

**Letter of 22 February 2010
from the Legal Service Division of the Legislative Council Secretariat
on the Companies (Amendment) Bill 2010**

立法會秘書處法律事務部
二零一零年二月二十二日有關《2010年公司（修訂）條例草案》的函件

Administration's Response
行政當局的答覆

Use of gender-neutral language

- (a) It is noted that “his” and “him” are used in the existing section 14A(2)(h) and (i) of the Companies Ordinance (Cap.32) (the Ordinance). However, it is noted that “he or she” is used in the new section 14A(2)(k) and (l) as amended by clause 5(3) of the Bill. Please consider whether it would be more consistent to use the same style of phrases in the same section of an ordinance.
- (b) It is also noted that “他” (but not “他或她”) is used as the Chinese rendition of “he or she” in the new section 14A(2)(k) and (l) as amended by clause 5(3). Please consider whether it is necessary to amend the Chinese rendition of “he or she” to reflect the meaning of the English text.

The use of “shall” and “must” in the same section

It is noted that “shall” is used in the existing sections of the Ordinance (e.g. sections 20, 22, 95, 109, 158 and 346). However, “must” is used in the new sections added by the Bill (e.g. the new sections 20(2A), 22(3A), 95(1A), 109(1C), 158(4AB) and (5B), and 346(2A)). The effect of this is that there would be intermixing of the use of “must” and “shall” in the same section of the Ordinance. To achieve consistency within the above sections, please consider amending “shall” to “must” in the relevant sections. It is noted that similar amendments have been introduced in the Occupational Deafness (Compensation) (Amendment) Bill 2009.

Reply

Drafting style for legislation needs to be modernised with the aim to minimising assumptions regarding the gender of human referents and using plain language as appropriate. The drafting practice now requires that opportunity is to be taken to use gender-neutral terms or avoid using merely a specific gender pronoun, and to use "must" instead of "shall" to impose an obligation in line with ordinary speech in provisions being inserted. The new section 14A(2)(k) and (l) and the subsections newly added to the existing sections 20, 22, 95, 109, 158 and 346 were drafted in accordance with the latest drafting practice. We, however, do not consider it necessary to make corresponding amendments to the other provisions in those sections. This change of drafting practice is only a matter of change of style. The legal meaning of the relevant provisions is not affected.

2. It is our view that gender-neutrality has no significant implications for Chinese drafting of the phrase "he or she". The Chinese character "他" is more gender-neutral compared to "he". For example, "他們" is used for a group of people of both sexes. We, therefore, consider that the use of "他" in the new section 14A(2)(k)(i) and (ii) and (2)(l)(i) is suitable and concise.

答覆

法例草擬的形式需與時並進，以盡量減少對法例中提及的人的性別作出假設，並盡量採用顯淺易明的用語。現時的草擬慣例，是在法例加插新條文時，採用性別中立的字詞，或避免使用代表某一性別的代名詞；並使用"must"而非"shall"的字眼以表達法例對某些人士施加的責任，以貼近日常用語。新增的第14A(2)(k)和(l)條及在現有第20、22、95、109、158和346條中新增的各款，均是按最新的草擬慣例草擬。然而，我們認為無需對該等條文中的其他條款作相應修訂。有關草擬慣例的轉變純屬形式上的轉變，對有關條文的法律意義並無影響。

2. 我們認為，性別中立對"he or she"的中文法律草擬影響不大。中文字的"他"較諸英文中的"he"更為性別中立。例如，"他們"可指一個包括男及女的群體。因此，我們認為在新增的第14A(2)(k)(i)和(ii)條及(2)(l)(i)條中使用"他"既適當又簡潔。

Part 7 – clauses 36 to 48

- (a) **Clauses 36 to 48 seek to remove obstacles to the introduction of paperless holding and transfer of shares and debentures. Under section 4 of and Schedule 1 to the Stamp Duty Ordinance (Cap. 117), a contract note for the sale or purchase of any Hong Kong stock is chargeable with stamp duty. Would the amendments under Part 7 of the Bill have any implications on stamp duty chargeable under the Stamp Duty Ordinance (Cap. 117)?**
- (b) **It is noted that under section 3 of and Schedule 1 to the Electronic Transactions Ordinance (Cap. 553), the provisions of that Ordinance relating to the use of electronic records do not apply to the making, execution or making and execution of any instrument which is required to be stamped or endorsed under the Stamp Duty Ordinance (Cap. 117) other than a contract note to which all agreement under section 5A of that Ordinance relates. Under section 4 of and Schedule 1 to the Stamp Duty Ordinance (Cap. 117), a contract note for the sale or purchase of Hong Kong stock is chargeable with stamp duty. In order to introduce paperless holding and transfer of shares and debentures, apart from amending the Companies Ordinance (Cap. 32) and section 397 of the Securities and Futures Ordinance (Cap. 571), is it necessary to also amend the Electronic Transactions Ordinance (Cap. 553) and/or any other ordinances?**

Reply

It is necessary to introduce legislative amendments to take forward the scripless initiative. As mentioned in the paper entitled “Legislative Proposals in the Companies (Amendment) Bill 2009 and Business Registration (Amendment) Bill 2009” (CB(1)1829/08-09(01)) discussed at the meeting of the Panel on Financial Affairs (the FA Panel) on 11 June 2009, the Administration proposes to introduce technical amendments to the Companies Ordinance (CO) to remove, or provide exceptions to, existing limitations in the CO that arise from provisions compelling the issue or use of paper documents of title and transfer. This will be an important first step in the entire legislative process for implementing the scripless initiative.

2. As stated in Annex A to the Administration’s reply of 25 January 2010 to the FA Panel’s letter of 6 January 2010 on “Follow up to meeting on 4 January 2010”, these proposed technical legislative amendments (as enshrined in the Companies (Amendment) Bill (C(A)B) 2010) aim to facilitate the market to focus discussions on the proposed operational model for implementing a scripless

securities market in Hong Kong, which is the subject currently under consultation¹. The amendments will also lay the foundation for implementing a scripless securities market in Hong Kong. By incorporating these amendments into the C(A)B 2010, the Administration hopes to indicate its support for the scripless initiative in principle.²

3. The proposed legislative amendments contained in Part 7 of the C(A)B 2010 will be commenced only when there is general market consensus on, and readiness to implement, the proposed scripless operational model.

4. Further legislative amendments will be pursued as necessary as the operational model takes shape. These further amendments will set out the framework for regulating the scripless environment, and those that play a key role in that environment. The specific legislative amendments will depend very much on the operational model that is eventually adopted, and hence on the outcome of the current consultation¹. In addition to the CO, other legislation that will require amendment includes the Securities and Futures Ordinance (SFO) and the Stamp Duty Ordinance (SDO).³

Reply to Question (a)

5. Under the SDO, stamp duty is charged on instruments. For a sale and purchase of Hong Kong stock, the parties shall execute a contract note as required under the SDO and cause the contract note to be stamped. As stated at the first paragraph above, the proposed amendments under Part 7 of the C(A)B 2010 aim to remove, or provide exceptions to, existing limitations in the CO that arise from provisions compelling the issue or use of paper documents of title and transfer (e.g. to remove the statutory obligation to use an instrument of transfer where the transfer is effected in accordance with new legislative provisions under the SFO for the purpose of regulating the scripless environment) (please refer to paragraph 4 above), and do not intend to affect the obligation to execute contract notes.

¹ As foreshadowed in the Panel Paper discussed at the meeting of the FA Panel on 11 June 2009 (CB(1)1829/08-09(01)), a 3-month consultation on the proposed operational model for implementing a scripless securities market in Hong Kong was launched jointly by the Securities and Futures Commission (SFC), Hong Kong Exchanges and Clearing Limited (HKEx) and the Federation of Share Registrars Limited (FSR) on 30 December 2009 and will end on 31 March 2010. The FA Panel was briefed on the contents of the joint consultation paper at its meeting on 1 February 2010.

² As stated at paragraph 12(a) of the paper discussed at meeting of the FA Panel held on 1 February 2010 (CB(1)978/09-10(05)).

³ As stated at paragraph 12(b) of the paper discussed at meeting of the FA Panel held on 1 February 2010 (CB(1)978/09-10(05)).

Reply to Question (b)

6. No amendment to the Electronic Transactions Ordinance (ETO) will be required. As question (b) rightly points out, section 3 of and Schedule 1 to the ETO provides that the provisions of the ETO relating to the use of electronic records do not apply to the making, execution or making and execution of any instrument which is required to be stamped or endorsed under the SDO *other than a contract note to which an agreement under section 5A of the SDO relates* (emphasis added). This effectively allows contract notes to be stamped electronically if they are contract notes to which an agreement under s5A of the SDO relates. Appropriate amendments to section 5A or other section(s) of the SDO, if necessary, may be considered as the scripless operational model takes shape. Besides, the scripless proposal, as it now stands, aims to enable transfer without an instrument of transfer. There is no intention to introduce an “electronic instrument of transfer”.

答覆

我們有需要修訂法例，以便在香港推行證券市場無紙化。立法會財經事務委員會在二零零九年六月十一日的會議上，討論了一份題為“《2009 年公司(修訂)條例草案》及《2009 年商業登記(修訂)條例草案》的立法建議”的文件(立法會 CB(1)1829/08-09(01)號文件)。政府當局在該文件中建議，對《公司條例》作出技術性修訂，以消除現時因《公司條例》規定必須發出紙張式所有權文件或使用紙張式文件轉讓所有權而造成的限制，或就有關限制訂明例外情況。這將是實行證券市場無紙化的整個立法過程中重要的第一步。

2. 政府當局其後在二零一零年一月二十五日回覆財經事務委員會二零一零年一月六日就“跟進二零一零年一月四日會議”而發出的信件。一如該覆函附件A所述，這些對法例的技術性修訂(載於《2010 年公司(修訂)條例草案》)旨在便利市場人士聚焦討論在香港實行證券市場無紙化的建議運作模式，也就是目前所進行諮詢的內容¹。這些修訂也會為在香港實行證券市場無紙化奠定基礎。政府當局把這些修訂納入《2010 年公司(修訂)條例草案》，希望藉此表明原則上支持無紙化建議²。

¹ 一如財經事務委員會在二零零九年六月十一日的會議上討論的文件(立法會 CB(1)1829/08-09(01)號文件)所預告，證券及期貨事務監察委員會(證監會)聯同香港交易及結算所有限公司(港交所)及證券登記公司總會有限公司(登記公司總會)在二零零九年十二月三十日，就在香港實行證券市場無紙化的建議運作模式展開為期三個月的諮詢，諮詢期將於二零一零年三月三十一日結束。有關方面已在財經事務委員會二零一零年二月一日的會議上，向委員會簡介聯合諮詢文件的內容。

² 載於財經事務委員會在二零一零年二月一日會議上討論的文件(立法會 CB(1)978/09-10(05)號文件)第 12(a)段。

3. 載於《2010年公司(修訂)條例草案》第7部的建議修訂，只會在市場人士普遍就建議的無紙化運作模式達成共識，並為實施這模式作好準備後，才會生效。

4. 待證券市場無紙化運作模式成形後，我們會按需要作進一步的法例修訂。有關修訂會為無紙化環境及在當中擔當主要角色的人士訂立規管架構。具體的法例修訂在很大程度上會取決於最終採納的運作模式，因此亦會視乎是次諮詢的結果而定¹。除了《公司條例》須予修訂外，其他須予修訂的法例包括《證券及期貨條例》及《印花稅條例》。³

對問題(a)的答覆

5. 根據《印花稅條例》，印花稅是按文書徵收的。有關香港證券的買賣，有關人士須按《印花稅條例》規定，簽立成交單據，並就該成交單據加蓋印花。一如上文首段所述，《2010年公司(修訂)條例草案》第7部的建議修訂，旨在消除現時因《公司條例》規定必須發出紙張式所有權文件或使用紙張式文件轉讓所有權而造成的限制(例如在轉讓是按照《證券及期貨條例》為規管無紙化環境所制定的新法例條文而進行時，免除使用轉讓文書的法定責任)(請參閱上文第4段)，或就有關限制訂明例外情況，但無意影響履行成交單據的責任。

對問題(b)的答覆

6. 《電子交易條例》無須修訂。一如問題(b)正確指出，《電子交易條例》第3條及附表1訂明，條例中有關使用電子紀錄的條文不適用於訂立、簽立或訂立及簽立根據《印花稅條例》須加蓋印花或加以簽註的文書，**但《印花稅條例》第5A條所指的協議所關乎的成交單據除外**(斜體以示強調，為後來加上)。這實際上容許以電子方式為成交單據加蓋印花，只要有關單據是《印花稅條例》第5A條所指的協議所關乎的成交單據便可。待證券市場無紙化運作模式成形後，我們會按需要對《印花稅條例》第5A條或其他條文作出適當的修訂。此外，就現時的無紙化建議來看，建議旨在讓證券在沒有轉讓文書的情況下可以轉讓。我們無意引入“電子轉讓文書”。

³ 載於二零一零年二月一日財經事務委員會會議上討論的文件(立法會 CB(1)978/09-10(05)號文件)第12(b)段。

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