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Panel on Financial Affairs

Special meeting on 11 June 2009

Background brief on the Companies (Amendment) Bill 2009

Purpose

This paper recapitulates the background of the rewrite exercise of the Companies Ordinance (Cap. 32) (the Ordinance) and the Companies (Amendment) Bill 2009 (the Bill), which contains amendment proposals to the Ordinance ahead of the rewrite exercise. It also summarizes Members' views in relation to the proposed legislative amendments under the Bill.

Background

2. The Ordinance is one of the largest and most complex piece of legislation in Hong Kong with over 600 sections and subsections and 20 schedules. The last major review of the Ordinance 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 January 1984 to advise the Financial Secretary on necessary amendments to the Ordinance as and when experience showed such amendments were required.

3. In February 2000, 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). Although many recommendations of the SCCLR's Report and the review have been implemented through a series of amendment bills 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 Ordinance is necessary to enhance Hong Kong's competitiveness and attractiveness as a major international business and financial centre, and to

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.

modernize Hong Kong's company law in the light of experiences of comparable common law jurisdictions.

Progress of the rewrite exercise

4. Given the extent and the complexity involved, the rewrite exercise is taken forward in two phases. Phase I of the Ordinance rewrite exercise focuses on the core company provisions affecting the daily operation of some 700 000 live companies, while Phase II will deal with all winding-up related provisions in the Ordinance. The Administration has conducted three topical public consultations in 2007 and 2008 to gauge views on certain complex issues. The Administration will take into account public feedback from the consultations in preparation of a draft Companies Bill for public consultation in the fourth quarter of 2009 before it is introduced into the Legislative Council (LegCo) around October 2010. The Administration discussed with the Panel on Financial Affairs (FA Panel) its proposal to rewrite the Ordinance at the meetings on 5 July 2004, 4 July 2005, 7 November 2005, 16 October 2006, 7 May 2007 and 26 February 2009. The views and suggestions of Members on the rewrite exercise are summarized at **Appendix**.

5. Ahead of the rewrite exercise, the Administration will introduce another amendment bill (i.e. the Companies (Amendment) Bill 2009) in the last quarter of 2009 for implementation of electronic company incorporation and other technical amendments. This will include legislative amendments to facilitate electronic incorporation of companies, electronic and website communications by a company to its shareholders, exempting listed companies from giving notice of closure of register of members by advertisement in a newspaper, enabling multiple statutory derivative actions and technical amendments paving the way for scripless trading. Amendments will also be proposed through the Bill to tackle the problem of "shadow companies" which has exploited the company name registration system in Hong Kong to facilitate their counterfeiting activities. The Administration also plans to implement simultaneous application for company incorporation/registration and business registration upon the implementation of electronic incorporation of companies. In this connection, relevant legislative amendments will have to be made to the Business Registration Ordinance (Cap. 310). The Business Registration (Amendment) Bill 2009 will be introduced together with the Companies (Amendment) Bill 2009 for this purpose.

Major views and concerns expressed by Members

6. The Administration advised the FA Panel of the proposed amendments under the Companies (Amendment) Bill 2009 during its progress report on the rewrite exercise at the meeting on 26 February 2009. Members have expressed the following views in relation to the proposed legislative amendments:

- (a) In the light of the recent recommendation of the Court of Final Appeal for legislative amendments to allow for multiple derivative

actions, a member expressed concern that the statutory derivative action regime under the Ordinance did not provide for multiple derivative actions, and considered that amendments should be made to rectify the problem.

- (b) On the legislative amendments to tackle possible abuses of company name registration regime by "shadow companies", a member suggested that the Administration should make reference to the relevant Mainland regulations and requirements in preparation of the legislative amendments, in view of the increasing economic integration between Hong Kong and the Mainland.

Latest position

7. The Administration will brief the FA Panel on the proposed amendments under the Companies (Amendment) Bill 2009 and the Business Registration (Amendment) Bill 2009 Bill at the meeting on 11 June 2009.

Relevant papers

8. The relevant papers are available at the following links:

http://www.legco.gov.hk/yr07-08/english/panels/fa/papers/fa_c1.htm

http://www.legco.gov.hk/yr11-12/english/panels/fa/papers/fa_c1.htm

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**Summary of Members' views and suggestions
on the Ordinance rewrite exercise expressed
at previous meetings of the Panel on Financial Affairs**

- (a) To enhance the cost-effectiveness of the rewrite exercise, the Administration should consider making reference to the outcome of the company law reforms or reviews conducted in other common law jurisdictions (such as the review of the United Kingdom Companies Act 2006) so as to leverage on their experience.
- (b) To ensure the quality of the rewrite exercise, the Administration should recruit staff of the right calibre to join the Companies Bill Team (CBT), engage consultants with the appropriate experience and expertise to undertake related research. The Administration should also put in place an appropriate administrative structure delineating the roles and duties of the various parties involved in the rewrite exercise, such as the CBT, the SCCLR, the four dedicated Advisory Groups² and the Steering Committee³ in order to avoid possible overlap of their work.
- (c) The rewrite exercise should aim at keeping the Ordinance 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) 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. The Administration was therefore urged to expedite the rewrite exercise.
- (e) Members stressed the need to step up consultation with the accounting profession and related business organizations to ensure that the rewrite exercise would have the broad support of the industry and relevant stakeholders.
- (f) Opportunity should be taken to enhance corporate governance of companies through codifying the directors' general duties.

² 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.

³ A Steering Committee, chaired by the Permanent Secretary for Financial Services and the Treasury (Financial Services) and comprising senior representatives of relevant departments, has been established to oversee and steer the entire rewrite exercise.

- (g) The scope of the rewrite exercise should cover issues of wide public interest, such as review of the provisions governing privatization of listed companies, as the existing voting requirements imposed by law for approval of the scheme arrangement for privatization might not adequately safeguard the interest of minority shareholders as intended.