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29 January 2010

Mrs Vivian Kam  
Clerk to House Committee  
Legislative Council Secretariat  
3/F, Citibank Tower  
3 Garden Road  
Hong Kong

[Fax: 2509 0775]

Dear Mrs Kam,

**Companies (Amendment) Bill 2010 and  
Business Registration (Amendment) Bill 2010**

I am writing to convey our views concerning the arrangement of the Bills Committee in connection with the Companies (Amendment) Bill 2010 and the Business Registration (Amendment) Bill 2010.

As you are aware, the above Bills will be introduced into the Legislative Council for first and second reading on 3 February. Thereafter, the Bills will be considered by the House Committee on 5 February. Subject to Members' views, we would like to suggest that the above Bills be considered together by one single Bills Committee should such be formed.

We have set out in the Legislative Council Brief issued on ----- 20 January (see Annex) details concerning the legislative amendments to be introduced into the Companies (Amendment) Bill 2010 and the Business Registration (Amendment) Bill 2010. In brief, the Companies (Amendment) Bill seeks to, among others, amend the Companies Ordinance (Cap. 32) to provide for electronic registration of companies and corresponding changes in the registration procedure upon the implementation of the Phase II of the Integrated Companies Registry Information System ("ICRIS II") which is expected to come on stream in

late 2010/early 2011. In connection with the implementation of ICRIS II, we will introduce one-stop simultaneous application for company registration and business registration for the purpose of enhancing the ease of doing business. This would require relevant legislative amendments to be made to the Business Registration Ordinance (Cap. 310) mainly to deem a person who makes an application for company registration to have applied for business registration at the same time, to empower the Registrar of Companies to collect business registration particulars, the prescribed business registration fee and levy, and to issue the business registration certificate on behalf of the Commissioner of Inland Revenue. Such amendments are included in the Business Registration (Amendment) Bill 2010.

In view of the fact that most of the amendments contained in the Business Registration (Amendment) Bill 2010 concern the one-stop simultaneous application mentioned above and are related to the implementation of ICRIS II where changes to the application process are prescribed under the Companies (Amendment) Bill 2010, we are of the view that it would be desirable, for the purpose of clarity and entirety, that the two Bills could be considered together by Members under one Bills Committee.

I should be grateful if you would convey our views to Members for their consideration. In the meantime, if you have any questions, please let us know. Thank you for your kind attention.

Yours sincerely,



( John C. Y. Leung )

for Secretary for Financial Services  
and the Treasury

c.c. AA/SFST )  
D of Adm ) w/o Encl.  
PS for Tsy )

File Ref.: C2/1/72(2009)

## **LEGISLATIVE COUNCIL BRIEF**

Companies Ordinance (Cap. 32)  
Business Registration Ordinance (Cap. 310)

### **Companies (Amendment) Bill 2010 and Business Registration (Amendment) Bill 2010**

#### **INTRODUCTION**

A&B At the meeting of the Executive Council on 12 January 2010, the Council ADVISED and the Chief Executive ORDERED that the Companies (Amendment) Bill 2010 and the Business Registration (Amendment) Bill 2010, at Annexes A and B respectively, should be introduced into the Legislative Council ("LegCo") at the same time.

#### **JUSTIFICATIONS**

##### **(A) Electronic Company Registration and Expediting Company Name Registration Process**

2. The Companies Registry ("CR") is developing Phase II of the Integrated Companies Registry Information System ("ICRIS II") which is expected to come on stream in late 2010/early 2011. ICRIS II will enable on-line applications for company registration<sup>(1)</sup> and filing of company documents but this will require legislative amendments to the Companies Ordinance (Cap. 32) ("CO") to tie in with the changes in the registration procedure, e.g. to allow the signing of incorporation forms using passwords, streamline the attestation requirements for signatures by founder members, and facilitate the issue of certificates of incorporation/registration by electronic means, etc.

3. As a related matter, in order to expedite the company name approval process, a company name will be accepted for registration

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**Note** <sup>(1)</sup> "Company registration" is used as a generic term in this brief to cover both the incorporation of local companies and registration of non-Hong Kong companies.

instantaneously if it satisfies certain preliminary requirements, namely, that it is not identical to another name on the register and does not contain certain specified words or expressions<sup>(2)</sup>. Thereafter, if the company's name is found to be objectionable, the Registrar of Companies ("Registrar") will be empowered to direct the company in question to change its name within a period specified by the Registrar. The revised procedures will shorten the processing time for company incorporation from four working days to one day. This will put Hong Kong on a par with comparable jurisdictions like the UK and Singapore. To implement the above changes, legislative amendments to the CO are required ahead of the rewrite of the CO which we are undertaking in parallel.

4. To address the concerns from the business community especially trademark/brand name owners in Hong Kong and overseas in particular those in the US and Japan, we propose to strengthen our company name registration system to enhance enforcement against possible abuses by "shadow companies"<sup>(3)</sup> by empowering the Registrar to act pursuant to court orders to direct a "shadow company" to change its name. The Registrar may substitute the company's name with its registration number if it fails to comply with the Registrar's direction to change name. The same power to substitute names of a company will be given to the Registrar where a company fails to comply with a direction to change its name that is too like that of another company on the register; gives the impression that the company is connected with the Hong Kong SAR Government or the Central People's Government; constitutes a criminal offence; or is contrary to the public interest.

#### **(B) One-stop Service for Company Registration and Business Registration**

5. We propose that, upon the implementation of ICRIS II and electronic incorporation of companies by the CR, any person who submits an application for company registration will be deemed to have applied for business registration at the same time. CR will issue the business registration certificate together with the certificate of

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**Note** <sup>(2)</sup> The Companies (Specification of Names) Order (Cap. 32 sub. leg. E), contains a list of words or expressions (e.g. "Trust", "Municipal", "Building Society", etc.) requiring the Chief Executive's prior approval (authority delegated to the Registrar of Companies) for registration as part of a company's name. We shall conduct a separate review in consultation with relevant bureaux/departments to update the list.

**Note** <sup>(3)</sup> "Shadow companies" refer to those companies incorporated in Hong Kong with names which are very similar to existing and established trademarks or trade names of other companies and which often pose themselves as representatives of the owners of such trademarks or trade names to produce counterfeit products in Mainland China bearing such trademarks or trade names.

incorporation/registration to the successful applicants. Such service will be made available for both paper and electronic applications. With simultaneous application in place, an on-line application for registration of a local company and business registration will be completed through one step and within one day, compared with an average of 4 working days to complete the two registrations under the existing system. We therefore have to amend the Business Registration Ordinance (Cap. 310) ("BRO"), for instance, to provide that a person who makes an application for company registration is deemed to have also made an application for business registration, to empower the Registrar to collect business registration particulars, the prescribed business registration fee and levy, and issue the business registration certificate on behalf of the Commissioner of Inland Revenue ("Commissioner"), etc.

6. Currently, a company is required under the CO and the BRO to notify the Registrar and the Commissioner respectively of any change in certain particulars, for example, corporate name, registered office address, etc. In order to provide more efficient and integrated customer-friendly services to the business sectors, we propose treating the company's notification of the change in such particulars to the Registrar as a notification to the Commissioner. The proposed amendments to the BRO to this effect will come into operation only when the relevant part of ICRIS II is implemented. Moreover, in order to facilitate the processing of simultaneous applications and other business registration applications<sup>(4)</sup> through electronic means, legislative amendments will be made to the BRO to provide for the use of digital signatures or passwords in these applications and the issuance of business registration certificates in electronic mode.

### **(C) Facilitating Electronic and Website Communications**

7. Amendments have recently been made to the Listing Rules of the Hong Kong Exchanges and Clearing Limited ("HKEx") to allow a listed issuer to send corporate communications to its shareholders by making them available on the listed issuer's website if the shareholders agree, or are deemed to have so agreed. Since there are currently no similar provisions in the CO which provide for such mode of communications, Hong Kong-incorporated listed companies are not able to make use of such facilities. We therefore see the need to amend the CO so that Hong Kong companies can also make use of the companies' websites to communicate with their shareholders. To further facilitate electronic communication and promote environmental friendliness, we propose to amend the CO to generally enable documents or information to be sent or supplied by a company

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**Note** <sup>(4)</sup> These include business registration applications in respect of sole proprietorship and partnership.

to any person other than the Registrar under the CO through electronic means. Notwithstanding this, we propose to retain the shareholders' right to request the companies to deliver hard copies of documents to them free of charge, and allow individual shareholders to choose not to communicate with the companies electronically. This is to safeguard the interest of those shareholders who do not have access to internet facilities.

**(D) Exempting Listed Companies from Giving Notice of Closure of Register of Members by Advertisement in a Newspaper**

8. Section 99(1) of the CO requires a company incorporated in Hong Kong to give notice of closure of its register of members/debenture holders by advertisement in a newspaper. However, the Listing Rules require a listed company to publish its notice of closure of register of members on HKEx's website instead of in a newspaper<sup>(5)</sup>. As a result, a listed company incorporated in Hong Kong has to publish its notice of closure of register of members both in a newspaper and on the HKEx's website. To streamline the requirements and to ensure a level playing field between listed companies incorporated in Hong Kong and elsewhere, we propose to amend the CO to allow listed companies to give notice of closure of registers of members/debenture holders in accordance with the Listing Rules.

**(E) Providing for Multiple Statutory Derivative Actions**

9. The statutory derivative action ("SDA") procedure in the CO allows a member of a company to bring an action or intervene in the proceedings on behalf of the company in respect of "misfeasance"<sup>(6)</sup> committed against the company. Unlike some overseas jurisdictions such as Australia, Canada and New Zealand, where members of a related company<sup>(7)</sup> of the company in question have similar rights under their law, section 168BC(1) of the CO only gives members of the company a right to seek leave to commence a SDA, i.e. only "simple" derivative actions as opposed to "multiple" derivative actions (i.e. allowing a member of a related company to commence or intervene in SDA on behalf of the company) can be taken. We propose that, in

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**Note** <sup>(5)</sup> Rule 2.07C and Rule 13.66 of the Main Board Listing Rules which were implemented on 25 June 2007.

**Note** <sup>(6)</sup> "Misfeasance" is defined as "fraud, negligence, default in compliance with any enactment or rule of law, or breach of duty" in section 168BB(2) of the CO.

**Note** <sup>(7)</sup> A "related company" in relation to a specified corporation means any company that is the specified corporation's subsidiary or holding company, or a subsidiary of that specified corporation's holding company.

view of a recent court case<sup>(8)</sup> where both the Court of Appeal and the Court of Final Appeal ruled that a “multiple” derivative action is maintainable in Hong Kong under the common law and considered it appropriate for the CO to be extended to cover “multiple” SDA, the CO should be amended to expand the scope of SDA to cover “multiple” derivative actions. The proposal would further enhance the protection of the interests of minority shareholders.

**(F) Technical Amendments Paving the Way for Scripless Holding and Transfer of Shares or Debentures**

10. We propose to introduce technical amendments to the CO to remove, or provide exceptions to, the limitations arising from provisions in the CO that compel the use of paper documents of title and paper instruments of transfer in relation to shares and debentures. This would be an important first step in the legislative process to allow for the development of a scripless market in Hong Kong. The Securities and Futures Commission (“SFC”) is currently working with the HKEx and the Federation of Share Registrars (“FSR”) on a proposed operational model for implementing a scripless market and have issued a consultation paper on the proposed model on 30 December 2009. A firm commitment to remove the existing statutory hurdles in the CO will help focus the market on the scripless initiative to enhance market efficiency and investor protection. The proposed amendments to the CO will come into operation only when the market is ready to implement a scripless model. Other legislative amendments, mainly to the Securities and Futures Ordinance (Cap.571), will also be needed to provide for the regulation of the scripless environment and persons who play a key role in that environment.

**(G) Amendment to Rectify the Chinese Version of Section 57B(7) of the CO**

11. We noted in our review of the CO and from a 2007 court judgment that there is a discrepancy between the English and Chinese versions of section 57B(7) of the CO. As this provision is regularly encountered in corporate practice, we would take the opportunity to amend the Chinese version of this provision so as to bring it in line with the policy intention and the prevailing market understanding of the legislation.

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**Note** <sup>(8)</sup> *Waddington Ltd. v Chan Chun Hoo* CACV No. 220 of 2005 [2006] 2 HKLRD 896; [2008] 11 HKCFAR 370

## **THE BILLS**

### **The Companies (Amendment) Bill 2010**

#### *Electronic Company Registration and Streamlined Company Name Approval Regime*

12. On electronic company registration, **clauses 3-5** provide for a streamlined company formation procedure for the purpose of electronic registration, which will remove the attestation requirements for the signing of memorandum of association and articles of association by a founder member and to reduce the number of founder members required to sign an incorporation form from two to one. **Clauses 24 and 25** provide for electronic communications with the Registrar, including the delivery of documents and forms to the Registrar in electronic form and the signing of the documents using digital signature or password. **Clauses 22 and 23** provide for the signature requirement of certain documents if they are delivered to the Registrar in electronic form and to provide for the documents to be delivered to the Registrar by authorised representatives. **Clause 27** empowers the Registrar to issue certificates in any form including electronic form.

13. On company names registration, **clauses 9-11** empower the Registrar to prohibit a company from being registered by a name that is the same as that for which a direction to change name has been given, and to direct a company to change its name pursuant to a court order or under other circumstances, including those relating to the use of a name which may constitute a criminal offence or is considered to be offensive or contrary to the public interest. **Clause 12** gives a new power to the Registrar to replace a company's name by its registration number if it fails to comply with the Registrar's direction to change its name.

#### *Electronic and Website Communications by a Company to Another Person (Other than the Registrar)*

14. **Clause 31** adds new provisions to the CO to provide for the means of communication (i.e. communication in electronic form, communication in hard copy form and communication by means of website) by a company to any person other than the Registrar. It also provides rules that govern such communications (e.g. electronic communications can be made upon the recipient's agreement and to an address specified by the recipient, period of time specified for the information or document to be made available on the website, etc.) and retains the right of the recipient to request hard copy of the document or information.



### *Multiple Statutory Derivative Actions*

15. **Clauses 14-20** amend the CO to enable a member of a related company of a specified corporation to bring or intervene in proceedings against a specified corporation as defined in section 2 of the CO.

### *Paving Way for Scripless Holding and Transfer of Shares and Debentures*

16. **Clauses 36-47** amend the CO and its subsidiary legislation to remove obstacles to the introduction of the scripless holding and transfer of shares and debentures. **Clause 48** is a related amendment to the Securities and Futures Ordinance (Cap.571).

### *Other Amendments*

17. **Clauses 49, 50, 52, 55, 56 and 57** make minor amendments to certain provisions of the CO to rectify textual discrepancies. **Clause 53** amends section 99 of the CO to provide for an alternative means of closing registers of members and registers of debenture holders other than by advertisement in a newspaper. **Clause 54** makes textual amendments to section 102(1) of the CO.

## **The Business Registration (Amendment) Bill 2010**

### *One-stop Service for Company Registration and Business Registration*

18. **Clauses 3-7, 14, 21, 22 and 25** provide for simultaneous application for company registration and business registration by, among others, deeming the person who makes an application for company registration to have applied for business registration at the same time, and allowing the Registrar to collect on behalf of the Commissioner business particulars as well as related business registration fee and levy, and to issue business registration certificates to successful applicants. On simultaneous notification of changes in business particulars, **clause 10** amends the BRO to treat the company's notification of changes in certain business particulars to the Registrar as a notification to the Commissioner.

### *Electronic Record for Prescribed Form*

19. **Clauses 11, 23 and 24** provide for the submission of business registration and branch registration applications as well as the issuance of business registration certificates and branch registration certificates by electronic means. **Clauses 26-30** make related and consequential amendments to other legislation.

### *Other Amendments*

20. Other clauses make minor textual amendments to certain provisions of the BRO.

### **LEGISLATIVE TIMETABLE**

21. The legislative timetable will be –

|  |                 |
|--|-----------------|
| Publication in the Gazette   | 22 January 2010 |
| First Reading and<br>Commencement of Second<br>Reading Debate                | 3 February 2010 |
| Resumption of Second<br>Reading debate, committee<br>stage and Third Reading | To be notified  |

### **IMPLICATIONS OF THE PROPOSAL**

C 22. The proposal has economic, financial and civil service implications as set out at Annex C. The proposal is in conformity with the Basic Law, including provisions concerning human rights. The amendments proposed in the Companies (Amendment) Bill 2010 and the Business Registration (Amendment) Bill 2010 will not affect the current binding effect of the CO and the BRO. It has no productivity, sustainability or adverse environmental implications.

### **PUBLIC CONSULTATION**

23. In June 2009, we consulted the LegCo Panel on Financial Affairs on the legislative proposals set out in this paper. Members of the Panel did not object to the proposals. The Standing Committee on Company Law Reform has also been consulted and it supported the proposals. The CR and the Inland Revenue Department (“IRD”) have consulted their Customer Liaison Groups and Users’ Committee respectively where members were supportive of the proposals. The proposal to empower the Registrar to tackle the problem of “shadow companies” was also broadly supported by the respondents in a public consultation conducted in the second quarter of 2008 as part of the CO rewrite exercise. As regards the proposal to remove obstacles to the introduction of scripless holdings and transfers of shares and debentures, the SFC, HKEx and FSR launched a consultation to consult the market on a proposed operational model for implementing a scripless market in Hong Kong on 30 December 2009.

## **PUBLICITY**

24. A press release will be issued when the two Bills are gazetted on 22 January. A spokesman will be available to handle any enquiries.

## **BACKGROUND**

25. In mid-2006, the Government launched a major and comprehensive exercise to rewrite the CO. By updating and modernising the CO, we aim to make it more user-friendly and facilitate the conduct of business to enhance Hong Kong's competitiveness and attractiveness as a major international business and financial centre. We aim to introduce the Companies Bill into the LegCo by the end of 2010. Ahead of the rewrite, there is a need to amend the CO to provide for electronic incorporation and filing of documents to tie in with the development of ICRIS II. We take this opportunity to implement other changes in law, including amendments to the BRO to provide for simultaneous application for company registration and business registration, to enhance business friendliness in Hong Kong. Although the Electronic Transactions Ordinance (Cap. 553) permits electronic incorporation and filing of documents under the CO and the BRO, we considered it desirable to include express provisions in the CO and the BRO to specify the requirements in relation to these matters.

## **ENQUIRIES**

26. For any enquiries, please contact Mr Arsene Yiu, Assistant Secretary for Financial Services and the Treasury (Financial Services) at 2528 9077.

**Financial Services and the Treasury Bureau**  
**20 January 2010**