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CHARTERED SECRETARIES
特許秘書

April W. Y. Chan
President

Clerk to Bills Committee on Companies (Amendment) Bill 2010 and
Business Registration (Amendment) Bill 2010
Legislative Council Secretariat
3rd floor, Citibank Tower
3 Garden Road
Central, Hong Kong

17 March 2010

Dear Sir

Re: Meeting on Tuesday, 30 March 2010 - Invitation for Submissions

Thank you for your letter of 26 February 2010 inviting our Institute to give views on the Bills. The Hong Kong Institute of Chartered Secretaries ('our Institute') is pleased to submit the following comments to the Bills Committee on Companies (Amendment) Bill 2010 and Business Registration (Amendment) Bill 2010.

Amendments Relating to Company Name

Our Institute supports the Government's initiative to:

- Strengthen our company name registration system;
- Step-up enforcement against possible abuses by 'shadow companies'.

Amendments Relating to Communications by Company to Another Person (other than Registrar of Companies)

Our Institute supports the Government's initiative in promoting:

- The use of information technology, particularly in facilitating communications between companies and their shareholders, members of the public; and
- The use of environmentally friendly practices.

Electronic Registration of Companies

Our Institute understands that the Companies (Amendment) Bill 2010 seeks to, among other things, amend the Companies Ordinance to provide for electronic registration of companies and corresponding changes in the registration procedure upon the implementation of the Phase II of the Integrated Companies Registry Information System ('ICRIS II') which is expected to come on stream in late 2010/early 2011.

Our Institute supports and welcomes the launch of ICRIS II and look forward to the convenience of having a one-stop shop for company incorporation and business registration.

However, it is also our Institute's view that in an endeavour to promote ICRIS II, we should never lose sight of the need to carry out customer due diligence on individuals and corporations to the level currently practised by members working in the trust and company service provider ('TCSP') sector.

Customer Due Diligence – General

Generally speaking, before a TCSP practitioner accepts a client, he or she will carry out rather stringent customer due diligence on the client.

By way of example:

- For an individual, the practice is to check and verify the individual's identity and to obtain a personal reference letter from either an international banker or a registered member of a professional body, the objective being to ascertain the person is who he or she claims to be;

- For a company, the practice is to obtain a 'certificate of good standing' from the local authorities so as to verify the legal status of the company as well as identifying the individual beneficial owners who are holding more than 10% interests in the company;

- And depending on the particular circumstances, for overseas companies whose director or shareholder information may not be available in public registers at its home jurisdiction, the practice is to obtain an up-to-date 'certificate of incumbency' so as to verify the overseas company's latest management structure.

Such a practice is in line with the standards recommended by the Financial Action Task Force on Money Laundering and also accords with the requirements laid down by the Hong Kong Monetary Authority for financial institutions.

Our Institute believes that the same standard should be followed in electronic registration of companies via ICRIS II: we should have the same customer due diligence on individuals or companies acting as founders for companies incorporated and registered through ICRIS II.

<u>Customer Due Diligence for ICRIS II</u>

Our Institute believes there are two ways to carry out this:

Option 1

The Companies Registry could take up the customer due diligence itself.

Option 2

The Companies Registry could delegate this important function to professionals like Chartered Secretaries, lawyers and accountants. In this regard, inspiration could be drawn from the detailed legislative proposals on the customer due diligence and record-keeping requirements for financial institutions put forward by the Financial Services and the Treasury Bureau in December 2009.

Paragraph 3.14 of the said consultation paper states: "upon consideration, we propose to put in place a special arrangement to allow financial institutions to rely on lawyers, accountants and specified trust and company service providers (chartered secretaries and trust companies registered under the Trustee Ordinance, Cap 29) in Hong Kong in carrying out customer due diligence provided that the financial institutions are satisfied that the intermediaries to be relied on have put in place adequate procedures to prevent money laundering."

Paragraph 3.15 states: "this will be a time-limited arrangement and will lapse within a qualified period of, say, 3 years."

If the financial institutions could rely on the professionals to carry out the customer due diligence, our Institute sees no reason why similar arrangement could not be made for ICRIS II.

One misstep in the design of ICRIS II could compromise the Government's efforts made in the past years to enhance Hong Kong's anti-money laundering and combating the financing of terrorism regulatory regime and potentially could upset the Government's overall strategy in maintaining Hong Kong's world class financial centre status.

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We have to be prudent.

Next Step

This is an important subject. Mrs Natalia Seng, our Immediate Past President and Chairman, Professional Development Committee, will attend the Bills Committee meeting on Tuesday, 30 March 2010. Mrs Seng will address the Bills Committee on matters related to this submission. As requested, enclosed is the reply slip.

On a related matter, Financial Services and the Treasury Bureau has just concluded its First Phase Consultation on Draft Companies Bill. We enclose our submission to the Bureau for your information.

Once again, thank you for giving our Institute a chance to address the Bills Committee on this important issue.

With best regards

Yours faithfully

April W. Y. Chan FCIS FCS(PE)
President

Enclosure

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April W. Y. Chan
President

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

16 March 2010

Dear Sirs,

Re: Consultation Paper on Draft Companies Bill – First Phase Consultation

We are pleased to enclose our submission in response to the above consultation paper.

We have no objection to your disclosing our submission to the public.

Thank you for your attention.

Yours faithfully,

April W. Y. Chan FCIS FCS(PE)
President

Enclosure

ISSUES HIGHLIGHTED FOR CONSULTATION		
		Comments
	Headcount test	
Question (1)	In respect of members' schemes of listed companies, which of the following options do you prefer? Please explain the reasons. Option 1: retain the headcount test; *[Please proceed to Question 4]*	
	Option 2: retain the headcount test but give the court a discretion to dispense with the test; or *[Please proceed to Question 3]*	
	Option 3: abolish the headcount test. *[Please proceed to Question 2]*	We agree with the arguments set out in paragraph 6.12 of the consultation paper and support the abolition of the headcount test.
Question (2)(a)	If your answer to Question 1 is Option 3, do you think that the headcount test should also be abolished in respect of members' schemes of non-listed companies?	Consistent with the 'one share one vote' principle, the headcount test should also be abolished in respect of members' schemes of non-listed companies.

Question (2) (b)	If your answer to (a) is yes, do you think that some form of additional protection should be provided for small shareholders? If so, what should such protection be?	We agree with the arguments set out in paragraph 6.25 - as the court has a general discretionary power to reject a scheme that improperly prejudices the interests of small shareholders, there does not appear to be a strong case for introducing any form of additional protection for small shareholders.
Question (3)	If your answer to Question 1 is Option 2 or Option 3, do you think that the same approach should apply to creditors' scheme?	For the reasons stated in paragraph 6.29, we believe the headcount test should also be abolished in creditors' scheme.
	Residential address and identification numbers	
Question (4)(a)	Do you agree that directors' residential address should continue be made available for inspection on the public register?	Members' views on this question are diverse: <u>For</u>: Given the directors' considerable duties and responsibilities to shareholders, creditors and other stakeholders, their residential address should continue to be made available for inspection on the public register. A service address may not be effective in the service of legal proceedings. <u>Against</u>: There is no need for directors' residential address to be available for inspection on the public register. An address for service (and a post office box alone is not an acceptable address) should suffice. Directors' family members should not be subject to possible inconvenience from process servers or company creditors.

		On balance, more members seem to be in favour of not making directors' residential address available for inspection on the public register.
Question (4)(b)	If your answer to (a) is in the negative, do you think that either: (i) the Australian approach (paragraphs 7.8 and 7.9); or	
	(ii) the UKCA 2006 approach (paragraph 7.10(b)) should be adopted?	We favour the UK approach but do not see the need for a separate confidential register (with director's residential address) accessible by the authorities or credit reference agencies.
Question (4)(c)	If you consider that either the Australian or the UKCA 2006 approaches should be adopted, do you have any suggestions on how to tackle the practical problems highlighted in paragraph 7.13(c) to (e) above?	A phased approach to deal with the existing records.
Question (5)(a)	Do you think that there is a need to mask certain digits from the identification numbers of new records of directors and company secretaries on the public register?	Yes in light of the increasing risk of identity theft.
Question (5)(b)	If your answer to (a) is yes, do you have any views on how to deal with personal identification numbers on existing	A phased approach as suggested in paragraph 7.16 of the consultation paper.

	records?	
	Fair dealings by directors	
Question 6	On the assumption that a new disinterested members' approval exception to prohibitions on loan and similar transactions in favour of directors and their connected persons will be introduced in respect of public companies, which of the following options do you prefer? Option 1 "relevant private companies" as defined in section 157H(10) of the CO should continue to be subject to more stringent regulations similar to public companies (including restrictions relating to quasi-loans and credit transactions, restrictions relating to connected persons and disinterested members' approval requirement);	
	Option 2: extending the concept of "relevant private company" to cover companies associated with non-listed public companies;	
	Option 3: modifying the concept of "relevant private	

	company" by disapplying it to private companies having a common holding company with a listed/public company;	
	Option 4: modifying the concept of "relevant private company" to cover only private companies which are subsidiaries of a listed/public company; or	Based on the arguments set out in paragraph 8.9 of the consultation paper, we favour Option 4.
	Option 5: abolishing the concept of "relevant private companies", i.e. all private companies should be subject to the same treatment.	
	Any other option (please elaborate)?	
	Derivative action	
Question (7)	Do you consider that the common law derivative action currently preserved in section 168BC(4) of the CO should be abolished in the CB?	While we respect the Court of Final Appeal's comment in Waddington that "once the legislation is extended to cover multiple derivative action, the continued existence of two parallel regimes will serve no discernible purpose," we are inclined to support retaining the common law derivative action (for the reasons set out in paragraph 9.7 of the consultation paper).

DRAFT CLAUSES		
		Comments
PART 10 DIRECTORS AND SECRETARIES		
Clause 10.13	Duty to exercise reasonable care, skill and diligence	We stand by our earlier comment (in our 7 July 2008 submission) that we do not find it necessary to codify the general duties of directors. It would seem that issuing non-statutory guidelines (by the Companies Registry) to clarify and give guidance on this complex subject is a flexible and probably the preferred approach.
Clause 10.26	Registrar to give directions to a company relating to the appointment of secretaries	We support the provision.
PART 11 FAIR DEALING BY DIRECTORS		
Clause 11.56	Thresholds for substantial property transaction	We wonder if the threshold set for a public company (exceeds 10% of the company's asset value and is over $750,000, or exceeds $10,000,000) is practical. A better approach, it seems, is to set the threshold at the higher of the two.