

**CB(1)813/09-10(01)**

***Draft Companies Bill  
First Phase Consultation***

**January 2010**

**Financial Services and the Treasury Bureau**

**[www.fstb.gov.hk](http://www.fstb.gov.hk)**

# Rewrite of the Companies Ordinance

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- One of the longest and most complex pieces of legislation
- Comprehensive rewrite exercise launched in mid-2006
- **Objective**

*To update and modernise the legal framework for companies in Hong Kong so as to facilitate the conduct of business and enhance Hong Kong's competitiveness and attractiveness as a major international business and financial centre.*

# *Rewrite of the Companies Ordinance*

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## □ **Guiding Principles**

- Catering for SMEs - “think small first”
- Enhancing corporate governance
- Complementing Hong Kong’s role as an international business and financial centre
- Encouraging the use of information technology

## *Progress Made*

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- ❑ Three public consultations in 2007 and 2008 to gauge views on some complex subjects
- ❑ Benefited from the advice of the Standing Committee on Company Law Reform, as well as that of five dedicated advisory groups
- ❑ Draft Companies Bill (CB) consultation to be conducted in two phases. Present first phase covers 10 Parts or roughly half of the CB.
- ❑ Reform proposals aim to enhance corporate governance, ensure better regulations, business facilitation and modernise the law

# *Enhancing Corporate Governance*

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- To enhance transparency and accountability of companies and their operations, we will :
  - codify the standard of directors' duty of care, skill and diligence
  - restrict the appointment of corporate directors by requiring every company to have at least one individual director after a grace period
  - enhance shareholders' engagement in the decision-making process and facilitate their participation through the use of information technology

## *Enhancing Corporate Governance (cont'd)*

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- foster shareholder protection by strengthening rules on directors' self-dealing and connected transactions, providing for multiple derivative actions and extending the scope of the unfair prejudice remedy
- \*require public companies and larger private companies to furnish more analytical and forward-looking business review
- \*strengthen auditors' rights to obtain information for performing their duties

\* Relevant draft provisions are set out in the second phase consultation

# *Ensuring Better Regulations*

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- To ensure that the regulatory regime is effective and business-friendly, we will:
  - #introduce electronic incorporation and expedited company name approval process to enable companies to be incorporated within one day
  - #empower the Registrar of Companies to tackle “shadow companies”, e.g. following up on court orders to direct companies to change their names; and substituting a company’s name by its registration number if it fails to comply with the direction
  - enhance the Registrar’s powers to help ensure that the information on the public register is accurate and up-to-date and to obtain necessary information for enforcement of the law

# Relevant provisions will be incorporated in the amendment Bill to be introduced into the Legislative Council in early 2010.

## *Ensuring Better Regulations (Cont'd)*

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- streamline those regulations which are outdated and no longer serve any purpose (e.g. removing the share qualification requirement for directors)
- \*streamline and update the regime of registration of charges
- \*improve the enforcement regime by updating the provisions on company investigations, offences and penalties

# *Business Facilitation*

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- To save compliance and business costs, particularly of SMEs, we will:
  - allow companies to dispense with AGMs by unanimous members' consent
  - \*allow more companies to take advantage of simplified accounting and reporting requirements
  - \*introduce cheaper and less time-consuming court-free procedures for the reduction of share capital and intra-group amalgamation
  - \*streamline the buy-back rules for all companies subject to a solvency test

# *Modernising the law*

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- To modernise the law to meet the needs of modern business, we will:
  - #allow electronic communications between a company and its members
  - #enable scripless holding and trading of shares and debentures
  - modernise the language and rearrange the sequence of the provisions in a more logical and user-friendly order
  - \*abolish the par value regime and to adopt a mandatory system of no-par for all companies with a share capital
  - \*remove the requirement for authorised capital

# *Specific Issues for Consultation*

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## **□ Headcount test**

Whether the “headcount test” for approving a scheme of arrangement or compromise should be retained or abolished?

# *Headcount test*

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- **Three options for members' schemes of listed companies**
  - Status quo (i.e. retaining the headcount test)
  - Retaining the headcount test but give the court discretion to dispense with the test
  - Abolish the headcount test
  
- Should the same approach be adopted for members' schemes of non-listed companies and creditors' schemes?

# Headcount test

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## □ Status quo (i.e. retaining the headcount test)

### FOR

- Giving minority shareholders an opportunity to have a say in the future development and structure of a company under a scheme
- Reducing the possibility of schemes being oppressive to, or ignoring the interests of, minority shareholders

### AGAINST

- Inconsistent with the “one share one vote” principle
- Placing significant veto power in the hands of small shareholders vis-à-vis their financial involvement in the company
- Difficulties for beneficial owners to express their views in a headcount test as most of the shares in listed companies are held by nominees and custodians
- Possible abuses involving share splitting

# ***Headcount test***

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- **Retaining the headcount test but give the court discretion to dispense with the test**

## **FOR**

- Opportunity for the court to look into the ‘true’ headcount position and decide whether a scheme should be sanctioned, taking into account whether voting is unfairly influenced by certain activities (e.g. share splitting)

## **AGAINST**

- Uncertain as to how the court would exercise its discretion, which may deter companies from proposing a members’ scheme, given the time, cost and uncertainty involved

# *Headcount test*

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## □ Abolish the headcount test

### FOR

- Consistent with the “one share, one vote” principle
- For listed companies, minority shareholders’ interest already safeguarded by the requirements under the Code on Takeovers and Mergers

### AGAINST

- Concern over the adequacy of safeguards for minority shareholders’ interest

## *Specific Issues for Consultation*

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### **□ Residential addresses of directors and identification numbers of directors and company secretaries**

Whether residential addresses of directors and identification numbers of directors and company secretaries should continue to be disclosed on public register?

# *Residential addresses of directors and identification numbers of directors and company secretaries*

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## □ **Residential addresses of directors**

### Australian Model

- A director may apply for substituting his usual residential address on the public register by an alternative address, if including his residential address in the public register will put at risk the director or his family members' personal safety

### Practical Problems

- Difficult for the Companies Registry ("CR") to assess claims of personal safety risks
- Possible abuses by those who do not have any genuine claim of safety risks
- Difficult to deal with existing records of directors' residential addresses embedded in documents filed with the CR over the past decades

# *Residential addresses of directors and identification numbers of directors and company secretaries*

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## □ **Residential addresses of directors**

### UK Model

- Directors can provide service addresses for the public register
- Directors' residential addresses are kept on a confidential register to which access is restricted to specified public authorities and credit reference agencies
- Existing addresses already on the public record will be purged upon application

### Practical Problems

- Difficult to maintain a confidential register for a single category of information and to ensure that it is kept up to date
- Difficult to decide who should have access to the confidential register.
- Difficult and in some cases impracticable for addresses in the existing records to be purged

## *Residential addresses of directors and identification numbers of directors and company secretaries*

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### □ **Identification numbers of directors and company secretaries**

#### ■ **Maintain the full disclosure of identification numbers**

##### **FOR**

- Easy and unique identifier for individual directors
- Minimize the risk for the dishonest to escape creditors or otherwise engage in fraudulent activity

##### **AGAINST**

- Privacy concerns

## *Residential addresses of directors and identification numbers of directors and company secretaries*

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### □ Identification numbers of directors and company secretaries

#### ■ Masking certain digits of identification numbers

##### FOR

- Better protection of personal data

##### AGAINST

- Difficult to decide who should have access to the full information
- Difficult to purge identification numbers already existing in numerous documents kept by the Registrar

## *Other Issues for Consultation*

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- whether private companies associated with a listed or public company should be subject to more stringent regulations similar to public companies for the purposes of the provisions on fair dealings by directors?
- whether the existing right for shareholders to take common law derivative action should be abolished after the introduction of multiple derivative actions (i.e. allowing a member of a related company to take a statutory derivative action)?

## *Consultation Arrangements and Future Work*

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- ❑ Consultation Period up to **16 March 2010**
- ❑ The consultation paper and the consultation draft of the relevant CB provisions are available at the websites of the Financial Services and the Treasury Bureau and the Companies Registry
- ❑ Second phase consultation covering the draft provisions of the other CB Parts will be launched in March 2010
- ❑ We will refine the draft Bill in the light of the public comments received, and introduce the CB into the Legislative Council by the end of 2010

**Thank You**