one acting for registered / beneficial individual shareholder of the subject company.

3. Part 3 (6)(b) and Part 4 (10)(b) states that a person authorized by a data subject to obtain the withheld / protected information must provide documentary proof of the authorization. If liquidator of companies within and outside the group of the subject company is also empowered to apply to your Registry, the request for confirmation should include an explanation as to why the withheld / protected information are relevant to their liquidation case.

4. Re application to be made by member and although the Companies Registry is empowered to ask any information and documentary proof and for consistent / clarify sake, I would suggest to also require documentary evidence such as share certificate or confirmation from the subject company to prove their membership in the subject company.

I have no comments on Annex 10 and 12.

Regards

Frances Chan

pwc

羅兵咸永道

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

21 December 2012

Our Ref: DCPH.NIDD/100
Your Ref: CBT/7/6/1

Phase 2 - Public Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance

Dear Ladies and Gentlemen

We welcome the invitation to provide views on the proposed Regulations and Rules (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 9 & Annex 9 – Companies (Revision of Financial Statements and Reports) Regulation

We are seriously concerned by the decision to replicate section 408 of the new CO in section 16 of the draft Regulation in the context of revised financial statements. Firstly, we do not believe that it is appropriate to introduce a criminal penalty through secondary legislation. Secondly, we do not believe such a penalty is necessary at all.

It seems to us that there is a danger of double jeopardy for auditors, as it appears that the provisions of section 16 apply in addition to those of section 408. This is particularly so, as there in no provision in the draft Regulation that says the audit report required by section 14 of the draft Regulation becomes the audit report on the financial statements of the company in place of the report on the original financial statements.

We note that there are differences between the draft Regulation and the corresponding UK legislation (SI2008/373 "The Companies (Revision of Defective Accounts and Reports) Regulations 2008"):

1. The normal audit report requirement of section 495 of the Companies Act 2006 is disapplied – the legislation specifically says that section 495 does not apply to revised financial statements.

2. Section 507 of the Companies Act 2006 (the equivalent of section 408 of the new CO) is not replicated within the regulation. Furthermore, as the normal audit report requirements under section 495 are disapplied, the provisions of section 507 cannot be read across as section 507 specifically only applies to audit reports prepared under section 495.

3. The UK Regulations stipulate the content to be covered by the audit report on the revised financial statements. In this respect, the auditors are also required to opine on whether the directors have correctly identified the issues which had caused the original financial statements to fail to give a true and fair view. This does not seem to be the case under the draft Regulation.

4. The UK Regulations specify that the audit report required under the Regulations becomes the audit report on the annual accounts of the company in place of the report on the original annual accounts.

We consider the structure of the UK legislation is preferable as it does not introduce a criminal penalty through secondary legislation and it does not place the auditors in double jeopardy of two penalties.

We note from paragraph 9.9 that there is a proposal to initiate a review of section 408 with the Hong Kong Institute of Certified Public Accountants ("HKICPA"). We welcome this proposal, as a means to make improvements to the drafting of section 408 to address the concerns of the accounting profession and to bridge potential implementation gaps.

We recognize that the imposition of a criminal penalty on auditors under section 408 for failings related to their audit report has gone through due process and is now public policy. However, we share many of the misgivings articulated in the HKICPA's letter of 13 June 2012 to the then Chairman of the Bills Committee on Companies Bill about what is now section 408 of the new CO. We acknowledge that the concern about the application of the penalty to junior staff at audit firms has to some degree been addressed. However, concerns still remain over the lack of clarity of the concepts of "knowingly" or 'recklessly" and the unlevel playing field that has been created between auditors of Hong Kong companies with auditors of non-Hong Kong companies. We consider that the first of these concerns should be addressed as part of the proposal to review the drafting of section 408. Resolution of the second concern will require a fundamental reassessment by Government, particularly as to the implications vis-à-vis facilitating the conduct of business and encouraging the setting up and operation of companies in Hong Kong.

Chapter 8 & Annex 8 – Companies (Trading Disclosures) Regulation

Chapter 10 & Annex 10 – Companies (Disclosure of Information about Benefits of Directors) Regulation

Chapter 11 & Annex 11 – Companies (Residential Addresses and Identification Numbers) Regulation

Chapter 12 & Annex 12 – Companies (Unfair Prejudice Proceedings) Rules

We have no comments on these chapters and Annexes.

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pwc

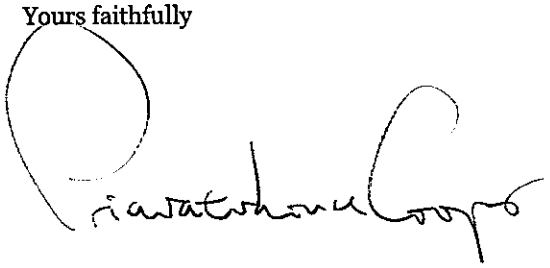
羅兵咸永道

Financial Services and the Treasury Bureau and the Companies Registry
Our Ref: DCPH.NIDD/100
Your Ref: CBT/7/6/1
21 December 2012

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 2 consultation and hope that it does not cause you undue inconvenience.

Yours faithfully



HONG KONG BAR ASSOCIATION

Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong
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Telephone: 2869 0210 Fax: 2869 0189

28th December 2012

Secretary for Financial Services
And the Treasury
Companies Bill Team
Financial Services and the Treasury Bureau
Government of the HKSAR
15/Floor, Queensway Government Offices
66 Queensway, Hong Kong.

Attn: Mr. Darryl Chan

Dear Sirs,

Consultation on the Subsidiary Legislation to be made Under the New Companies Ordinance – Phase Two

I refer to your letter of 2nd November 2012.

Please find herewith a copy of the Comments of the Hong Kong Bar Association dated 28th December 2012 in response to the Second Phase Consultation on the Subsidiary Legislation to be made under the New Companies Ordinance. The same has been endorsed during the Bar Council Meeting held on 27th December 2012.

Yours sincerely,

Kumar Ramanathan SC
Chairman

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

1. The Hong Kong Bar Association ("the Bar") has previously provided its comments on the draft Companies Ordinance in relation to some of the matters covered by the proposed Regulations. In relation to Annexes 8 to 12, the Bar has the following 2 observations.

2. First, in relation to the proposed Companies (Trading Disclosures) Regulation (Annex 8), the only matter which may have some practical significance to the issue of service of documents on companies is the exemption of companies which have no accounting transaction since incorporation from the display requirements (reg. 3(3)). However, given the combined effect of s.658(2)-(4) (which render the designation of registered office in the stipulated documents at the Companies Registry conclusive) and s.827 (which reproduces the current s.356), the Bar is of the view that such exemption is unlikely to lead to substantial disputes on service.

3. As for the Companies (Disclosure of Information about Benefits of Directors) Regulation (Annex10), the Bar notes that its suggestions in July 2007 in relation to the same have not been taken on board in the new Companies Ordinance. Nevertheless the Bar has no objection to the contents of this proposed Regulation.

28th December 2012

Hong Kong Bar Association

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

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

31 December 2012

Our Ref.: C/CB, M86522

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 2)

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 contact Mary Lam, the Institute's Deputy Director, Specialist Practices at tel. 2287 7086 or by email at < mary@hkicpa.org.hk >.

Yours faithfully,

Peter Tisman
Director, Specialist Practices

PMT/ML/ay
Encl.

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Appendix

Annex 8 Companies (Trading Disclosures) Regulation

Section 3 Display of registered name at registered office, etc.

Section 3(1) of the Regulation requires that a company must display continuously its registered name in legible characters prominently on the outside of its registered office, while section 3(2) provides for displaying of the registered name of a company by electronic means and specifies in sections 3(2)(a) and 3(2)(b) how to satisfy the requirement to "display continuously", for the purpose of section 3(1).

We welcome the modernisation of the requirement to accommodate the display of registered names of companies by electronic means. However, it would be impracticable for the names to be displayed continuously, on a 24-hour, 7-day basis, through an electronic device. It would not be meaningful or environmentally friendly to keep an electronic device on for displaying the names during Sundays, public holidays, after normal office hours (the period from late evening to early morning of the following day), given also that, during such periods, access into commercial/office buildings is often restricted. In order to facilitate the use of electronic means to display registered names, we recommend that the Regulation should be revised to clarify how the requirement to "display continuously" by using electronic devices can be satisfied, taking into consideration the practicalities.

Section 3(2) requires the registered name to be displayed for at least 20 continuous seconds once in every four minutes or to be displayed within four minutes after a request to display is made. In addition to such detailed specification, we recommend that there should also be provisions in the Regulation to cater for any breakdown or malfunction of electronic devices; otherwise, in such situations, which may occur from time to time, the company and its responsible person could inadvertently commit an offence under section 7(1) of the Regulation.

In addition, there will be practical difficulties to make available an electronic device "outside" of an office or place of business. Building owners or occupiers are generally not allowed to place objects in common areas of a building under the deed of mutual covenant of the building. They may also violate fire safety rules and regulations by placing objects in common areas. A more suitable place to install an electronic device for displaying company names would be the reception area of the office. This may result in the device not being able to be made available for public access after the office is closed. It is therefore suggested that the application of the requirement for displaying a name "on the outside of" an office or place of business, under section 3(1) of the Regulation, be revised to cater for the potential practical difficulties relating to electronic displays.

Annex 9 Companies (Revision of Financial Statements and Reports) Regulation

Section 2 Interpretation

We consider that "audit report", which is defined to mean a report on revised financial statements in this Regulation, could easily be confused with "auditor's report", which has the meaning given to it by section 357(1) of the new Companies Ordinance ("CO"). These two similar terms with different meanings could easily be confused, especially in part 5 of the Regulation, where section 15 refers to both an audit report and an auditor's report. Also, the public would generally understand the term "audit report" to mean the same as "auditor's report". Therefore to improve clarify and avoid misunderstandings, we recommend that "audit report" be replaced by "auditor's report on revised financial statements".

Section 16 Offences relating to contents of an audit report

The empowering section of this Regulation is section 450 of the new CO, which provides for various matters relating to the revised financial statements, summary financial report or directors' report to be prescribed by subsidiary legislation/regulations. Section 450(3) stipulates that the regulations (i.e., subsidiary legislation) may provide for offences for failure to take all reasonable steps to secure compliance with, or for contravention of, requirements relating to financial statements, summary financial report or directors' report that have been revised; a specified provision of the regulations; or a specified provision of the new CO as having effect under the regulations. It appears, therefore, that section 450(3) does not explicitly empower the regulations to introduce an offence relating to contents of the auditor's report on revised financial statements, akin to section 408 of the new CO in relation to the auditor's report.

It is noted that there were protracted discussions and considerable differences of opinion among the stakeholders, the government and the legislators on clause 399 (section 408 of the new CO), which introduces a criminal sanction on auditors, during the passage of the Companies Bill through the Legislative Council ("LegCo"). Committee Stage Amendments were proposed to this clause, including amendments advocated by the accountancy profession to alleviate the profession's concerns and an amendment put forward by the Administration to deal with perceived drafting and implementation issues. However, ultimately, none of the Committee Stage Amendments to clause 399 was passed by LegCo and the clause was retained in its original form when the Companies Bill was passed.

The Administration acknowledges that there is "room for future improvement to the drafting of section 408 to address industry concerns and bridge potential implementation gaps" and have indicated that they will approach the Hong Kong Institute of CPAs about a review of section 408 to improve the wording, in the light of comments received from LegCo and stakeholders (paragraph 9.9 of the consultation document).

In view of the controversy surrounding this section, we have serious concerns about the proposal to introduce an equivalent criminal sanction in respect of omissions from the contents of the auditor's report on revised financial statements through subsidiary legislation. If the original offence was considered to be, and indeed was, of sufficient importance to be incorporated in primary legislation and to have to undergo the full process of scrutiny accorded to primary legislation, it would be inconsistent and objectionable to introduce an offence of equal weight and importance through a process that ordinarily involves a lesser

degree of scrutiny and opportunity for interested parties to fully air their concerns. Introducing through subsidiary legislation an offence equivalent to section 408 for omissions from auditor's report on revised financial statements would also make this provision more susceptible to future amendment, which could, for example, mean increasing the sanctions for breach of the provision. We note that some parties already proposed heavier penalities at the time clause 399 was under consideration. Given the nature of this provision, simplifying the process of amendment in this way would be inequitable.

We are also very concerned that a proposal to reproduce in very similar terms, in this regulation, a section from the new CO, which is known to have deficiencies, and which needs to be amended, is extremely difficult to justify and would set a very dubious precedent.

We consider, therefore, that the proposed Annex 9 section 16 offence should be withdrawn. If the Adminstration considers it necessary to introduce an offence in relation to the auditor's report on revised financial statements equivalent to the section 408 offence, this should be put forward as amendments to the primary legislation at an appropriate time, which would afford all stakeholders a full opportunity to have their views heard and to suggest any changes that they consider necessary or desirable.

Annex 10 Companies (Disclosure of Information about Benefits of Directors) Regulation

Section 2 Interpretation of Part 2
Section 4 Information about directors' retirement benefits

Definition of "retirement benefits"

The new wording of section 2 and section 4 of the Regulation (as compared with section 161 of the existing CO) will cause unnecessary confusion as to which amounts should be disclosed as retirement benefits payable to directors or past directors. We recommend that the wording of sections 2 and 4 be revisited to ensure that the requirements of this Regulation are clearly stated and result in an appropriate level of disclosure. Details of our concerns are as follows:

(i) Part (a)(iii) of the definition of retirement benefits effectively states that the term "includes any lump sum, gratuity, periodical payment or other like benefit, any other property, or any other benefit whether in cash or otherwise … given or to be given on, or in anticipation of, or in connection with any change in the nature of the person's service". Similarly, part (a)(iii) of the definition of retirement insurance scheme effectively states that it "means a scheme for the provision of medical, accident or life assurance coverage … on or in connection with any change in the nature of a person's service". The phrase "any change in the nature of a person's service" appears much broader than the generally accepted concept of "retirement". For example, it would seem to include an expansion in the active role of a director to include additional board committee responsibilities, such as being asked to act as chair person.

(ii) On the other hand, the requirements set out in section 4 of the Regulation concerning the information to be disclosed appear unduly narrow. That is, it appears from section 4(1)(a) that the amount discloseable is "the excess of the retirement benefits paid over the retirement benefits entitled", where the "retirement benefits paid" is defined in section 4(2)(a) as a reference to retirement benefits paid "under any retirement benefits scheme". This would appear to mean that only any amounts paid out of a scheme that exceed entitlements would be discloseable, which is a much narrower concept than the definition of "retirement benefits" set out in section 2.

Part 4 Disclosure of Directors' Material Interests in Transactions, Arrangements or Contracts (sections 16 and 17)

Part 4 of the Regulation stipulates the detailed provisions pertaining to the requirements of section 383(1)(e), which are that the notes to the financial statements should contain information relating to "material interests of directors in transactions, arrangements or contracts entered into by the company or another company in the same group of companies". It is noted that part 4 of the Regulation reproduces the disclosure requirement in section 129D(3)(j) of the existing CO, which in effect brings the disclosures of directors' interests in contracts into the financial statements and, therefore, into the audit scope, rather than being in the directors' report. As a result, part 4 of the Regulation requires the notes to the financial statements to include information relating to transactions between parties, other than those companies upon which the auditor has been appointed to report.

As stated in section 17 of the Regulation, the information required to be disclosed relates to transactions, arrangements or contracts entered into between a director of the company (or his/her connected entities) and any one of the following parties:

(a) the company;
(b) a holding company of the company;
(c) a subsidiary undertaking of the company; or
(d) a subsidiary undertaking of the holding company.

Transactions covered under category (a) and, in the case of consolidated financial statements, category (c), will be within the scope of the auditor's procedures, on the basis that the transactions, arrangements or contracts will be recorded in the relevant company's books and records that are subject to audit.

However, the transactions covered by categories (b) and (d) are between two parties neither of which are within the scope of the auditor or the company's audit procedures.

In view of the above, we consider that it would be better were disclosure of directors' material interests in transactions, arrangements or contracts to stay in the directors' report. However, since section 383(1)(e) of the new CO has already stipulated that such information is to be contained in the notes to financial statements, we propose that the subsidiary legislation narrow down the scope of this section by limiting the interpretation of the phrase "the company or another company in the same group of companies" in section 383(1)(e) to categories (a) and (c) above.

It would also be helpful if sections 17(4) and 17(5) could clarify that the "significance" of any such transaction is to be judged with reference to the company for which these financial statements are being prepared (i.e., the reporting entity). The current drafting is unclear as to whether "a company" and "the company" in sections 17(4) and 17(5) refer to the reporting entity or to whichever of the companies identified in sections 17(1)(a) to (d) is a party to the transaction in question. In other words, it is not clear whether the significance of a transaction between, for example, a director and the company's holding company (under section 17(1)(b)), should be judged with respect to the significance of that transaction to the company itself or to the holding company.

If the disclosures are considered insufficient to address the matters currently covered by section 129D(3)(j), then we recommend that the Companies (Directors' Report) Regulation, as referred to in sections 388(1)(b) and 388(2)(b) of the new CO, should be expanded to include those additional disclosures.

Annex 11 Companies (Residential Addresses and Identification Numbers) Regulation

No specific comments.

Annex 12 Companies (Unfair Prejudice Proceedings) Rules

Rule 7 Drawing up of order

Rule 7(1) requires a draft of the order to be drawn up "before the expiry of the day following the day on which an order under section 725 of the Ordinance is pronounced in the Court".

We would like to seek clarification of the following technical and administrative matters:

(a) What if the day following the day on which an order is pronounced is a holiday? Would the day that a draft of the order has to be drawn up be deferred to the first business day following the day on which an order is pronounced?

(b) Would the phrase "leave with the Registrar" a draft of the order and all other documents under rule 7(1) mean physical delivery of the documents to the office of the Companies Registry? Would it be acceptable for the documents be delivered via electronic means and, if so, would the documents be required to be saved in any specific format?

(c) Since it is required to leave with the Registrar a draft of the order and all other documents before the expiry of the relevant day, it would seem that, from a practical point of view, "before the expiry of the day" could not be at 23:59 on that day and that the relevant documents should be delivered to / received by the Registrar by a certain time specified by the Registrar.

We suggest that the above technical issues need to be clarified in the Rules.

Rule 8 Service of order, etc.

It appears that "order" in rule 8(1) would mean the order referred to in rule 7(1), i.e., an order under section 725 of the new CO, but it is not sufficiently clear. Please also clarify whether an "office copy" of the order is meant to be a sealed copy of the order and, if not, to what does it refer?

General comment

We understand that at present, practitioners just need to issue a High Court Companies (Winding-up) petition even if the primary relief they seek is one of buy-out under section 168A of the existing CO, so long as winding-up is one of the reliefs. It is not clear whether practitioners will still be able to do the same after the new Rules take effect. It appears that the new Rules anticipate that a High Court Miscellaneous Proceedings petition should be issued, even if one of the reliefs is winding-up. We would suggest that this matter be clarified and further explanation be provided as to how this will work.