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By Post & Email: bc\_03\_10@legco.gov.hk

Hon Paul Chan Mo-po, MH, JP  
Chairman  
Bills Committee on Companies Bill  
Legislative Council  
Legislative Council Building  
8 Jackson Road  
Central  
Hong Kong

Dear Chairman

**Companies Bill**

We would like to set out below our comments on the Companies Bill for the consideration of the Bills Committee.

**Registrar of Companies and Companies Registry**

**Clause 43**

We suggest that this clause be clarified to the effect that documents filed at the Companies Registry should have signatures masked before being open to inspection by the public. The right of inspection is clearly purposive and the purpose of inspection is stated in the clause. It is difficult to see how this purpose can be served by revealing the signature which we understand helps the Registrar for purpose of authentication. The availability of signatures for public inspection may facilitate commission of fraud (e.g. forgery of signatures). We submit it is incumbent on the Registrar to take this into account and if possible, put in place a system that may help to prevent this. There are also issues of personal data privacy which arise out of disclosure of signatures.

**Clause 49**

We suggest continuation of publication of addresses of directors and their identity document numbers for the following reasons:

- (a) It provides an additional money laundering check.
- (b) The fact that the directors' details are made public enhances a sense of responsibility on the part of directors because they know that they can be contacted by persons who have a complaint against them.

*Chairman* Bank of China (Hong Kong) Ltd  
*Vice Chairmen* The Hongkong and Shanghai Banking Corporation Ltd  
Standard Chartered Bank (Hong Kong) Ltd  
*Secretary* Eva Wong Mei Seong

主席 中國銀行（香港）有限公司  
副主席 香港上海匯豐銀行有限公司  
渣打銀行（香港）有限公司  
秘書 黃美嫦



A possible compromise might be for an address for service being included on filed documents rather than a residential address with residential addresses blocked from old records.

## **Share Capital**

### Clause 130

We support the retirement of par value of shares but suggest that the legislation allows the ability of a company to accept an amount of paid in surplus from an existing shareholder without issue of new shares. This is an overseas common practice.

### Clauses 279 and 280

- (a) We believe that the wording of Clause 279(1)(c) requires clarification in two areas. First, reference to financial assistance “that has not been repaid” may give rise to difficulties in practice because financial assistance does not necessarily involve a payment. Secondly, we think that the wording “aggregate amount received by the company in respect of the issue of shares and the reserves of the company” could be simplified further and instead expressed simply as the paid up share capital and reserves. Otherwise, there may be a query as to whether shares issued for a consideration other than cash or other forms of capital injection will be included.
- (b) We think that a standardised form of notice to shareholders should be given and we suggest that the form should be that referred to in Clause 281(1)(c).
- (c) We think that the solvency statement and a statement containing the text of the notice to shareholders should be delivered for filing at the Companies Registry as per Section 47F(3) of the Companies Ordinance. This should be in respect of the financial assistance given under each of Clauses 280 and 281 and provision should be made in Clause 280 for a special notice to be prepared for this purpose.

## **Registration of Charges**

### Clauses 331(4)(a)(ii) and (b)(ii)(B)

When charges are registered, this is usually handled by solicitors who would normally prepare the certified copy of the charge as well as the form for registration. For clarity, it is suggested Clauses 331(4)(a)(ii) and (b)(ii)(B) should allow this to be done by a representative of the chargee rather than requiring the chargee to specifically authorise somebody to handle the registration. A similar consideration applies to Clauses 344(5)(b)(ii)(A).

### Clause 333(1)

This provision should be clarified so that:

- (a) retention of title provisions are excluded due to the fact that these are included in a large number of standard form conditions of sale and enforcement would be difficult once goods are in the hands of a purchaser (cf trust receipts);
- (b) any reference to a bill of sale in view of its outdated nature can be removed; reference should be made to chattel mortgages and charges over plant, machinery and equipment;
- (c) to remove any doubt on whether a charge on share dividends and assignments of choses in action e.g. assignments of insurance contracts are registrable (e.g. as a charge over book debts).

We also favour providing for codification of the priorities as between competing registered charges.

### Clause 334(7)

This provides for the ability of a chargee to recover from the company creating the charge any fee paid for registration of a charge. We suggest this should also be extended to include any costs incurred if by reason of the Company's failure to register a specified charge, the chargee needs to apply for a court order to enable late registration (see also Clauses 335(8), 340(7) and 341(8)).

### Clauses 337 and 338

These are provisions which relate to registration of charges where a company acquires property subject to a charge. These provisions do not contain the parallel provisions allowing the chargee to register the charge nor do they contain the provisions in respect of charges contained in debentures covered in Clauses 334 and 335. For completeness, these provisions should be included. Also, an equivalent of Clause 334(7) (amended as suggested above) should be included.

### Clause 339

This is the provision requiring companies seeking to register as non-Hong Kong companies to register certain charges when they apply for registration as non-Hong Kong companies. However, it does not make provision for the chargee to register these charges. This should be included as well as a provision similar to Clause 334(7) amended as suggested above.

### Clause 340(1)(c)

One of the conditions requiring delivery of other particulars of debentures is that a statement of particulars of the charge has already been delivered for registration. This would seem to suggest that, if (for example wrongly) no statement of particulars of charge has been delivered, then there is no requirement to register other particulars. It seems to us that the obligations in respect of registration of the particulars of a charge as well as the other particulars should be concurrent and one should not be

dependent upon the other. See the alternative drafting in Clause 341(1)(d) which refers to a requirement to deliver particulars.

#### Clauses 341(1)(d) and (6)

This is convoluted in the extreme and would benefit from much clearer drafting to eliminate confusing double cross referencing.

#### Clause 345

The provision regarding extension of the time for late registration requires this to be done by application to court. These applications are time consuming and expensive but are almost always approved as a matter of routine. We would suggest that power be granted to the Registrar to approve late registration particularly as Clause 345(3) makes it clear when the late registration can be permitted. We also suggest, as a disincentive to late registration, that an increased fee should be payable. In addition, we believe that it should be a statutory requirement in the event that the right to extend the period of registration is exercisable by the Registrar, that late registration should be made without prejudice to the rights of other parties against the property acquired prior to actual registration. This reflects the current practice of the courts.

#### Clause 346

For similar reasons, we suggest that rectification of registered particulars should also be sanctioned by the Registrar. We repeat our other observations on Clause 345 which are also relevant to this clause.

### **Accounts and Audit**

#### Clauses 358 to 362 and Schedule 3

We support the provisions allowing more companies to make simplified reporting but we think that the figures in respect of the definition of a small group should be larger than those in respect of a small company. However, we believe that guarantee companies should not have the benefit of the relaxation and should be subject to the requirements applicable to other companies which do not have the benefit of the exemption. This is to preserve transparency. If guarantee companies are to have the benefit of the exemption, it is not clear why the annual revenue for a guarantee company to qualify for the relaxation should be less than that of a small company.

#### Clause 380 and Schedule 5

We would prefer to see the business review as an encouraged good practice rather than a mandatory requirement particularly as certain of the requirements are vague and non-auditable e.g. environmental and employee issues.

#### Clause 403

We consider that the existing provision requiring directors, managers and the secretary of the company to provide information to auditors is adequate without



extending it to employees and other subsidiaries of a company. Furthermore, we do not think that the provision enabling auditors to require a holding company to provide information regarding its non-Hong Kong subsidiaries is necessary as the auditors always have the ability to qualify their opinion.

## **Directors and Company Secretaries**

### Clause 456

We are in favour of the provision of this clause requiring directors to exercise skill, care and diligence. In addition, we think it is necessary for the Companies Registry to revise and update its non-statutory guidelines on directors' fiduciary duties (other than those of skill, care and diligence) to provide clearer guidance.

### Clauses 475 to 479

We note the proposal to expand the definitions of "connected entity" and "family members" of a director. While this will enhance governance, we suggest to align the definition under the Companies Bill with the definition of "connected person" under the Listing Rules, in order to facilitate monitoring, control and compliance by listed companies. For example, under the Listing Rules, "family member" includes, among others, a child of the director below the age of 18; on the other hand, the Companies Bill proposes to extend "family member" to a child of the director of any age.

### Clause 485(2)

For clarity, this clause should be amended so that paragraph (a) shall be referring to the company providing the benefits referred to in Clauses 495(1)(a) and (2)(a) and paragraph (b) is referring to the company entering into the assignment referred to in Clauses 495(1)(b) and 2(b). The possible distinction between the concepts of a company taking part in arrangements and entering into an arrangement are too vague.

### Clause 488(3)

Reference to Section 497 can be deleted as this does not refer to a relevant transaction.

### Clause 504(1)(c)

This provision is important because it excludes the right to avoid transactions in breach of the provisions of Part 11 Division 2 which affect innocent parties (e.g. lenders receiving a guarantee or security without knowledge that the restrictions are breached). Unfortunately, however, the wording is not wide enough to cover these parties as it only applies to persons "not a party to a transaction". A lending bank will not come within this wording because as a beneficiary of the guarantee or security, it will necessarily be a party to the transaction. Also, reference to acquiring rights for value might not cover a lending bank where for example the guarantee or security is provided after the loan is advanced. We suggest that a better approach is that contained in Section 157I(3) of the existing Companies Ordinance. We also

suggest that an equivalent of Section 157I(5) of the existing Companies Ordinance be included for clarification so that transactions are not otherwise invalidated.

## **Company Administration and Procedures**

### Clauses 537 to 551

We believe that the new detailed provisions contained in Clauses 537 to 551 of the Companies Bill will render the passing of resolutions in writing much more complex and we are not aware of any abuses under the present law which need to be remedied. The proposals themselves run contrary to the approach of the Bill which is to make the law less complicated. If the provisions are to be included, there should be a clear carve out for resolutions passed unanimously by private companies, including those belonging to a listed group, without these formalities as per present practice. It is not clear whether Clause 537(3) achieves this.

## **Arrangements, Amalgamation and Compulsory Share Acquisition**

### Clause 664(2)(a) and (b)

For creditors' schemes of arrangement, we think that the headcount test should be abolished leaving only approval by 75% of creditors in value as here value is a more appropriate yardstick of approval. In any event, minority creditors still have the ability to petition for winding up and many of them will be preferential creditors.

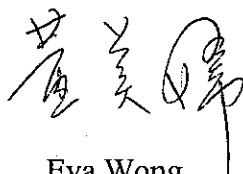
## **Investigation and Enquiries**

### Clauses 861(4) and (5)

These provisions should not apply to disclosure of information by authorised institutions due to their need to preserve the duty of confidentiality.

Should you require any further information, please do not hesitate to contact our Manager, Ms. Caris Wan at 2521 1855.

Yours faithfully



Eva Wong  
Secretary