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Companies Registry External Circular No. 5/2012

Passage of the new Companies Ordinance

As a major milestone in the legislative history of Hong Kong, I am pleased to announce the passage of the Companies Bill by the Legislative Council on 12 July 2012.

Background

2. A comprehensive exercise to rewrite the Companies Ordinance (Cap. 32) was launched in mid-2006 with the aim of modernising Hong Kong's company law and further enhancing Hong Kong's status as a major international business and financial centre. Following five rounds of public consultations and numerous discussions during a series of public forums and seminars over the years, the Companies Bill was finalised and introduced into the Legislative Council ("LegCo") on 26 January 2011. A Bills Committee to scrutinise the Bill was formed under the chairmanship of the Honourable Paul Chan Mo-po, MH, JP, in February 2011. After 44 meetings lasting a total of over 120 hours and consideration of over 200 papers or submissions, the Bills Committee completed its scrutiny of the Bill in June 2012. On 12 July 2012, the Companies Bill was passed by LegCo.

The new Companies Ordinance

3. The new Companies Ordinance ("the new CO"), which consists of more than 900 sections and 10 schedules, provides a modernised legal framework for the incorporation and operation of companies in Hong Kong.

Major initiatives in the new CO

4. The new CO aims to achieve four main objectives, namely, to enhance corporate governance, ensure better regulations, facilitate business and modernise the law. A summary of the major initiatives introduced to achieve these objectives is set out at **Annex**.

Highlights of some of these initiatives are set out as follows:

(a) Abolishing Par Value for Shares

The new CO adopts a mandatory system of no-par for all companies with a share capital and retires the par value of shares, in line with international trends and to provide companies with more flexibilities in structuring their share capital.

(b) Restricting Corporate Directorship in Private Companies

Every private company is required to have at least one director who is a natural person, to enhance transparency and accountability. A grace period of six months from the commencement date of the new CO will be given for companies to comply with the new requirement.

(c) Replacing the Headcount Test

The “headcount test” for privatisations and specified schemes of arrangement is replaced by a “not more than 10% disinterested voting” requirement. The court is given a new discretion to dispense with the “headcount test” in cases where it is retained for members’ schemes.

(d) Clarifying Directors’ Duty of Care, Skill and Diligence

With a view to providing clear guidance to directors, the standard for company directors’ duty of care, skill and diligence is clarified in the new CO to incorporate a mixed objective and subjective test.

(e) Strengthening the Enforcement Regime

The new CO strengthens the enforcement regime in relation to the liabilities of officers of companies for contravention of provisions in the Ordinance, including lowering the threshold for prosecuting a breach or contravention through a new definition of “responsible person”.

(f) Facilitating Simplified Reporting

The new CO allows companies that meet specified size criteria to prepare simplified financial statements and directors’ reports. Larger private companies that do not meet the specified size criteria will also be entitled to prepare simplified financial statements and directors’ reports if their sizes do not exceed a higher threshold provided that members holding 75% of the voting rights so resolve and no member objects.

(g) Strengthening Auditors' Rights

An auditor is empowered to require a wider range of persons, including the officers of a company's Hong Kong subsidiary undertakings and any person holding or accountable for the accounting records of the company or its subsidiary undertakings, to provide information or explanation reasonably required for the performance of the auditor's duties. The offence for failure to provide the information or explanation is extended to cover officers of the company and the wider range of persons.

Implementation

5. To facilitate implementation of the new CO, over ten regulations will have to be made in 2013-14. In parallel, the Companies Registry will enhance its information system and carry out an overall review of its procedures and forms for the implementation of the new legislation. The new CO is expected to commence operation in 2014.

Updates on our website

6. A dedicated thematic section on the "New Companies Ordinance" has been set up on the website of the Companies Registry at www.cr.gov.hk to provide information and updates on the implementation of the new CO. The full version of the new CO will be uploaded upon its publication in the gazette in late July. The Registry will continue to update the thematic section with briefing materials and guidelines on the new CO before its implementation. To ensure that relevant stakeholders are aware of the requirements of the new legislation, seminars / briefing sessions will be arranged nearer the time of implementation.

7. To receive email notifications of the updates, please register for our e-News service, free of charge, at the "What's New > Companies Registry News Subscription" section of the Registry's website.

Enquiries

8. Enquiries concerning this circular should be directed to Mr YU Kwok-kuen, Assistant Registry Manager (Registration) 2, at (852) 2867 5365 / kkyu@cr.gov.hk or Ms Agnes Wong, Assistant Registry Manager (Customer Services), at (852) 2867 4570 / agneswong@cr.gov.hk.

Ms Ada LL CHUNG
Registrar of Companies

The New Companies Ordinance – Major Initiatives¹

MEASURES FOR ENHANCING CORPORATE GOVERNANCE

Strengthening the Accountability of Directors

- Restricting the appointment of corporate directors by requiring every private company to have at least one natural person to act as director, to enhance transparency and accountability.
- Clarifying in the statute the directors' duty of care, skill and diligence with a view to providing clear guidance to directors.

Enhancing Shareholder Engagement in the Decision-Making Process

- Introducing a comprehensive set of rules for proposing and passing a written resolution.
- Requiring a company to bear the expenses of circulating members' statements relating to the business of, and proposed resolutions for, Annual General Meetings, if they are received in time to be sent with the notice of the meeting.
- Reducing the threshold requirement for members to demand a poll from 10% to 5% of the total voting rights.

Improving the Disclosure of Company Information

- Requiring public companies and the larger (i.e., companies that do not qualify for simplified reporting) private companies² and guarantee companies³ to prepare a more comprehensive directors' report which includes an analytical and forward-looking "business review", whilst allowing private companies to opt out by special resolution. The business review will provide useful information for shareholders. In particular, the requirement to include information relating to environmental and employee matters that have a significant effect on the company is in line with international trends to promote corporate social responsibility.

¹ The Companies Bill was passed by the Legislative Council on 12 July 2012. The new Companies Ordinance would come into operation after the enactment of over ten subsidiary legislation.

² Under the new Ordinance, a private company is regarded as small if it satisfies any two of the following conditions: (a) total annual revenue of no more than HK\$100 million; (b) total assets of no more than HK\$100 million; and (c) no more than 100 employees.

³ Under the new Ordinance, a guarantee company is regarded as small if its total annual revenue does not exceed HK\$25 million.

Fostering Shareholder Protection

- Introducing more effective rules to deal with directors' conflicts of interests, including expanding the requirement for seeking shareholders' approval to cover directors' employment contracts which exceed three years.
- Requiring disinterested shareholders' approval in cases where shareholders' approval is required for transactions of public companies and their subsidiaries.
- Requiring the conduct of directors to be ratified by disinterested shareholders' approval to prevent conflicts of interest and possible abuse of power by interested majority shareholders in ratifying the unauthorised conduct of directors.
- Replacing the "headcount test" with a not more than 10% disinterested voting requirement for privatisations and specified schemes of arrangement, while giving the court a new discretion to dispense with the test (in cases where it is retained) for members' schemes.
- Extending the scope of the unfair prejudice remedy to cover "proposed acts and omissions", so that a member may bring an action for unfair prejudice even if the act or omission that would be prejudicial to the interests of members is not yet effected.

Strengthening Auditors' Rights

- Empowering an auditor to require a wider range of persons, including the officers of a company's Hong Kong subsidiary undertakings and any person holding or accountable for the company or its subsidiary undertakings' accounting records, to provide information or explanation reasonably required for the performance of the auditor's duties. The offence for failure to provide the information or explanation is extended to cover officers of the company and the wider range of persons.

MEASURES FOR ENSURING BETTER REGULATION

Ensuring the Accuracy of Information on the Public Register

- Clarifying the powers of the Registrar of Companies (the Registrar) in relation to the registration of documents, such as specifying the requirements for the authentication of documents to be delivered to the Companies Registry (the Registry) and the manner of delivery, and withholding the registration of unsatisfactory documents pending further particulars.
- Clarifying the Registrar's powers in relation to the keeping of the register, such as rectifying typographical or clerical errors, making annotations and requiring a company to resolve any inconsistency or provide updated information.

- Providing a statutory basis for applications to court for removing information from the register that is inaccurate, forged or derived from anything invalid, ineffective or done without the authority of the company.
- Requiring a company to deliver to the Registry a return, including a statement of capital, whenever there is a change to its capital structure, to ensure that the public register contains up-to-date information on a company's share capital structure.

Improving the Registration of Charges

- Revising the list of registrable charges, such as expressly providing that a charge on an aircraft or any share in an aircraft is registrable, and removing the requirement to register a charge for the purpose of securing an issue of debentures.
- Replacing the automatic acceleration of the repayment obligation with a choice given to the lender as to whether the secured amount is to become immediately payable when a charge is void due to non-compliance with the registration requirements.
- Requiring a certified copy of the charge instrument (in addition to the prescribed particulars of the charge) to be registered and available for public inspection, to provide more detailed information to those who search the register.
- Shortening the period for delivery to the Registrar of the charge instrument and the prescribed particulars from five weeks to one month, to reduce the period during which the charge is not visible on the register.
- Requiring written evidence of satisfaction/release of a charge to accompany a notification to the Registrar for registration of the satisfaction/release, thus making such documents available for public inspection.

Refining the Scheme for Deregistration of Companies

- Imposing three additional conditions for the deregistration of defunct companies, namely that the applicant must confirm that the company is not a party to any legal proceedings and that neither the company nor its subsidiary has any immovable property in Hong Kong, to minimise any potential abuse of the deregistration procedure.

Improving the Enforcement Regime

- Enhancing the investigatory powers of an inspector, for example, by requiring a person under investigation to preserve records or documents and to verify statements made by statutory declaration.

- Providing better safeguards to ensure the confidentiality of information obtained in investigations and enquiries and for the better protection of informers.
- Providing new powers for the Registrar to obtain documents or information to ascertain whether any conduct that would constitute an offence in relation to the provision of false or misleading statement to the Registrar has taken place.
- Strengthening the enforcement regime in relation to the liabilities of officers of companies for the companies' contravention of provisions in the new Ordinance, including lowering the threshold for prosecuting a breach or contravention and extending it to cover reckless acts through a new definition of "responsible person".
- Introducing a new offence in relation to inaccurate auditor's reports. The offence would be committed if the auditors in question knowingly or recklessly caused two important statements to be omitted from the auditor's report.
- Empowering the Registrar to compound specified offences to optimise the use of judicial resources. Compoundable offences are generally confined to straightforward, minor regulatory offences committed by companies that are punishable by a fine.

MEASURES FOR FACILITATING BUSINESS

Streamlining Procedures

- Allowing companies to dispense with Annual General Meetings by unanimous shareholders' consent.
- Introducing an alternative court-free procedure for reducing capital based on a solvency test.
- Allowing all types of companies (rather than just private companies, as in the current Companies Ordinance (Cap.32)) to purchase their own shares out of capital, subject to a solvency test.
- Allowing all types of companies (whether listed or unlisted) to provide financial assistance to another party for the purpose of acquiring the company's own shares or the shares of its holding company, subject to a solvency test. Under the current Companies Ordinance, subject to certain specified exceptions, there is a broad prohibition on the giving of financial assistance to purchase the company's own shares.
- Introducing a new court-free statutory amalgamation procedure for wholly owned intra-group companies.

- Streamlining the procedures for the restoration of dissolved companies by court order.
- Introducing a new administrative restoration procedure for a company dissolved by the Registrar in straightforward cases, without the need for recourse to the court.

Facilitating Simplified Reporting

- Facilitating SMEs to prepare simplified financial and directors' reports along the following lines:
 - a private company (with the exception of a bank/deposit-taking company, an insurance company or a stockbroker) will automatically qualify for simplified reporting if it qualifies as a "small private company".
 - the holding company of a group of companies that qualifies as a "group of small private companies" will also qualify for simplified reporting.
 - a private company that is not a member of a corporate group may adopt simplified reporting with the agreement of all the members.
- Allowing small guarantee companies and groups of small guarantee companies, which have a total annual revenue of not more than \$25 million, to qualify for simplified reporting.
- A private company or a group of private companies which is not qualified as a "small private company" or a "group of small private companies" respectively may prepare simplified reports if it meets a higher size criteria and if the members holding 75% of the voting rights so resolve and no member objects.
- Making the summary financial reporting provisions more user-friendly and extending their application to companies in general (rather than confining them to listed companies, as in the current Companies Ordinance).

Facilitating Business Operations

- Making the use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad.
- Permitting a general meeting to be held at more than one location using electronic technology.
- Setting out the rules governing communications to and by companies in electronic form.

MEASURES FOR MODERNISING THE LAW

Abolishing Par Value for Shares

- Adopting a mandatory system of no-par for all companies with a share capital as par value is an antiquated concept that may give rise to practical problems, such as inhibiting the raising of new capital and unnecessarily complicating the accounting regime.

Removing the Power to Issue Share Warrants

- Removing the power of companies to issue share warrants to bearers. Share warrants are rarely issued by companies nowadays and are undesirable from the perspective of anti-money laundering because of the lack of transparency in the recording of their ownership and the manner by which they are transferred.

Better Protection of Personal Data

- Introducing new provisions for withholding directors' residential addresses and full identity card/passport numbers of individuals from public inspection in order to foster the protection of personal data.

Clarifying the Rules on Indemnification of Directors against Liabilities to Third Parties

- Clarifying the rules on the indemnification of directors against liabilities to third parties in order to remove the uncertainties at common law.