

Bills Committee on Companies Bill

Follow-up to the Meetings on 6 and 13 May 2011

Supplementary Information

INTRODUCTION

In response to questions raised by Members at the meeting on 6 and 13 May 2011, this paper provides supplementary information on Part 9 (Accounts and Audit) and Part 12 (Company Administration and Procedure) of the Companies Bill (“CB”), as well as on the compliance rate for the filing of annual returns and the consultation conducted for the Companies Ordinance (“CO”) Rewrite exercise. The information on Part 9 and Part 12 is further to the information provided on 11 May 2011 (LC Paper No. CB(1)2132/10-11(03)).

PART 9

Public Views on the Scope of Companies Qualified for Using Simplified Financial and Directors’ Reports

2. During the second phase consultation on the draft CB, a number of respondents commented on the proposal to relax the qualifying criteria for private companies to prepare simplified financial and directors’ reports¹. Some respondents² supported the proposal. Among them, there was a view that unanimous consent should be required for “large” companies/group to benefit from simplified reporting, while there was

¹ In the draft CB published for the second phase consultation, we proposed that a small private company/group will automatically be qualified for simplified reporting, while a private company/group that does not qualify as “small” can also enjoy the benefit of simplified financial and directors’ reports if members holding at least 75 % of the voting rights so resolve and no other member objects.

² Mr Gordon Jones, Slaughter and May, the Society of Chinese Accountants and Auditors, Great Eagle Holdings Limited and Hong Kong Institute of Directors.

another view suggesting that the “no member objecting” requirement should be dropped. On the other hand, the Hong Kong Institute of Certified Public Accountants (“HKICPA”) and some others³ expressed concern on the appropriateness of allowing “large” private companies to prepare simplified accounts in accordance with the SME Financial Reporting Standard (“SME-FRS”), which was designed for SMEs, even with the prescribed approval of members.

3. We have considered the public views received. As explained in our earlier submission (LC Paper No. CB(1)2132/10-11(03)), we recommend keeping only the option for “small” private companies/groups to prepare simplified financial and directors’ reports. “Large” private companies/groups can still prepare accounts in accordance with the Hong Kong Financial Reporting Standard for Private Entities which is less onerous in terms of disclosure requirements than the full Hong Kong Financial Reporting Standards. We note that in other comparable jurisdictions like the United Kingdom (“UK”), companies and groups may apply the simplified reporting framework only if they meet the size criteria. The Standing Committee on Company Law Reform (“SCCLR”) with members drawn from the business and relevant professional sectors also supported our current proposal.

PART 12

Section 116BA of the Companies Ordinance

4. Section 116BA of the Companies Ordinance (“CO”) (Duty to notify auditors of proposed written resolution), together with sections 116B and 116BB, were introduced in 2000 by the Companies (Amendment) Ordinance 2000. The provisions were recommended by the SCCLR and enable a company to dispense with the holding of general meetings for passing resolutions provided that unanimous written resolutions are used; the resolutions are signed by or on behalf of all members of the company; and a copy of the proposed written resolution is sent to the auditors of the company. The provisions are in line with

³ KPMG, PricewaterhouseCoopers, Deloitte Touche Tohmatsu, Ernst and Young and a respondent who requested anonymity.

sections 381A, 381B and 381C of the UK Companies Act 1985. The requirement to send proposed written resolutions to auditors is also consistent with the auditors' entitlement to receive notice of resolutions under section 141(7) of the CO.

Proxy as the Chairperson of a General Meeting

5. If a chairman has failed to properly perform his functions and duties, the usual remedy would be to obtain court orders to set aside decisions of the chairman or to set aside resolutions passed at the meeting. It may also be possible for the general meeting to remove the chairman during the course of the meeting and to appoint another in his place if there is abuse of authority. There would be no difficulties in the application of these principles where a proxy acts as chairman. "Legal liability" in the sense of personal liability to pay compensation might be a theoretical possibility, but we would not have thought that this is an issue that would normally arise. To the extent that there could be any such liability, a proxy acting as chairman would be in the same position as anyone else acting as chairman in terms of the proxy's liability. As in other common law jurisdictions like UK, a person appointed as proxy is a "lawfully constituted agent"⁴. For any liability of the member who appointed the proxy, if the proxy acts within the scope of authority, the member, as principal of the proxy, is liable for the proxy's act. It is not necessary to specify in the CB the legal liability of the parties under common law as there is no intention to depart from those principles.

COMPLIANCE RATE FOR FILING OF ANNUAL RETURNS

6. According to the records of the Companies Registry, about 84% of local companies filed annual returns for 2010 on time.

CONSULTATION CONDUCTED FOR THE CO REWRITE

7. We consider it important to gauge the views of stakeholders and the general public in the process of the CO rewrite. In this connection,

⁴ *Re English Scottish and Australian Bank* [1893] Ch 385

we have benefitted from the advice of the SCCLR as well as that of the four Advisory Groups (comprising members nominated by the relevant professional bodies and business organisations, academics, SCCLR members and representatives from relevant Government departments) and the Joint Government/HKICPA Working Group set up to advise on specific areas of the Rewrite. We also conducted three topical public consultations in 2007 and 2008 to gauge views on a number of complex subjects⁵. Having taken into account the views received, we prepared a draft CB for further public consultation held in two phases in 2009 and 2010.

8. The consultation paper and the draft clauses were widely circulated to various stakeholders including relevant professional bodies, business organisations, market practitioners, chambers of commerce, financial regulators, academics, etc. They were posted on the CO rewrite website of the Financial Services and the Treasury Bureau and hard copies were made available to the general public at a number of Government premises. We briefed the Legislative Council Panel on Financial Affairs on the reform proposals and held a public consultative forum during each of the public consultation exercises. We also attended other meetings/forums, including meetings with the SME Committee, to brief the participants on the proposals and listen to their views. The Consultation Conclusions were posted on the CO Rewrite website <www.fstb.gov.hk/fsb/co_rewrite> and show the number of respondents, a summary of the respondents' comments and lists of forums and meetings attended. We have taken into account all the views received, including those from SMEs, in finalising the CB.

RESPONSIBLE PERSON

9. We note Members' views on the issue of "responsible person", and will provide our response later.

⁵ Subjects covered in the consultations include (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.

**Financial Services and the Treasury Bureau
Companies Registry
17 May 2011**