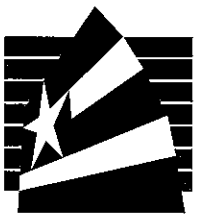

AmCham

Ms. Mary So
Clerk to Bills Committee
Legislative Council
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The American Chamber of Commerce in Hong Kong
1904 Bank of America Tower
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September 10, 2010

Attn: Bills Committee

RE: Submission to the Bills Committee on Legal Practitioners (Amendment) Bill 2010

After consultation with our members through our Law Committee, AmCham is pleased to provide its views to the Bills Committee for the upcoming Legislative Council review on September 17, 2010, in regards to the amendment to the Legal Practioners Bill on limited liability partnerships ("LLP") and underscore to the Committee the possible impact that this Bill may have on law firms in Hong Kong.

We fully support adoption of a LLP model in order to facilitate the continued growth and development of the legal industry in Hong Kong. Adoption of LLPs will bring Hong Kong in line with other commercial and financial centers such as New York, Ontario, London, and Singapore. This in turn will help bolster efforts to promote Hong Kong as an international financial, commercial and legal centre.

The introduction of LLPs worldwide recognizes that law firms, like other business organizations, should be allowed to operate with limited liability to their owners and this has become acutely important in recent years with the need of law firms to develop greatly expanded platforms to service the increasingly sophisticated needs of the financial and commercial businesses in Hong Kong.

We offer the attached comments, however, because we believe that certain revisions to the proposed bill are needed in order to allow Hong Kong to provide a sufficiently meaningful LLP model. To this end, we fully support the comments and recommendations previously made by The Law Society of Hong Kong. We hope our comments explain our concerns that the proposed bill contains too many exceptions or limitations on what should be an optimal LLP structure and, in particular, one that is consistent with New York, London, and Singapore.

Thank you for allowing us to present the views of our membership. In addition, we respectfully request permission for a representative to attend the Bills Committee meeting on 17 September 2010.

Sincerely,

Richard R. Vuylsteke

Richard R. Vuylsteke
President
The American Chamber of Commerce in Hong Kong

Encl.

THE AMERICAN CHAMBER OF COMMERCE IN HONG KONG

Submission to the Bills Committee On Legal Practitioners (Amendment) Bill 2010

We are submitting these comments regarding the draft Legal Practitioners (Amendment) Bill 2010 ("Bill") on behalf of the American Chamber of Commerce, reflecting the views of members of the Law Services Committee (which includes many of the foreign law firms practicing in Hong Kong).

As a general matter, we strongly support the views and recommendations expressed by the Law Society of Hong Kong (the "Law Society") in its Submission to the Bills Committee on Legal Practitioners (Amendment) Bill 2010 dated August 6, 2010. The introduction of limited liability partnerships ("LLPs") as a new alternative for Hong Kong law firms will bring the business structures available for the legal industry in Hong Kong in line with those of other commercial and financial centers such as New York in the United States, Ontario in Canada, London in the United Kingdom and Singapore. We believe the introduction of LLPs will support the growth of the legal industry in Hong Kong and bolster efforts to promote Hong Kong as an international financial and legal center.

At the same time, we believe that some revisions to the draft Bill are needed in order to keep the Bill in line with global standards. The comments that follow address several of these points. In many cases, the relevant issues have been addressed by the Law Society's Submission, so we have not repeated them in our comments for the sake of efficiency, although we strongly concur in the Law Society's Submission.

Partial shield

The draft Bill adopts a partial shield model rather than a full shield model. We believe that it is advisable for the Bills Committee to change to the full shield model as that is the prevailing modern practice for LLPs in the jurisdictions where major commercial and financial jurisdictions are located, including New York in the United States, Ontario in Canada, London in the United Kingdom and Singapore.

The first LLP law was introduced in 1991 in the state of Texas in the United States, and LLP laws have now been enacted by all 50 states in the United States. The earliest LLP laws adopted a partial shield model, but the current practice overwhelmingly favors the full shield approach. 41 of the 50 states in the United States have adopted the full shield model for their LLP laws. These 41 states include ten states that amended their LLP laws to convert from the

partial shield model to the full shield model in line with modern practice.[1] The U.S. Revised Uniform Partnership Act, which is part of a series of model statutes that serve as guides to governments and legislatures of U.S. states in adopting or revising their company laws, was amended in 1997 to adopt a full shield model. The LLP laws of only nine states in the United States continue to follow a partial shield model, and none of these nine states includes a major financial or commercial center.

Ontario, the major financial center of Canada, also adopted the partial shield model for its initial LLP law. But in 2006, Ontario amended its LLP law to switch from the partial shield model to the full shield model, in line with the trend in other jurisdictions. Singapore, which introduced LLPs in 2005, also provides full shield protection to partners of LLPs.

As noted in the Law Society's Submission, Hong Kong law firms are currently allowed to, and many already do, use service companies to carry out non-client administrative functions such as renting office space, employing staff and dealing with suppliers and vendors. The use of service companies in this manner has the effect of shielding partners of a law firm from ordinary commercial liabilities of the law firm in the same way as a full shield LLP model. We understand the Administration views the availability of service companies as one factor indicating there is less need for Hong Kong to adopt a full shield LLP model and that a partial shield model would be sufficient. We disagree with this view. Permitting law firms to use service companies in this manner constitutes implicit acceptance of the position that there is no need to treat a law firm any differently vis-a-vis its commercial creditors (as opposed to clients) than any other business being conducted through a business organization with limited liability. We believe this is a correct public policy. But having accepted such policy position, requiring law firms to artificially route administrative services through service companies in order to achieve this result imposes an unnecessary administrative burden that serves no useful purpose. Adopting the full shield model for the introduction of LLPs in Hong Kong would provide a natural and logical means to eliminate the need for these artificial and costly arrangements.

Based on the above, we recommend that Hong Kong adopt the full shield model for LLPs in accordance with the prevailing practice in jurisdictions where other major financial and commercial centers are located.

Distribution of partnership property

The introduction of LLPs implicitly is a recognition of the principle that law firms, like other business organizations, should be allowed to operate with limited liability to their partners. We strongly support this initiative and believe that it will support the growth of the legal industry in Hong Kong. This achievement is significantly undermined, however, by Section 7AI of the draft Bill, which restricts distributions on partnership property by LLPs. Section 7AI puts LLPs in a worse position than other business organizations with limited liability, such as limited liability companies, which we believe is unnecessary. We understand that Hong Kong's existing insolvency law already includes protections for creditors against fraudulent or undervalue transfers that apply to all business organizations, whether general partnerships or companies with limited liability, and that would apply to LLPs, as well, if the Bill is adopted without Section 7AI. We believe that LLPs do not need to be held to any stricter standard than other business organizations with limited liability, and that the additional substantial restrictions in Section 7AI are unnecessary.

[1] These 10 states include Arizona, Hawaii, Illinois, Kentucky, Louisiana, Maine, New Jersey, North Carolina, Ohio and Texas.

We note that this approach would be consistent with the approach generally taken in the United States, including in New York and under the Revised Uniform Partnership Act, where LLP laws generally do not include specific restrictions on the distribution on partnership property for LLPs but rely instead on the provisions of general bankruptcy laws, which apply to LLPs in the same way as other business organizations.

For these reasons, we strongly recommend that Section 7AI of the draft Bill be deleted.

Requirement of Client Knowledge of LLP Status

Section 7AC(4) of the draft Bill protects a partner of an LLP from liability only if the client knew or ought reasonably to have known that the partnership was an LLP at such time. We believe this provision is unnecessary since the draft Bill separately requires a law firm to include the initials "LLP" in its name, to display its firm name clearly and to notify clients of its LLP status, and also requires the Law Society to maintain a list of all LLPs available for public inspection. These provisions together should be sufficient to ensure that clients are aware of the LLP status of a law firm.

Retaining Section 7AC(4) as drafted will invite unnecessary and wasteful disputes at the time of any claim against an LLP and impose an unnecessary burden of proof on the law firm or partners seeking to establish the limitation of liability. In contrast, businesses that operate through limited liability companies enjoy limited liability without the business having to prove that its creditors or other third parties had knowledge of such limited liability status. Although LLPs may now be a new concept in Hong Kong, that does not warrant creating through this kind of provision that effectively amounts to a presumption against the limitation of liability.

Finally, we are not aware of any precedent for this requirement in the LLP legislation of other jurisdictions. While Hong Kong must of course consider what legislation is appropriate under the conditions prevailing in Hong Kong, the fact that such a significant provision does not appear in the LLP legislation in other jurisdictions is instructive.

For these reasons, we recommend that Section 7AC(4) of the draft Bill be deleted.

Foreign LLPs

The draft Bill will serve two purposes. Most importantly, the Bill will permit Hong Kong law firms that currently operate as general partnerships to convert to LLPs. The Bill also will permit foreign law firms that already are organized as LLPs in their home jurisdictions to register their LLP status in Hong Kong. The following comments focus on ensuring that the Bill achieves both of these objectives as well as possible.

Recognition of Foreign LLPs

The LLP laws of many jurisdictions – including New York, California, Ontario and British Columbia – include provisions that expressly recognize foreign LLPs that conduct business in such jurisdictions. These provisions generally state that the laws of the foreign jurisdiction under which the foreign LLP is organized shall govern the internal affairs of such LLP and (with one exception discussed below) the liability of its partners. After Hong Kong introduces LLPs through the adoption of the draft Bill, then Hong Kong law firms automatically will enjoy the benefit of these provisions in the LLP laws of other jurisdictions, which will expressly recognize the status of Hong Kong LLPs.

The draft of an LLP law for Hong Kong proposed by the Law Society in 2004 included a similar provision that would have expressly recognized the status of foreign LLPs operating in Hong Kong, but that provision has not been included in the draft Bill proposed by the Administration. We believe it would be preferable for the Bill to include a provision similar to that proposed in 2004 as a matter of comity, as well as to avoid ambiguity regarding the status of foreign LLPs under Hong Kong law.

For example, the New York LLP statute provides that the laws of the foreign jurisdiction under which the foreign LLP is organized shall govern the internal affairs of such LLP and the liability of its partners, except that the same standard of personal liability that applies to partners of LLPs formed in New York shall apply to partners of such foreign LLP.

Including this provision is not intended to change, and is not inconsistent with, the approach in the draft Bill of applying the same standard of liability to Hong Kong LLPs and foreign LLPs operating in Hong Kong. The provisions that expressly recognize foreign LLPs in the legislation of other jurisdictions take two approaches to this issue. Some jurisdictions state simply that the laws of the foreign jurisdiction under which the foreign LLP is organized shall govern all internal affairs of such LLP. Other jurisdictions (e.g., New York) provide an exception to this general principle with respect to the liability of partners, and state that the liability of the partners of the foreign LLP shall be the same as (or no less than) the liability of partners of an LLP formed in that jurisdiction. The draft Bill for Hong Kong takes the latter approach (like New York), and it would be possible to maintain that principle in the draft Bill even if the Bill were amended to include a provision that generally recognizes foreign LLPs.

Based on the foregoing, we propose that the following provision be included in the Bill to clarify the status of foreign LLPs:

"The laws of the jurisdiction under which a foreign limited liability partnership is formed shall govern its organization and internal affairs and the liability of its partners for debts, obligations and liabilities of, or chargeable to, the foreign limited liability partnership or any of its partners.

Notwithstanding the above, a partner of a foreign limited liability partnership does not have any greater protection against individual liability with respect to his or her activities in Hong Kong than a partner in a limited liability partnership has under Section 7AC(1) with respect to his or her activities in Hong Kong."[2]

Procedures for Foreign LLPs

Regardless of whether the Bill includes language that explicitly recognizes foreign LLPs, we believe that the following changes should be made to the draft Bill to ensure that the Bill functions properly with respect to foreign firms organized as LLPs in their home jurisdiction that wish to register under the Bill as a foreign LLP. These changes are intended to be technical corrections and are not intended to have any material substantive effect.

[2] This language is based on the British Columbia Partnership Law, which is also similar to the language used in the Alberta and Saskatchewan LLP laws.

Section 7AA(2)

The draft Bill contains references in several places to a firm "becoming a limited liability partnership." These references are ambiguous in the context of foreign firms already organized as LLPs in their home jurisdictions that are registering as LLPs in Hong Kong. For example, Section 7AG(2) of the draft Bill requires a foreign firm to inform its existing clients in Hong Kong within 30 days after "it becomes a limited liability partnership." We believe this provision is intended to require the foreign firm to make the notification within 30 days after registering in Hong Kong as an LLP, but that conclusion is not clear from the current language. Similar questions of interpretation arise elsewhere in the draft Bill.

To address this ambiguity, we therefore propose that a new sentence be added to Section 7AA(2) as follows:

"If a foreign firm is organized as a limited liability partnership in its home jurisdiction, a reference in this Part to such foreign firm becoming a limited liability partnership is a reference to such foreign firm registering as a limited liability partnership in Hong Kong in accordance with the provisions of this Part".

Section 7AB

Section 7AB as drafted appears to require a specific reference to the Hong Kong LLP statute in its partnership agreement in order for an entity to qualify as a "limited liability partnership" thereunder. Many foreign law firms already are organized as LLPs in their home jurisdictions under their existing partnership agreements, so any requirement to refer explicitly to the Hong Kong LLP statute in order to register as an LLP in Hong Kong would require these firms to amend their partnership agreements. This is an unnecessary burden that would be quite significant for some law firms, as the largest firms in the world now have hundreds of partners. Moreover, many law firms today are organized in a single jurisdiction, but practice in multiple countries and jurisdictions. It is not practical for their partnership agreements to refer to the specific LLP law of each jurisdiction in which such law firm conducts business. We note that LLP laws of other jurisdictions do not generally require any specific reference to the LLP law of such jurisdiction.

Based on the foregoing, we propose that Section 7AB be amended as follows:

"7AB. Limited liability partnership

For the purpose of this Part, a limited liability partnership is a partnership that is for the time being –

(a) a Hong Kong firm or a foreign firm; and

(b) *designated by written agreement between the partners as (i) a partnership to which this Part applies or (ii) a partnership with limited liability under the laws of its jurisdiction of organization if other than Hong Kong ."*

Section 7AG(3)

In Section 7AG(3), the reference to "carrying on" the practice of law in a foreign jurisdiction in Section 7AG(3) on its face focuses on whether a law firm conducts business in a

foreign jurisdiction, instead of whether the law firm is organized as an LLP under the relevant law of a foreign jurisdiction. Since we believe the intent is for Section 7AG(3) to apply to any LLP formed under the laws of a foreign jurisdiction, we believe the language should be revised accordingly.

We propose that Section 7AG(3) be amended as follows:

"(3) For the purposes of subsection (2), a foreign firm is a specified foreign firm if, before ~~becoming~~ registering as a limited liability partnership in Hong Kong, it has been organized ~~carrying on, in a foreign jurisdiction, the practice of law~~ as a partnership with limited liabilities under the law of ~~that~~ a foreign jurisdiction."

Definition of "business"

We believe there is a technical flaw in the definition of "business" in Section 7AA(1). As drafted, clause (a) covers the practice of Hong Kong law by a Hong Kong law firm, while clause (b) covers the practice of foreign law by a foreign law firm. Hong Kong law firms also are permitted to practice foreign law (through the employment of registered foreign lawyers), but it is not clear whether this practice is covered by the current definition of "business". If not, the effect of the omission would be that the foreign law practice of the Hong Kong law firm would not benefit from the limitation of liability in Section 7AC(1). Since the purpose of the Bill is to promote the development of the legal industry in Hong Kong, this is an important drafting point that should be addressed.

Moreover, we believe that the definition is unnecessary. An "LLP" is already defined in Section 7AB as a Hong Kong firm or a foreign firm operating under an LLP agreement, and any entity that qualifies as an "LLP" under the Bill should be entitled to the full benefits of the Bill. There is no need to try to define the "business" of the LLP that would be entitled to the limitation on liability set forth in Section 7AC(1). Doing so is unnecessarily restrictive and inconsistent with the practice of other jurisdictions, including New York and Ontario.

Accordingly, we believe the best way to address the technical problems in the current definition of "business" is simply to delete this definition, and rely instead on the plain meaning of the word "business" wherever that term is used in the Bill.

* * * * *

Thank you for taking the time to consider our comments on the proposed Bill. We would be pleased to discuss with you our comments or any other matters you feel would be helpful in your consideration of the Bill.

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