

# 立法會 *Legislative Council*

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## **Panel on Financial Affairs**

### **Meeting on 4 January 2010**

#### **Updated background brief on the Companies Ordinance rewrite exercise**

#### **Purpose**

This paper provides the background and key features of the rewrite exercise of the Companies Ordinance (Cap. 32) (the Ordinance). It also summarizes Members' major views and concerns on the subject.

#### **Background**

2. The Ordinance is one of the largest and most complex pieces 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)<sup>1</sup> was formed in January 1984 to advise the Financial Secretary on necessary amendments to the Ordinance as and when experience shows 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

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<sup>1</sup> 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 light of the experiences of comparable common law jurisdictions. A dedicated Companies Bill Team headed by a Deputy Secretary for Financial Services and the Treasury (Financial Services) was set up in mid-2006 to take forward the rewrite exercise.

## **The Ordinance rewrite exercise**

### Approach for the rewrite exercise

4. Given the extensive nature of the rewrite exercise, the Administration has adopted a phased approach by tackling the core company provisions which affect the daily operation of live companies in Hong Kong in Phase I. The winding-up and insolvency-related provisions, which are mainly administered by the Official Receiver's Office, will be reviewed in Phase II of the rewrite. Those parts of the Ordinance concerning prospectuses will be dealt with in a separate review by the Securities and Futures Commission and will be transferred from the Ordinance to the Securities and Futures Ordinance (Cap. 571).

### Consultation

5. Besides the SCCLR, which is the principal body to advise the Administration on all major proposals arising from the rewrite, the Administration has appointed four dedicated Advisory Groups (AGs)<sup>2</sup>, comprising mainly representatives from relevant professional bodies, major chambers of commerce and company law academics to advise on specific areas of the Ordinance. A Steering Committee, chaired by the Permanent Secretary for Financial Services and the Treasury (Financial Services) and comprising senior representatives of relevant departments such as the Companies Registry (CR) and the Department of Justice, has been established to oversee and steer the entire rewrite exercise. It is tasked to consider all major proposals on the rewrite of the Ordinance discussed at the SCCLR and/or the AGs.

6. Three topical public consultations have been conducted in 2007 and 2008 to gauge views on certain complex subjects, including: (a) accounting and auditing provisions; (b) company names, directors' duties, corporate directorship and registration of charges; and (c) share capital, capital maintenance regime and court-free merger procedure. The Administration has issued the consultation conclusions for public information and consideration by SCCLR.

7. The Administration will prepare a draft Companies Bill, incorporating the proposals put forward in the topical consultations together with SCCLR's other

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<sup>2</sup> 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.

recommendations, for further public consultation to be held in two phases. The first phase, mainly covering provisions on enhancing corporate governance, is planned to be launched in December 2009. The second phase will cover the more technical parts relating to share capital and accounting and will be undertaken in early 2010. The Administration aims to introduce the Companies Bill into the Legislative Council (LegCo) by the end of 2010.

#### Legislative amendments to be introduced separately

8. The Administration is separately working on legislative amendments to the Ordinance ahead of the introduction of the Companies Bill to provide for electronic incorporation of companies and filing of company documents, so as to tie in with the development of the Phase II of CR's Integrated Companies Registry Information System. The Administration briefed the Panel on Financial Affairs (FA Panel) on the legislative proposal at the meeting on 11 June 2009. The Administration's plan is to introduce these legislative amendments into LegCo through a Companies (Amendment) Bill in early 2010.

9. In January 2009, the Administration adopted the recommendation of the Task Force on Economic Challenges to re-consider the introduction of a corporate rescue procedure, ahead of the schedule of the Phase II rewrite exercise. On 29 October 2009, the Administration launched a three-month public consultation on the review of the corporate rescue procedure legislative proposals. The Administration briefed the FA Panel on the legislative proposals at the meeting on 7 December 2009. Subject to the outcome of the consultation, the Administration plans to prepare draft legislation for introduction into LegCo in 2010-2011.

#### **Major views and concerns expressed by Members**

10. The Administration discussed with the 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. While welcoming the rewrite exercise, Members have given the following views and suggestions for the Administration's consideration:

- (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 that in the United Kingdom and in Australia) so as to leverage on their experience. There was also a view that a model that suited the unique circumstances of Hong Kong should be developed instead of adopting one directly from overseas jurisdiction.
- (b) 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.

- (c) 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 end of 2010, there might not be sufficient time for Members to complete scrutiny of the Bill before the end of the LegCo term in July 2012. The Administration was therefore urged to expedite the rewrite exercise.
- (d) Opportunity should be taken to enhance corporate governance of companies through codifying the directors' general duties, and reference should be made to the United Kingdom Companies Act 2006 in this regard.
- (e) 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.

### **Latest position**

11. On 17 December 2009, the Administration launched the first phase public consultation on the draft clauses of the Companies Bill (covering clauses for Parts 1 to 2, 10 to 12 and 14 to 18). The consultation period will end on 16 March 2010. The Administration will update the Panel on the progress of the Ordinance rewrite exercise, including the first phase consultation on the draft Companies Bill, at the meeting on 4 January 2010.

### **References**

12. Relevant papers are available at the following links:

Updated Background Brief on the Companies Ordinance rewrite exercise

<http://www.legco.gov.hk/yr08-09/english/panels/fa/papers/fa0202cb1-677-e.pdf>

Administration's paper on "Progress Update on the Companies Ordinance Rewrite Exercise"

<http://www.legco.gov.hk/yr08-09/english/panels/fa/papers/fa0202cb1-678-5-e.pdf>

Minutes of FA Panel meeting on 26 February 2009 (Paragraphs 47 to 58)

<http://www.legco.gov.hk/yr08-09/english/panels/fa/minutes/fa20090226.pdf>

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