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Panel on Financial Affairs
Meeting on 7 November 2005

Background Brief
on rewrite of the Companies Ordinance

Purpose

This paper sets out the background of the Administration's proposal to conduct an exercise to rewrite the Companies Ordinance (CO) (Cap. 32), and summarizes the major views and concerns expressed by members when the relevant proposal was deliberated at the meetings of the Panel on Financial Affairs (FA Panel) on 5 July 2004 and 4 July 2005.

Major reviews of the CO

2. The CO is one of the largest and most complex pieces of legislation in Hong Kong with over 600 sections and 20 schedules. It is essentially derived from the Companies Act of the United Kingdom (UK) first enacted in 1865 and is broadly in line with the major UK company law reforms taken place in 1948 and 1976. Since the last major review of the CO in 1984, continuous efforts have been made to update the CO to keep it attuned to business needs. The Standing Committee on Company Law Reform (SCCLR)[1] was formed in 1984 to advise on necessary amendments to the CO on a continuous basis.

3. In the budget speech for 1994, the then Financial Secretary (FS) announced the Government's intention to undertake a comprehensive review of the CO. In November 1994, the Administration appointed Mr Ermanno Pascutto to lead the review exercise and engaged consultants to undertake relevant research. "The Consultancy Report on the Review of the Hong Kong Companies Ordinance" (the Consultancy Report) was completed in March 1997.

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[1] 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.

The Administration presented the major findings of the Consultancy Report to the FA Panel at the latter's meeting on 2 June 1997.

4. The Administration then conducted a public consultation exercise on the Consultancy Report. In 1999, the SCCLR undertook further study on the subjects upon which the Consultancy Report had made recommendations and the public had given opinions during the consultation exercise. In February 2000, the 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) which contained 168 recommendations covering a wide range of issues. On the basis of the recommendations in the SCCLR Report, the Administration identified a total of 62 items for legislative amendments or further study. These items are divided into four phases. Phase I involves amendments to specific sections of the CO. Phases II and III involve areas for further study and consultation. Phase IV involves an overhaul of the CO. The details are in **Appendix I**. Some of the items have been included in the Companies (Amendment) Ordinance 2003 and the Companies (Amendment) Ordinance 2004, which have been implemented; and the Companies (Amendment) Ordinance 2005, which was enacted in June 2005.

5. In 2000, the SCCLR was tasked by the then FS to conduct a comprehensive corporate governance review. The review covered virtually all the items categorized in Phase II of the SCCLR Report (as well as many other items) and was completed in early 2004.

6. There are certain parts of the CO which have not been examined in the context of the SCCLR Report. One of them is the accounting and auditing provisions in Parts II, IIA and IV of the CO. The Joint Government/Hong Kong Society of Accountants Working Group was established in March 2002 to undertake a comprehensive review of the accounting and auditing provisions.

7. The details of the major reviews of the CO conducted by the SCCLR and other relevant parties are in **Appendix I**.

Rewrite exercise of the CO

Reasons for the rewrite

8. As provisions in the CO are closely inter-linked and amendments to any specific section could have implications for numerous other provisions in the Ordinance, it has come to a stage where piecemeal amendments to the Ordinance are no longer desirable. The Administration considers that a complete rewrite and restructuring of the CO is necessary and vital for Hong Kong. The reasons are as follows:

(a) Over the past few years, actions to implement the recommendations in the SCCLR Report and other recommendations for improvement of the CO have been taken in the context of a series of major companies amendment bills. It has now reached a stage where action to follow up many of the remaining recommendations, such as reform of the capital maintenance provisions and modernization of statutory language, will best be taken forward in the context of a rewrite of the CO.

(b) The rewrite of the CO will resolve problems inherent in the existing Ordinance. For example, there is a prima facie need to break up and rearrange Part IV of the CO to improve its accessibility and clarity as the core company law provisions regarding company administration, company general meetings, accounts and audit, company inspections, directors and other officers, loans to directors, arrangements and reconstruction and shareholder remedies etc. are all crammed into this Part.

(c) The new CO will bring significant economic benefits to Hong Kong. It will provide Hong Kong with a legal infrastructure which meets its needs and commensurates with its status as a major international business and financial centre. With streamlined and modernized regulation, Hong Kong company law will meet more fully the needs of, and help save the compliance costs incurred by, more than half a million local and overseas companies registered in Hong Kong.

(d) The rewrite of the CO will provide an opportunity for Hong Kong to leverage from company law developments taking place around the world. Over the past decade, many major common law jurisdictions including the UK, Australia, New Zealand, and Singapore have either completed or embarked upon major company law reform programmes. It is important for Hong Kong to keep pace with international developments.

(e) The SCCLR and members of the Bills Committees formed by LegCo to study various company amendment bills have on previous occasions indicated support for the proposal to rewrite the CO.

Administration's proposal

9. At the meeting of the FA Panel on 4 July 2005, the Administration briefed members on its proposal to rewrite the CO, as follows:

(a) A Steering Committee (SC) within the Administration would be formed to oversee the rewrite exercise. The SC would be chaired

by the Permanent Secretary for Financial Services and the Treasury (Financial Services) and comprise the Registrar of Companies, Deputy Secretary for Financial Services and the Treasury (Financial Services) and other senior officials of the Companies Registry (CR), Official Receiver's Office (ORO) as well as the Civil and Law Drafting Divisions of the Department of Justice (DoJ) as members.

(b) A dedicated Companies Bill Team (CBT) comprising staff of the Financial Services and the Treasury Bureau (FSTB) and the CR would be formed to co-ordinate, support and take forward the rewrite exercise. It would undertake research, conduct consultation with relevant stakeholders, and prepare a White Bill for public consultation. The CBT would be supported by legal professionals in DoJ and external consultant(s)[2]. It would also assist the Legislative Council (LegCo) in scrutinizing the Bill.

(c) The terms of reference of the rewrite exercise proposed by the Administration is in **Appendix II**. The rewrite would be a comprehensive exercise covering legal research into the existing provisions of the CO and the corresponding provisions in other major common law jurisdictions, identification of issues associated with the provisions' operation and options to tackle the issues, formulation of recommendations and consultation with stakeholders. Apart from implementing the recommendations in the SCCLR Report, the exercise would also focus on areas of the CO which were basically untouched by the previous reviews such as share capital (Part II of the existing CO), and distribution of profits and assets (Part IIA). The winding-up provisions in the CO (Parts IVA, V, VI and X of the CO and the relevant subsidiary legislation), which are generally of a different nature from the rest of the CO and are administered by the ORO, would be tackled in the second phase.

(d) On the staffing requirements for the rewrite exercise, while the Administration would critically examine the workload of the existing staff in the coming years with a view to meeting the staffing requirements through internal redeployment as far as possible, it envisaged that some additional posts, probably including a handful of directorate posts, would be needed for the rewrite.

(e) The total financial cost of the creation of additional posts in the Administration and the engagement of external consultant(s) was intended to be met by the Companies Registry Trading Fund. It was estimated that an annual recurrent expenditure of over $20

2 The external consultants are company law experts who would advise on the rewrite exercise, mainly in the review and rewrite of the relevant provisions of the CO on subjects in which the Administration has limited experience and expertise.

million would be incurred for the rewrite exercise and a non-recurrent expenditure of about $19 million to $22 million would be required for engaging external consultants.

(f) On the assumption that the necessary approval would be obtained from the Finance Committee (FC) by end of 2005, the Administration envisaged the following tentative timeframe for the rewrite -

Activity	Tentative Timing
● Formation of CBT and engagement of consultants	First quarter of 2006 – Mid 2006
● Undertaking research and preparing draft drafting instructions and the White Bill	Mid 2006 – Mid 2009
● Consultation on the White Bill	Mid 2009 – End 2009
● Revising the White Bill	First quarter of 2010 – Mid 2010
● Introducing the New Companies Bill into LegCo	Third quarter of 2010

Major views and concerns expressed by members of the FA Panel

10. At the meetings of the FA Panel on 5 July 2004 and 4 July 2005, while members indicated support for the proposal to rewrite the CO in general, they expressed the following views and concerns:

(a) Besides the UK's company law reform, the Administration should make reference to developments in company laws of other jurisdictions, such as the European Union and the Mainland.

(b) To ensure the quality of the rewrite exercise, the Administration should recruit staff of the right calibre to join the CBT, engage consultants with suitable experience and expertise to undertake related research, and put in place an appropriate administrative structure delineating the roles and duties of the various parties involved in the process.

(c) Given the complexity of the rewrite exercise, the Administration should closely monitor the implementation of the exercise to ensure its cost-effectiveness.

(d) On resource requirements for the rewrite, there was concern that the estimated non-recurrent cost for engaging external consultants and the annual recurrent cost were on the high side. In this connection, the Administration was requested to critically review the need for creation of new directorate posts in finalizing the staffing requirements proposal for the rewrite exercise.

(e) The Administration was urged to expedite the exercise so that Hong Kong's company regulatory regime could keep pace with international developments as soon as possible. In this connection, it was suggested that the Administration should identify major areas for reform and develop proposals for public consultation in stages, involve the active participation of relevant stakeholders, such as the SCCLR, in the exercise, and endeavour to introduce the New Companies Bill into LegCo in the 2008-09 session so as to allow sufficient time for scrutiny of the Bill within the LegCo term of 2008 to 2012.

11. The extract of the minutes of the FA Panel meetings on 5 July 2004 and 4 July 2005 are in **Appendices III and IV** respectively.

Recent developments

12. The Administration will brief the FA Panel further on its proposal to take forward the rewrite of the CO and consult members on the staffing requirements of the exercise at the meeting to be held on 7 November 2005. The Administration intends to submit the financial proposals relating to the rewrite exercise for approval of the Establishment Subcommittee and the FC at their meetings in December 2005 and January 2006 respectively.

References

13. A list of relevant papers is in **Appendix V**.

Council Business Division 1
Legislative Council Secretariat
4 November 2005

Appendix I

Major Reviews on Company Law

MAJOR REVIEWS

Report of the Standing Committee on Company Law Reform

In February 2000, the Standing Committee on Company Law Reform (SCCLR) published a report on the recommendations of a consultancy report of the review of the CO. The SCCLR Report contained recommendations on a wide range of legislative amendments including proposals to enhance shareholders' protection, update the requirements regarding directorships, simplify the requirements for registration of foreign companies and make structural changes to modernise the Ordinance.

2. On the basis of the recommendations in the SCCLR Report, we have identified a total of 62 items for legislative amendments or further study. These items are divided into the following four phases -

(a) Phase I: The 18 items in this phase involve amendments to specific sections of the CO;

(b) Phase II: The 19 items in this phase are related to corporate governance matters and require either further study or consultation. These items have been also examined in the context of either the Corporate Governance Review (CGR) (see paragraph 3 below) or the review of the accounting and auditing provisions (RAAP) of the CO by the Joint Government/Hong Kong Society of Accountants Working Group (see paragraph 4 below);

(c) Phase III: The 8 items in this phase are not related to corporate governance and require either further study or consultation;

(d) Phase IV: This 17 items in this phase involve restructuring and rewriting the Ordinance.

Corporate Governance Review (CGR)

3. In 2000, the SCCLR was tasked by the then Financial Secretary to conduct a comprehensive corporate governance review. The review covered virtually all the items categorised in Phase II of the SCCLR Report (as well as many other items) and was

completed in early 2004.

Review of Accounting and Auditing Provisions

4. There are certain parts of the CO which have not been examined in the context of the SCCLR Report. One of them is the accounting and auditing provisions in Parts II, IIA and IV of the CO. The JWG was established in March 2002 to undertake a comprehensive review of the accounting and auditing provisions (RAAP).

PRESENT POSITION

5. We have undertaken a stock-taking exercise of all the recommendations in the SCCLR Report, CGR and RAAP. The present position can be summarized as follows -

(a) All items in Phase I of the SCCLR Report have been included in the Companies (Amendment) Ordinance 2003 which was implemented on 13 February 2004;

(b) Items in Phases II and III of the SCCLR Report regarding shareholders remedies and overseas companies have been included in the Companies (Amendment) Bill 2003 which is being scrutinised by the Legislative Council[1];

(c) Several items in Phases II and III of the SCCLR Report have been included in a companies amendment bill being processed by the Securities and Futures Commission (SFC) to implement the recommendations of the Report of the Steering Committee on the Enhancement of the Financial Infrastructure, which covers scripless securities, dematerialization of shares etc;

(d) Those remaining corporate governance related items in Phase II of the SCCLR Report and Phases I and II of the CGR requiring legislative amendments are planned to be included in the next new companies amendment bill. The remaining items involving changes to, for example, best practice are being followed up by the relevant parties;

(e) Those proposals of the JWG which have been already finalized can be included in the companies amendment bill mentioned in (d). The

[1] The Companies (Amendment) Bill 2003 with proposals relating to group accounts removed was passed by LegCo in July 2004 (i.e. the Companies (Amendment) Ordinance 2004). The proposals relating to group accounts were subsequently incorporated in the Companies (Amendment) Bill 2004 (i.e. the Companies (Amendment) Ordinance 2005.)

remainder will be processed in the context of the rewrite of the CO;

(f) Remaining items in Phases III and IV of the SCCLR Report which include the inspection and offences provisions, capital maintenance provisions, and rewriting and restructuring of the CO will be taken forward in the context of the rewrite of the CO.

(*Source:* Annex to the paper provided by the Administration on "Overall Review of the Companies Ordinance" at the meeting of the Panel on Financial Affairs on 5 July 2004 (LC Paper No. CB(1)2254/03-04(05).)

Appendix II

Proposed Rewrite of the Companies Ordinance

Terms of Reference

(Position as at July 2005)

1. Having regard to the need to :

(a) ensure that company law in Hong Kong is as up-to-date as possible in order to enhance Hong Kong's competitiveness and attractiveness as a major international financial and business centre;

(b) take account of company law reform and proposals for reform in comparable overseas jurisdictions, as well as local and international commercial, regulatory and legal conditions, standards and developments; and

(c) identify and resolve problematic areas in company law which do not fall under (b).

it is proposed to rewrite and restructure the Hong Kong Companies Ordinance ("the Ordinance") and its subsidiary legislation (excluding the winding-up related provisions under Parts IVA, Part V, Part VI and Part X of the Ordinance).

2. In rewriting and restructuring the Ordinance, specific attention should be paid to the following issues :

(a) the recommendations in the Report of the Standing Committee on Company Law Reform ("SCCLR") on the Recommendations of a Consultancy Report of the Review of the Hong Kong Companies Ordinance, other than those mentioned in (d), (f), (h), (i) and (j), which have not already been enacted into law;

(b) the recommendations in the Consultation Papers on Proposals made in Phases I and II of the Corporate Governance Review by the SCCLR which have not already been enacted into law;

(c) the provisions of the United Kingdom Companies Bill produced consequent to the Company Law Review undertaken by the Company Law Review Steering Group and the United Kingdom Government's White Paper 'Modernizing Company Law';

(d) the re-categorization of companies in line with the SCCLR's recommendations as follows :

- private companies limited by shares (paragraph 5.79 and Recommendation 32)
- public companies limited by shares (both listed and unlisted) (paragraph 5.79 and Recommendation 34)
- companies limited by guarantee (paragraph 5.79 and Recommendation 36)
- unlimited companies (paragraph 5.79)

(e) the need to reframe and align the provisions of the Ordinance with the needs of private companies, which comprise the overwhelming majority of companies formed under the Ordinance and make appropriate differences between private and public companies;

(f) the provisions in the Ordinance which are applicable to public listed companies should be also made applicable to public unlisted companies (Recommendation 35);

(g) the Government's "Consultation Conclusions on Proposals to Enhance the Regulation of Listing" published in March 2004, which recommend the making of Rules under section 36 of the Securities and Futures Ordinance to give statutory effect to certain important Listing Rules, as well as the establishment of a new civil and criminal sanctioning regime for breaches of the new Rules;

(h) a separate part of the Ordinance should be dedicated to matters dealing with shareholders' rights and remedies (Recommendation 78);

(i) the overall organization of provisions regarding fundamental changes to a company, such as changing the scope of business or restructuring the share capital should be improved (Recommendation 101);

(j) the provisions of Parts VII and XIII regarding the administration of the Ordinance be consolidated and updated (Recommendation 142);

(k) the need to rationalize and simplify the statutory provisions wherever appropriate;

(l) the use of information technology and other means where appropriate to facilitate communications between companies, their shareholders, members of the public and the regulators;

(m) the use of schedules and subsidiary legislation to contain detailed requirements and the use of statutory instruments to facilitate regular updating of the law;

(n) the need to put in place appropriate transitional arrangements to minimize if not eliminate any problems resulting from the repeal of the existing Companies Ordinance and the enactment of the proposed Companies Ordinance; and

(o) any recommendations and issues which arise during the period of the rewrite.

3. Such other related matters as the Secretary for Financial Services and the Treasury may from time to time specify.

(*Source:* Annex to the paper provided by the Administration on "Rewrite of the Companies Ordinance" at the meeting of the Panel on Financial Affairs on 4 July 2005 (LC Paper No. CB(1)1919/04-05(11).)

Appendix III

Extract from the minutes of meeting
of the Panel on Financial Affairs on 5 July 2004

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V. Progress of review of the Companies Ordinance
(LC Paper No. CB(1)2254/03-04(05) — Paper provided by the Administration)

Briefing by the Administration

36. At the Chairman's invitation, the Secretary for Financial Services and the Treasury (SFST) briefed members on the progress of the overall review of the Companies Ordinance (CO) (Cap. 32). The salient points were summarized as follows:

(a) The CO was one of the largest and most complex pieces of legislation in Hong Kong. It was derived from the UK Companies Act, which was first enacted in 1865. Regular updates of the CO were necessary to ensure that Hong Kong's company law met the needs of modern day users and continued to provide the legal infrastructure commensurate with Hong Kong's status as a major international business and financial centre. The Standing Committee on Company Law Reform (SCCLR) had been formed in 1984 to advise on the necessary amendments to the CO on a continuous basis. Although there had been regular amendments to the CO over the past two decades, it had come to a stage where piecemeal amendments were no longer desirable. A complete rewrite and restructuring of the CO was considered appropriate to take account of the latest international practices, to upgrade Hong Kong's corporate governance regime, and to harmonize the new and old provisions.

(b) The Administration, in consultation with the SCCLR, considered it desirable to make reference to the developments in the UK company law review embarked on a few years before as the basis of the rewrite exercise of the CO. To take forward the exercise, a Companies Bill Team (CBT) would be established in the Companies Registry (CR) to prepare a White Bill for public consultation with a view to leading to the preparation of a new Companies Bill. Working Groups (WGs) would be formed under the CBT comprising representatives nominated by the

relevant professional bodies and company law academics for considering and endorsing the White Bill.

(c) Assuming that the UK White Bill would be available in early 2005, the Administration envisaged that preparation for the White Bill in Hong Kong would take about 24 months from May 2005 to April 2007. The White Bill would then be released for public consultation from May to October 2007. After revising the White Bill from November 2007 to April 2008, the new Companies Bill would be introduced into LegCo by October 2008. Given the complexity of the bill, it was expected that the scrutiny period would take about 18 months up to March 2010.

(d) The Administration had formed a working group to map out the terms of reference and the detailed work schedule for the rewrite exercise. The Administration planned to submit the necessary funding proposal for undertaking the exercise to LegCo before the end of 2004.

Discussion

Timeframe for the rewrite exercise

37. Ms Emily LAU indicated support for the proposal to rewrite the CO. She however expressed concern that under the proposed timeframe, it would take five years to complete the rewrite exercise. She urged that the exercise be expedited so that Hong Kong's company regulatory regime could keep pace with international developments.

38. In response, SFST assured members that the Administration would endeavour to complete the rewrite exercise as early as practicable. Given that it would be a very complex task involving extensive legal research and numerous parties, it was prudent to adopt a conservative timetable. He stressed that the proposed timeframe was indicative only and would hinge on a number of factors. The Registrar of Companies (RC) supplemented that the Administration planned to seek LegCo's approval for the resource requirements for the exercise before the end of 2004. Subject to provision of resources and suitable staff, the rewrite exercise would commence in mid 2005.

Company law reforms in other jurisdictions

39. Whilst supporting that reference should be made to the UK White Bill, Ms Emily LAU was concerned that if the UK White Bill was not available in early 2005, the rewrite exercise in Hong Kong might be delayed. She enquired how far the UK White Bill would affect the rewrite exercise.

40. In reply, RC re-iterated that both the Administration and the SCCLR agreed that, in taking forward the rewrite exercise, due regard should be given to the results of the UK company law review, as Hong Kong's company law was essentially

derived from the UK model. However, the rewrite exercise was not necessarily bound by the results of the UK review given the cultural, social, economic and regulatory differences between the two jurisdictions. While the rewrite exercise would go in parallel with the UK company law reform, it would not be constrained by the UK legislative timetable for enactment of the new UK Companies Act.

41. Mr Henry WU enquired whether the Administration would make reference to company laws of jurisdictions of the European Union (EU) in rewriting the CO. RC said that the SCCLR had not studied EU legislation, as EU countries were civil law jurisdictions whereas Hong Kong was a common law jurisdiction. He added that the SCCLR had focused its study on company laws of US, UK, Australia and Singapore etc, in conducting previous reviews on the CO.

Structure of the rewrite exercise

42. To enhance the efficiency of the rewrite exercise, Ms Emily LAU considered it important for the Administration to put in place an appropriate administrative structure delineating the roles and duties of the various parties involved in the process. In this connection, she enquired about the roles of the SCCLR and SFST in the exercise.

43. SFST advised that a designated CBT would be established in CR to undertake the relevant research work, to prepare the White Bill and to steer the new Companies Bill through LegCo. While RC would have overall administrative control of the exercise, SFST said that he himself would oversee the exercise. RC advised that in addition to the existing Joint Government/Hong Kong Society of Accountants (HKSA) Working Group, which was responsible for reviewing the accounting and auditing provisions of the CO, two new working groups would be established to undertake reviews of Part II of the CO, involving provisions on share capital and debentures, and the remaining parts of the CO. He stressed that, in view of the complexity and far reaching implications of the rewrite exercise, the Administration was fully aware of the need to involve experts and consult relevant stakeholders in the process. Representatives from professional and commercial organizations including the HKSA, Law Society of Hong Kong, Hong Kong Bar Association and the Hong Kong Chamber of Commerce etc., would be invited to join the working groups so that balanced views from the key sectors would be taken into account.

44. As regards the role of the SCCLR, RC said that although the SCCLR would not be involved in the detailed drafting of the new Companies Bill, it would be consulted on any related policy issues which emerged in the process of the rewrite and would provide guidance on the work of the CBT and WGs.

45. Referring to paragraph 11 of the paper provided by the Administration, Ms Emily LAU agreed that it was important to recruit staff of the right calibre to join the CBT in taking forward the rewrite exercise. She enquired about the details of

recruiting these staff and whether the Administration had contingency plan in the event that suitable persons could not be identified.

46. SFST advised that the Administration shared the SCCLR's view that it was crucial to recruit staff of the right calibre to undertake the re-write exercise to make it a success. The Administration's aim was to engage legal experts and relevant professionals in the private sector to participate in the task.

Cost for the rewrite exercise

47. Ms Emily LAU and Mr Henry WU enquired about the estimated cost for undertaking the rewrite exercise. SFST said that, given the complexity of the rewrite exercise, considerable resources would be required. He informed members that the last major review of the CO conducted in mid 1990s costed over $10 million. It was envisaged that the rewrite exercise would incur higher costs. SFST advised that the Administration would be working on the funding and manpower proposals relating to the exercise and planned to submit the proposals for LegCo's approval before end of 2004. He assured members that the Administration would be mindful of the need to conduct the rewrite exercise in a cost-effective manner.

48. Mr Henry WU remarked that the scale and complexity of the rewrite exercise were comparable to those of the exercise on the enactment of the Securities and Futures Ordinance (SFO) (Cap. 571). He sought information on the costs incurred by the Administration and the Securities and Futures Commission (SFC) in the latter exercise, including the costs involved in the whole process from the preparation and drafting of the White Bill in April 2000 and the enactment of the SFO in March 2002.

49. In respect of the costs incurred by the Administration, the Deputy Secretary for Financial Services and the Treasury (Financial Services) advised that three additional posts namely, one Directorate Staff Grade B post, one Directorate Staff Grade C post and one Senior Administrative Officer post had been created to undertake the exercise on the enactment of the SFO. As for the SFC, in addition to existing staff, it had engaged a number of outside experts to assist in the project. These experts were employed on contract basis and their posts had been deleted after completion of the exercise. SFST undertook to request the SFC to provide the details on the costs involved in the project for members' reference.

(*Post-meeting note:* The information provided by SFC was circulated to members vide LC Paper No. CB(1)2439/03-04(02) on 21 July 2004.)

Way forward

50. At the suggestion of Ms Emily LAU, members agreed that the Panel should continue to monitor progress of the rewrite exercise in the next legislative term.

(*Post-meeting note:* The item on "Comprehensive review of the Companies Ordinance" was included in the Panel's list of outstanding items for discussion.)

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Appendix IV

Extract from the minutes of meeting of the Panel on Financial Affairs on 4 July 2005

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VI. Rewrite of the Companies Ordinance

(LC Paper No. CB(1)1919/04-05(11) — Paper provided by the Administration

LC Paper No. CB(1)1919/04-05(12) — Background brief prepared by the Legislative Council Secretariat)

67. The Chairman took over the chair for this item.

Briefing by the Administration

68. Upon the Chairman's invitation, the Secretary for Financial Services and the Treasury (SFST) briefed members on the Administration's latest thinking on the possible framework for taking forward the rewrite exercise of the Companies Ordinance (CO) (Cap. 32). He highlighted the following points:

(a) The CO was of great importance to Hong Kong's economic well being and prosperity. It provided the legal framework enabling businessmen to form and operate companies which created wealth and employment for the community. It also had a regulatory function which set out the parameters within which these companies must operate in order to safeguard the interests of those parties who had dealings with them, such as shareholders;

(b) The CO was last substantially reviewed in 1984 and broadly in line with the major UK company law reforms taken place in 1948 and 1976. However, the CO no longer suited present day circumstances and, in fact, imposed a burden on large, medium and small-sized enterprises. While actions had been taken to amend the CO from time to time, it had reached a stage where a rewrite of the Ordinance was considered necessary;

(c) There would be significant economic benefits to Hong Kong from rewriting the CO. The new CO would provide Hong Kong with a legal infrastructure which met its needs and was commensurate with its status as a major international business and financial centre. With streamlined and modernized regulation, Hong Kong company law would meet more

fully the needs of, and help save compliance costs incurred by, more than half a million companies, both local and overseas, registered in Hong Kong. For instance, the wider use of electronic communications and the simplification of procedures for the conduct of company businesses as a result of the UK company law reform was estimated to bring about economic benefits amounting to over $3.5 billion. It was estimated that implementation of similar changes in Hong Kong would result in substantial savings for companies registered in Hong Kong;

(d) Over the past decade, many major common law jurisdictions including the UK, Australia, New Zealand, and Singapore had either completed or embarked upon major company law reform programmes. It was important that Hong Kong should not lag behind these jurisdictions. The rewrite of the CO would provide an opportunity for Hong Kong to leverage from company law developments taking place around the world;

(e) In July 2004, the Administration briefed the Panel on its preliminary proposal to rewrite the CO. The proposal generally received positive comments from Members. Since then, the Administration had given further thought to the proposal. Given that the CO was one of the longest and most complex pieces of primary legislation in Hong Kong, it was expected that the rewrite exercise would necessitate extensive legal research for the purpose of preparing draft drafting instructions, consulting stakeholders and the public on policy and legal matters, and subsequently drafting a new Companies Bill. To ensure that the Bill was a quality piece of work and available within a reasonable timeframe, it was essential that a robust framework be established, staff of the right calibre be recruited and adequate resources be allocated;

(f) The Administration had made reference to experience of the Company Law Reform of the UK. The Department of Trade and Industry (DTI) in the UK had deployed a dedicated team of staff to undertake the review of the Companies Act. The DTI's companies bill team had been established in July 2001 to take forward the work of turning the recommendations of the independent company law review into legislation. During the heaviest middle phase of the project, the team comprised a total of approximately 22 staff of whom 12 were policy staff and 10 were lawyers. The ranks of the vast majority of these staff were pitched at senior directorate, deputy or assistant directorate levels. In addition, the DTI team was supported by two parliamentary counsels who drafted the legislation;

(g) The Administration was discussing with the relevant bureaux and departments the total number of dedicated staff, both directorate and non-directorate, required for taking forward the rewrite. Meanwhile, the Administration was also critically examining the workload of the existing

staff in the coming years with a view to meeting the staffing requirements through internal redeployment as far as possible. It looked apparent that some additional posts would inevitably be needed for the rewrite, probably including a handful of directorate posts. Furthermore, it was also necessary to engage external consultant(s) to advise on the rewrite exercise, mainly in the review and rewrite of the relevant provisions on subjects in which the Administration had limited experience and expertise;

(h) The total financial cost of the creation of additional posts in the Administration and the engagement of external consultant(s) was intended to be met by the Companies Registry Trading Fund. The tentative timeframe for the rewrite exercise covered a period of five years from end of 2005 to the third quarter of 2010. It was estimated that the annual recurrent expenditure for the exercise would be over $20 million; and

(i) The Administration welcomed Members' views on the possible framework of the rewrite exercise. It would proceed with finalizing the staffing requirements proposal, and then consult the Panel again before seeking the Finance Committee's necessary approval.

Discussion

Company law reforms in other jurisdictions

69. Miss Mandy TAM indicated support for the proposal to rewrite the CO. Pointing out that the company law reform in the UK was still in progress, Miss TAM enquired how far new developments in the UK reform would affect the rewrite exercise.

70. In response, SFST stressed the importance to ensure that the new CO would meet the needs of modern day users and be on a par with international best practices so that Hong Kong would commensurate with its status as an international financial centre. He emphasized that the Administration would closely monitor developments in other common law jurisdictions and, where appropriate, incorporate their good corporate practices in the new CO.

71. The Registrar of Companies (R of C) supplemented that one of the objectives of the rewrite exercise was to restructure and modernize the CO to meet the needs of companies operating in the 21st century. While the new CO would provide a basic legal framework for operation and regulation of companies, schedules and subsidiary legislation would be used, where appropriate, to specify detailed and technical requirements. This would facilitate regular updating of the law to respond to rapid developments in the business environment. As regards latest developments in the UK company law reform, R of C advised that, on 17 March 2005, the DTI had issued a

White Paper on Company Law Reform for public consultation. The White Paper set out the final proposals for the Company Law Reform Bill and included about half the draft clauses of the Bill. The rest of the draft clauses was expected to be released in August 2005. He added that, as the major company law reform programmes in the UK and other major common law jurisdictions were in their final stages, it should be possible for Hong Kong to, where appropriate, use these as benchmarks with a fair degree of certainty that there would not be major changes for a considerable time to come.

72. Mr CHAN Kam-lam expressed support for the rewrite of the CO. Pointing out that the UK was a member of the European Union (EU), Mr CHAN enquired how far company law developments in the EU had affected the UK company law reform which in turn would have impact on the rewrite of the CO. Given the increasing economic integration between Hong Kong and the Mainland, Mr CHAN considered that reference should also be made to the company law of the Mainland in rewriting the CO.

73. R of C said that as a member of the EU, the UK was required to comply with the EU directives concerning company law, such as those related to capital maintenance. However, Hong Kong was not obliged to follow EU directives and could make reference to comparable provisions in other common law jurisdictions, such as Australia and Singapore, which had more flexible and liberal regulatory requirements in the area of capital maintenance. As regards company laws developments in the Mainland, R of C pointed out that, compared with the CO in Hong Kong which was common law based, Mainland company law was civil law based and generally had been drafted using the corporate law in Germany as a model. While Mainland company law basically laid down the basic principles for the operation and regulation of companies, the CO in Hong Kong contained the detailed requirements and provisions catering for various scenarios. Given the differences in the legal systems between Hong Kong and the Mainland, Mainland company law might not have direct relevance for Hong Kong.

Admin

74. In view of the complexity of the issues involved in the rewrite exercise, Mr CHAN Kam-lam suggested that the Administration should identify major areas for reform and develop proposals for public consultation in stages. The outcome of the consultations could provide good bases for formulating the White Bill which would be subject to further consultation. Mr Ronny TONG shared his view.

Timeframe for the rewrite exercise

75. Mr Ronny TONG and Ms Emily LAU expressed support for the proposal to rewrite the CO. While Ms LAU hoped that the Administration would commence the rewrite exercise as soon as possible, she was concerned that as the White Paper in the UK had just been issued in March 2005, the outcome of the UK company law reform might have impact on the rewrite exercise of the CO.

76. SFST assured members that the Administration would continue to closely monitor the developments in the UK. R of C added that reviewing and up-dating the CO had been undertaken on an on-going basis. Furthermore, Hong Kong was ahead of the UK in introducing statutory provisions on derivative actions and overhauling the registration system for foreign companies. Apart from implementing the recommendations contained in the Standing Committee on Company Law Reform (SCCLR)'s reports in previous companies amendment ordinances, the Joint Government/Hong Kong Institute of Certified Public Accountants Working Group had commenced a detailed review of the accounting and auditing provisions in the CO in March 2002. Proposals and recommendations of the review were expected to be released for public consultation in 2006.

77. Given the complexity of the issues involved in the new CO, Mr Ronny TONG and Ms Emily LAU stressed the need to allow sufficient time for scrutiny of the New Companies Bill by the LegCo. They suggested that the Administration should endeavour to introduce the Bill into LegCo in the 2008-09 session so that scrutiny of the Bill could be completed within the LegCo term of 2008 to 2012.

Admin

Resources requirements for the rewrite exercise

78. Ms Emily LAU expressed concern about the resource requirements for the rewrite exercise. Given that many major common law jurisdictions were undertaking company law reforms, Ms LAU urged the Administration to make reference to their developments and adopt practices where appropriate so as to enhance the cost-effectiveness of the rewrite exercise.

79. R of C stressed that, while review and reform of company laws in other jurisdictions would serve as good reference for the rewrite exercise, given the economic, social and political differences between these jurisdictions and Hong Kong, extensive research and analysis of the policy and legal background to the company laws of other jurisdictions would be needed to see whether or not they could be adopted by the new Companies Bill.

80. Ms Emily LAU considered that the estimated non-recurrent cost of $19 to $22 million for engaging external consultants and the annual recurrent cost of over $20 million for the rewrite exercise were on the high side. She further expressed concern about the need to create additional posts to take forward the exercise, in particular the creation of new directorate posts. She urged the Administration to critically review the need for creation of new directorate posts in finalizing the staffing requirements proposal for the exercise.

Admin

81. SFST stressed that the Administration was mindful of the need to undertake the rewrite exercise in a cost-effective manner and would endeavour to control the staff costs for the exercise. He re-iterated that the Administration was examining the feasibility of deploying existing staff to meet part of the staffing requirements of the rewrite exercise.

82. Ms Emily LAU referred to the comprehensive review of the CO led by Mr Ermanno Pascutto completed in 1997, which had incurred a huge consultancy fee of $15 million but contained recommendations of little use for Hong Kong. Ms LAU stressed the importance for the Administration to engage consultants with suitable experience and expertise to undertake the rewrite exercise.

83. R of C pointed out that the proposed rewrite exercise was completely different from the consultancy completed in 1997 in terms of purpose and scope. While the consultancy completed in 1997 aimed at reviewing the principles and policies in the CO, the rewrite would be a much more comprehensive exercise covering the review, restructuring and rewrite of existing provisions in the CO. Hence, it was not appropriate to make a direct comparison between the two exercises.

Consultation with relevant stakeholders

Admin

84. Mr Ronny TONG enquired about the role of the SCCLR in the rewrite exercise. He further suggested that the Administration should involve the active participation of relevant stakeholders including the SCCLR in the rewrite exercise.

85. R of C advised that the SCCLR was expected to play a key role in the rewrite exercise. The Administration's preliminary thinking was, in the case of those aspects of the CO which had already been reviewed and reformed in the context of companies (amendment) ordinances in recent years, only minor adjustments would be made during the rewrite. The rewrite would focus on areas which had been basically untouched by previous company reviews. The results of the research undertaken by the Companies Bill Team and the consultants on these items, as well as the proposals/recommendations arising from this would be forwarded to the SCCLR for advice in preparing the new Companies Bill. In the case of those proposals/recommendations which had far-reaching and profound implications and were of public concern, consultation with relevant stakeholders and the public would be conducted. R of C supplemented that the Company Law Reform Division of the Companies Registry provided support to the SCCLR in undertaking the necessary research and preparation of discussion papers for meetings.

Way forward

Admin

86. SFST assured members that the Administration would take into account Members' views expressed at the meeting in working out the details of the rewrite exercise. The Administration would consult the Panel on the staffing requirements proposal in the 2005-06 session.

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Appendix V

Rewrite of the Companies Ordinance

List of relevant papers

(Position as at 4 November 2005)

Paper/Report	LC Paper No.
"Consultancy Report on the Review of the Hong Kong Companies Ordinance"	CB(1)1667/96-97 *(issued in March 1997)* *(discussed at the FA Panel meeting on 2 June 1997)*
"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"	*(issued in February 2000)*
Administration's paper on "Overall Review of the Companies Ordinance"	CB(1)2254/03-04(05) *(discussed at the FA Panel meeting on 5 July 2004)*
Minutes of the FA Panel meeting on 5 July 2004	CB(1)2513/03-04
Administration's paper on "Rewrite of the Companies Ordinance"	CB(1)1919/04-05(11) *(discussed at the FA Panel meeting on 4 July 2005)*
"Background brief on rewrite of the Companies Ordinance" prepared by the LegCo Secretariat	CB(1)1919/04-05(12) *(discussed at the FA Panel meeting on 4 July 2005)*
Minutes of the FA Panel meeting on 4 July 2005	CB(1)2357/04-05
Administration's paper on "Rewrite of the Companies Ordinance"	CB(1)193/05-06(04) *(issued on 2 November 2005)*