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Panel on Financial Affairs
Meeting on 2 April 2007

Background Brief
on the Companies Ordinance rewrite exercise

Purpose

This paper sets out the background of the rewrite exercise for the Companies Ordinance (Cap. 32) (CO), and summarizes Members' major views and concerns on the subject.

Background

Need for the rewrite of the Companies Ordinance

2. The CO is one of the largest and most complex pieces of legislation in Hong Kong with over 600 sections and subsections and 20 schedules. It is essentially derived from the Companies Act of the United Kingdom (UK) first enacted in 1865 and is broadly in line with the major UK company law reforms taken place in 1948 and 1976. The last major review of the CO took place in 1984. Since then, there have been amendments from time to time to keep the Ordinance attuned to business needs. The Standing Committee on Company Law Reform (SCCLR)¹ was formed in 1984 to advise on necessary amendments to the CO on a continuous basis.

3. In February 2000, the SCCLR published "The Report of the Standing Committee on Company Law Reform on the Recommendations of a Consultancy Report of the Review of the Hong Kong Companies Ordinance" (the SCCLR Report). Subsequently, the SCCLR conducted a major corporate governance review and issued two consultation papers in 2001 and 2003. Although many recommendations of the SCCLR's Report and the review have been implemented

¹ Members of SCCLR include representatives of Securities and Futures Commission, the Hong Kong Exchanges and Clearing Limited and relevant government departments, as well as personalities from the relevant sectors or professions such as accountancy, legal and company secretarial.

through a series of amendment bills² over the past few years, it has been found that piecemeal amendments to the Ordinance are no longer desirable. The Administration considers that a complete rewrite and restructuring of the CO is necessary and vital for Hong Kong for the following reasons:

- (a) Action to follow up many of SCCLR's recommendations, such as restructuring of the CO, reform of the capital maintenance provisions and modernization of statutory language, etc., can only be taken forward in the context of a rewrite of the CO.
- (b) There are certain issues inherent in the existing CO which can only be dealt with through a rewrite of the Ordinance. For example, there is a prima facie need to break up and rearrange Part IV of the CO to improve its accessibility and clarity as most of the core provisions regarding company administration, general meetings, accounts and audit, company inspections and shareholder remedies etc. are all crammed into this Part.
- (c) A new CO, which provides for a streamlined and modernized corporate governance regime, will meet more fully the needs of more than half a million local and overseas companies registered in Hong Kong and help save their compliance costs.
- (d) The rewrite of the CO will provide an opportunity for Hong Kong to leverage from the developments regarding company law taking place around the world. For instance, one of the objectives of the UK company law reform is to facilitate the wider use of electronic communications and simplification of procedures for the conduct of company businesses.
- (e) The SCCLR and members of the Bills Committees formed by LegCo to study various company amendment bills have on previous occasions indicated support for the proposal to rewrite the CO.

The rewrite exercise

4. The Administration discussed with the FA Panel its proposal to rewrite the CO at the meetings on 5 July 2004, 4 July 2005, 7 November 2005 and 16 October 2006. Members of the Panel indicated support for the proposal. To provide the necessary staffing support to take forward the rewrite exercise, approval was given by the Finance Committee on 13 January 2006 for the creation of 13 posts (three directorate and ten non-directorate posts) in the Financial Services and the Treasury

² Notably the Companies (Amendment) Ordinance 2003 and Companies (Amendment) Ordinance 2004 which implement the SCCLR's recommendations on matters such as the formation of one-member companies, reduction in the threshold for circulating shareholders' proposals and removal of directors by ordinary resolution instead of special resolution etc.

Bureau, Companies Registry and Department of Justice (DoJ) for a limited period of 24 to 60 months.³

5. Given the extensive nature of the exercise, the Administration has adopted a phased approach to take forward the rewrite. It will rewrite the non-winding up provisions⁴ in the first phase of the exercise, as they affect the daily operation of some 600 000 live companies. The winding-up related provisions⁵ in the CO, which primarily deal with companies in liquidation and are administered by the Official Receiver's Office, will be dealt with in the second phase of the rewrite. The key features of the rewrite exercise comprise the following:

- (a) **Research:** This includes conducting legal/policy research into the existing provisions of the CO, corresponding provisions as well as developments in company law taking place in other major common law jurisdictions; identifying issues associated with the operation of the provisions; working out options on how to tackle them; analyzing their advantages and disadvantages; formulating recommendations, preparing drafting instructions; drafting the new Companies Bill and assisting LegCo to scrutinize the Bill.
- (b) **Consultation:** The SCCLR plays a key role in the exercise, including keeping an overview of the rewrite and advising on all the major recommendations arising from the rewrite. Four dedicated Advisory Groups (AGs) comprising mainly representatives from relevant professional bodies, major chambers of commerce and company law academics have been formed to advise on the specific areas of the CO.⁶ As regards the general public, the Administration's plan is to publish a White Bill in mid-2009 to consult them on the various proposals to reform the CO before introducing the Companies Bill. In the meantime, the Companies Bill Team (CBT) set up in mid-2006 will roll out several topical public consultations, the first being the consultation on accounting and auditing provisions launched in the first quarter of 2007.
- (c) A Steering Committee, chaired by the Permanent Secretary for Financial Services and the Treasury (Financial Services) and

³ As at the end of October 2006, all except 3 non-directorate posts to be created in DoJ have been filled.

⁴ Major issues involved could include, for example, the enforcement and oversight of accounting standards; problems relating to the present registration system of company charges; matters relating voting by institutional shareholders at company meetings and the idea of empowering beneficial shareholders to exercise their voting rights etc.

⁵ Mainly Parts IVA, V, VI and X of the existing CO and the relevant subsidiary legislation.

⁶ The four AGs will cover the following areas: (i) share capital, distribution of profits and assets and charges provisions; (ii) company formation, registration, re-registration, and company meeting and administration provisions; (iii) directors and officers related provisions; and (iv) inspections, investigations and offences and punishment provisions.

comprising senior representatives of relevant departments such as CR and DoJ, has been established to steer the rewrite.

- (d) The dedicated CBT headed by a Deputy Secretary for Financial Services and Treasury (Financial Services) and comprising both policy and legal staff is tasked to implement the first phase of the exercise. CBT consists of two integrated Policy and Legal Research Divisions and will heavily draw on the professional advice and input of DoJ, in particular the Law Drafting Division, and the Commercial Unit (CU) of the Civil Division (CD) of the Department. Moreover, CBT has engaged an external consultant to study and recommend proposals to reform some of the more complex areas, including share capital and debentures (Part II), distribution of profits and assets (Part IIA) and charges (Part III).
- (e) The total estimated cost of the rewrite exercise, including the estimated expenditure for the engagement of the external consultant, will be within \$91 million, to be spent over a period of five years. The cost will be met by the Companies Registry Trading Fund (CRTF).
- (f) The tentative timetable for the rewrite exercise announced by the Administration in November 2005 is as follows:

<u>Activity</u>	<u>Tentative Timing</u>
Formation of CBT and engagement of consultants	First quarter of 2006 – Mid 2006
Research and preparation of the White Bill (including public consultations on major issues in stages)	Mid 2006 – Mid 2009
Publication of a White Bill for public consultation	Mid 2009 – end 2009
Revision of the White Bill	First quarter of 2010 – Mid 2010
Introduction of the New Companies Bill into the LegCo	Third quarter of 2010

Major views and concerns expressed by Members

6. Members have followed closely the Administration's proposal to rewrite the CO. While welcoming the exercise, Members have raised the following views and concerns for the Administration's consideration:

- (a) To enhance the cost-effectiveness of the rewrite exercise, there was a suggestion that the Administration should consider making reference to the outcome of the UK Company Law Reform and the relevant provisions of the UK legislation. Nevertheless, to ensure that the future legislation would suit Hong Kong's needs best, the Administration was urged to make reference to a broader range of company law regimes of other jurisdictions in formulating an appropriate option for Hong Kong and draft the Companies Bill having regard to the special circumstances of Hong Kong instead of blindly copying international requirements and practices in company regulation.
- (b) To ensure the quality of the rewrite exercise, the Administration should recruit staff of the right calibre to join the CBT, engage consultants with the appropriate experience and expertise to undertake related research, and put in place an appropriate administrative structure delineating the roles and duties of the various parties involved in the process. Moreover, the SCCLR/Law Reform Commission should be invited to make recommendations on the outstanding issues which needed to be tackled in the rewrite of the CO, namely, the provisions relating to shareholders' disputes and winding-up of companies.
- (c) Members stressed that the rewrite exercise should aim at keeping the CO up-to-date to meet present day circumstances and improve the business environment of Hong Kong, for example, by facilitating the use of electronic communications and simplifying procedures for the conduct of company business.
- (d) There was considerable concern over the resources requirements for the rewrite exercise, and the justification for creating additional supernumerary posts and engaging an external consultant. To monitor the cost-effectiveness of the use of resources, the FA Panel has requested the Administration to provide information on the financial resources incurred and the progress of the rewrite exercise.
- (e) In order that Hong Kong's regulatory regime would be on par with international standards, the Administration was urged to expedite the rewrite exercise by identifying major areas for reform, developing proposals for public consultation and drafting the new Companies Bill sequentially and in stages.
- (f) In view of the complex legal and technical issues involved in the rewrite exercise, there was concern that if the Bill was introduced into LegCo in the third quarter of 2010, there might not be sufficient time for Members to complete scrutiny of the Bill before the expiry of the LegCo term in July 2012.

Latest position

7. The Administration will update the Panel on the progress of the CO rewrite exercise at the meeting on 2 April 2007.

References

8. A list of relevant papers is in **Appendix**.

Council Business Division 1
Legislative Council Secretariat
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Appendix

List of relevant papers

Committee	Paper	LC Paper No.
Meeting of Panel on Financial Affairs (FA Panel) on 5 July 2004	✧ Administration's paper on "Overall Review of the Companies Ordinance " http://www.legco.gov.hk/yr03-04/english/panels/fa/papers/fa0705cb1-2254-5e.pdf	CB(1)2254/03-04(05)
	✧ Minutes of the FA Panel meeting on 5 July 2004 http://www.legco.gov.hk/yr03-04/english/panels/fa/minutes/fa040705.pdf	CB(1)2513/03-04
Meeting of FA Panel on 4 July 2005	✧ Administration's paper on "Rewrite of the Companies Ordinance" http://www.legco.gov.hk/yr04-05/english/panels/fa/papers/fa0704cb1-1919-11e.pdf	CB(1)1919/04-05(11)
	✧ Background Brief on rewrite of the Companies Ordinance http://www.legco.gov.hk/yr04-05/english/panels/fa/papers/fa0704cb1-1919-12e.pdf	CB(1)1919/04-05(12)
	✧ Minutes of the FA Panel meeting on 4 July 2005 http://www.legco.gov.hk/yr04-05/english/panels/fa/minutes/fa050704.pdf	CB(1)2357/04-05
Meeting of FA Panel on 7 November 2005	✧ Administration's paper on "Rewrite of the Companies Ordinance" http://www.legco.gov.hk/yr05-06/english/panels/fa/papers/fa1107cb1-193-4e.pdf	CB(1)193/05-06(04)
	✧ Background Brief on rewrite of the Companies Ordinance http://www.legco.gov.hk/yr05-06/english/panels/fa/papers/fa1107cb1-193-5e.pdf	CB(1) 193/05-06(05)

