

**立法會**  
**Legislative Council**

LC Paper No. CB(1)2486/11-12  
(These minutes have been seen  
by the Administration)

Ref : CB1/BC/3/10/2

**Bills Committee on Companies Bill**

**Minutes of the seventh meeting held on  
Friday, 13 May 2011, at 10:45 am  
in the Chamber of the Legislative Council Building**

- Members present** : Hon Paul CHAN Mo-po, MH, JP (Chairman)  
Hon Starry LEE Wai-king, JP (Deputy Chairman)  
Hon CHAN Kam-lam, SBS, JP  
Dr Hon Philip WONG Yu-hong, GBS  
Hon Audrey EU Yuet-mee, SC, JP  
Hon Jeffrey LAM Kin-fung, SBS, JP  
Hon Andrew LEUNG Kwan-yuen, GBS, JP  
Hon WONG Ting-kwong, BBS, JP  
Prof Hon Patrick LAU Sau-shing, SBS, JP
- Members absent** : Hon Albert HO Chun-yan  
Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP  
Hon James TO Kun-sun  
Hon Miriam LAU Kin-yee, GBS, JP  
Hon Abraham SHEK Lai-him, SBS, JP  
Hon Ronny TONG Ka-wah, SC
- Public officers attending** : **Agenda item I**  
  
Mr John LEUNG, JP  
Deputy Secretary for Financial Services and the  
Treasury (Financial Services)

Mr Nick AU YEUNG  
Principal Assistant Secretary for Financial Services  
and the Treasury (Financial Services)

Mrs Karen HO  
Deputy Principal Solicitor  
(Company Law Reform)  
Companies Registry

Ms Phyllis MCKENNA  
Deputy Principal Solicitor  
(Company Law Reform)  
Companies Registry

Mrs Christine Frances SIT  
Senior Solicitor (Company Law Reform)  
Companies Registry

Mr Tim CHUNG  
Solicitor (Company Law Reform)  
Companies Registry

Mr Edward TYLER  
Senior Assistant Law Officer (Civil Law)  
Department of Justice

Miss Selina LAU  
Senior Government Counsel  
Department of Justice

Mr Ken FUNG  
Government Counsel  
Department of Justice

**Clerk in attendance** : Ms Connie SZETO  
Chief Council Secretary (1)4

**Staff in attendance** : Mr KAU Kin-wah  
Senior Assistant Legal Adviser 3

Mr Timothy TSO

Assistant Legal Adviser 2

Ms Sharon CHUNG  
Senior Council Secretary (1)4

Action

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**I Meeting with the Administration**

Matters arising from the meetings on 18 April and 6 May 2011

(LC Paper No. CB(1)2132/10-11(01) -- Follow-up actions to be taken by the Administration for the meeting on 18 April 2011

LC Paper No. CB(1)2132/10-11(02) -- Administration's response to issues raised by members at the meeting on 18 April 2011

LC Paper No. CB(1)2132/10-11(03) -- Administration's response to issues raised by members at the meeting on 6 May 2011)

Other relevant papers

(LC Paper No. CB(3)412/10-11 -- The Bill  
File Ref: CBT/17/2C -- Legislative Council Brief  
LC Paper No. LS26/10-11 -- Legal Service Division Report  
LC Paper No. CB(1)1406/10-11(01) -- Paper on Companies Bill prepared by the Legislative Council Secretariat (Background brief))

The Bills Committee deliberated (Index of proceedings attached at the **Appendix**).

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2. The Bills Committee requested the Administration to take the following actions to address members' concerns --

- (a) to provide annual figures of past few years of companies having failed to file annual returns or to notify the Registrar of Companies ("the Registrar") about changes to the registered

Action

office;

- (b) to provide information about the penalties imposed on the above non-compliance cases;
- (c) to provide an explanation of the criteria for determining which offences to be included in Schedule 7 to the Bill as compoundable offences;
- (d) to consider providing in the Bill a scheme, including the principles/factors the Registrar has to take into account, in exercising the power to compound an offence; and
- (e) to provide information on past consultations on the draft Bill conducted with organizations, in particular, associations of small and medium-sized enterprises and their representatives.

**II Any other business**

3. The Chairman reminded members that the next meeting of the Bills Committee would be held on Friday, 19 May 2011 at 4:30 pm to meet with the Administration.

4. There being no other business, the meeting ended at 12:46 pm.

Council Business Division 1  
Legislative Council Secretariat  
22 August 2012

**Bills Committee on Companies Bill**

**Proceedings of the seventh meeting  
on Friday, 13 May 2011, at 10:45 am  
in the Chamber of the Legislative Council Building**

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
001000-001027	Chairman	Opening remarks	
<u>The formulation of "responsible person" and offences under the Companies Bill</u>			
001028-002305	Administration	Briefing on the follow-up actions taken by the Administration for the meeting on 18 April 2011 (LC Paper No. CB(1)2132/10-11(02))	
002306-003526	Mr Andrew LEUNG Administration Senior Assistant Legal Adviser 3 ("SALA3")	Mr Andrew LEUNG's enquiries/views as follows --  (a) details of the two cases (given in paragraphs 9 and 10 of the Administration's paper) where the phrase "failure to take all reasonable steps" had been considered in the criminal law context and the liability of responsible persons under the new formulation of "responsible person" in the Companies Bill ("CB");  (b) it would be inappropriate to lower the prosecution threshold and require a company director/officer to prove that he/she had taken all reasonable steps to prevent the contravention or failure to comply with the provisions of CB, as the onus of proof rested with the prosecution;	

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		<p>(c) small and medium-sized enterprises ("SMEs") constituted about 97% of companies in Hong Kong. Directors/officers of SMEs were heavily involved in the daily operation of their companies. As they usually had limited legal resources, they would easily overlook regulatory obligations. It would be onerous to them to subject them to criminal liabilities for negligent omission of regulatory requirements; and</p> <p>(d) the Administration should provide detailed information on all offences under CB that a "responsible person" could be liable</p> <p>The Administration's response as follows --</p> <p>(a) the two court cases served to illustrate that when the court was satisfied that a defendant/appellant had taken all reasonable steps that a director/officer would have taken to ensure compliance, there would not be conviction on the offences;</p> <p>(b) there would be no change in the onus of proof before or after enactment of CB. When the new formulation of "responsible person" became effective, the responsibility for proving that a director/officer "authorized or permitted, participated in or failed to take all reasonable steps to prevent the contravention or failure" still vested with the prosecution, not the defendant;</p>	

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		<p>(c) there were 168 offences under CB that a "responsible person" could be liable. A list of the offences with general descriptions was provided in Annexes A to C to the Administration's paper (CB(1)2132/10-11(02));</p> <p>(d) lowering of the prosecution threshold did not necessarily mean that the Administration would take more prosecution action in future. The Registrar of Companies ("the Registrar") would take into consideration relevant factors, such as the nature and seriousness of the breach and the public interest involved, in determining whether to initiate prosecution; and</p> <p>(e) the new formulation of "responsible person" aimed to deter directors/officers from turning a blind eye to their responsibilities and obligations under CB; there were no reported cases of prosecution of directors under the United Kingdom Companies Act 2006 upon which the new formulation for "responsible person" was based</p> <p>SALA3's comments as follows --</p> <p>(a) the offences listed in Annexes A to C of the Administration's paper were mostly regulatory in nature and punishable by fines. If actions were subsequently taken by the director/officer concerned, the maximum fine might not apply; it was unlikely that a director's/officer's negligent omission of requirements</p>	

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		<p>under CB would lead to imprisonment; and</p> <p>(b) members could consider the various offences under CB in greater detail when the Bills Committee conducted the clause-by-clause examination of the Bill</p>	
003527-004126	Mr Andrew LEUNG Administration Chairman SALA3	<p>Mr Andrew LEUNG's views that for the summary offences punishable by fines, it would be inappropriate to prosecute the directors/officers of the company if penalties could be imposed on the company</p> <p>The Administration's response as follows --</p> <p>(a) while in most cases it was companies who would be prosecuted and fined for contravention of obligations, such as the filing of notices with the Registrar of changes of registered addresses; where the circumstances warranted, prosecution of directors may be considered. For instance, if a director/officer failed to keep books of accounts of the company and subsequently the company went into liquidation, the Registrar could only take action against the director/officer; and</p> <p>(b) the Administration would still require to collect sufficient evidence to prosecute a director/officer for failing to take all reasonable steps to prevent the contravention of provisions in CB and only where there was sufficient evidence to prove, that the director had failed to take all reasonable steps</p>	



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		<p>would the Registrar proceed with prosecution</p> <p>Mr Andrew LEUNG's enquiry on whether actions could be taken against a director/officer of a company in liquidation under other ordinances on his/her failure to keep books of accounts</p> <p>The Chairman's advice that the Inland Revenue Ordinance (Cap. 112) could be relevant</p> <p>SALA3's advice that --</p> <p>(a) as far as the sanctions against failure to keep books of accounts were concerned, the purposes of the Companies Ordinance (Cap. 32) ("CO") and the Inland Revenue Ordinance (Cap. 112) were different;</p> <p>(b) the provisions under CO sought to encourage a director to comply with the provisions to ensure protection on the stakeholders' interest to have adequate information on the company; and</p> <p>(c) it seemed to be the Administration's thinking that taking action against the responsible person would be more effective than against the company</p>	
004127-005949	Ms Audrey EU Administration Chairman	<p>Ms Audrey EU's enquiries as follows --</p> <p>(a) whether the offences listed in Annexes A to C of the Administration's paper had covered all the offences targeting the "responsible person" under CB;</p>	

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
		<p>(b) with reference to the two court cases cited in the paper, whether the criteria for considering a director/officer to have "taken all reasonable steps" under CO and CB were the same;</p> <p>(c) whether the requirements for the conduct of a director/officer under the new formulation of "responsible person" would apply to the responsibilities of a director/officer under Common Law;</p> <p>(d) the reason for using the term "person" instead of "officer" in the new formulation of "responsible person", whereas the term used in CO was "officer who is in default"; and</p> <p>(e) the views of professional bodies consulted by the Administration on the new formulation of "responsible person"</p> <p>The Administration's response as follows --</p> <p>(a) while it would be difficult to predict the development of court cases, the Administration believed that the criteria for the court to consider that a director/officer had taken "all reasonable steps" to perform his/her duties under CO would likely to apply to cases prosecuted under CB in future;</p> <p>(b) the formulation of "responsible person" under CB would not have any implication on the</p>	

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		<p>responsibilities of a director/officer under Common Law;</p> <p>(c) the formulation of "officer who is in default" under CO was changed to "responsible person" under CB in order to cover shadow directors who might not be covered by the term "officer";</p> <p>(d) Part 20 of CB empowered the Registrar to compound the breach of certain offences which were not serious, such as failure to file annual returns. Under such circumstances, the Registrar would give a notice to the company offering it an opportunity to avoid prosecution by filing the outstanding annual return to remedy the breach and paying a compounding fee to the Registrar. If the company accepted and complied with the terms of the notice, no prosecution action would be initiated;</p> <p>(e) the Administration had received views both supporting and expressing concerns on the new formulation of "responsible person" during past consultations; it was believed that the new formulation had struck the right balance after considering all views; and</p> <p>(f) the court would consider all of the relevant circumstances of each case in determining its conviction, including (i) whether the omission by the director/officer concerned was due to recklessness, (ii) whether reasonable steps had been taken to</p>	

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		<p>prevent the breach, and (iii) whether the director/officer concerned had duly delegated the compliance to someone who was competent and reliable to attend to the obligations and whether they had been monitoring the delegate's work</p> <p>Ms Audrey EU's view that the Administration's explanation had not allayed her concern that directors might be easily caught by CB and prosecuted for their inadvertent omissions of obligations under the Bill</p> <p>The Chairman's request for more information about compounding and the Administration's response that it would provide information on the provisions relating to compounding, i.e. clause 887 and Schedule 7 when the Bills Committee discussed proposals under Part 20 of CB</p>	
005950-010513	Mr WONG Ting-kwong Administration	<p>Mr WONG Ting-kwong's enquiries as follows --</p> <p>(a) the reasons to tighten the regulation of directors/officers of companies and whether there had been increase in number of cases where companies had failed to file annual returns or to notify the Registrar of necessary changes in the company; and</p> <p>(b) the possible impact of the new formulation of "responsible person" on employees, who might lose their jobs if they failed to meet the filing obligations on behalf of the directors</p> <p>The Administration's response as</p>	The

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		<p>follows --</p> <p>(a) about 10% of companies did not file annual returns on time; it would provide information as requested by Mr WONG after the meeting;</p> <p>(b) for offences that were not serious and were set out in Schedule 7 of the CB, compounding instead of prosecution would be adopted; and</p> <p>(c) CB was silent as to who should be held responsible for non-compliance with the regulatory requirements</p>	<p>Administration to take action as in paragraphs 2(a) and 2(b) of the minutes</p>
<p>010514-012500</p>	<p>Ms Audrey EU Administration Mr Andrew LEUNG</p>	<p>Ms Audrey EU's enquiries on the reasons for only including five compounding offences in Schedule 7 and the criteria for selecting these offences, and her request for the Administration to explain the criteria for determining which of the offences could be compounded and to consider providing in CB a scheme, including the principles/factors to be taken into account by the Registrar, in accordance with which the power to compound an offence was to be exercised</p> <p>The Administration's response as follows --</p> <p>(a) only offences which were not of a serious nature, such as failure to file annual returns, failure to affix the company's name on the outside of its offices, were considered for compounding. At this stage, Schedule 7 only listed out the most straightforward and least controversial offences for compounding;</p>	

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		<p>(b) clause 899 of the Bill provided that the Financial Secretary may by notice published in the Gazette amend Schedule 7, so that the scope of compoundable offences could be amended in future;</p> <p>(c) the Administration would provide more information on clause 887 and Schedule 7 when the Bills Committee discussed Part 20 of CB, and would consider Ms EU's suggestion; and</p> <p>(d) the imposition of liability on the director/officer aimed to encourage compliance with the obligations under CB rather than to increase the number of prosecutions</p> <p>Mr Andrew LEUNG's views as follows --</p> <p>(a) the Administration should not seek unlimited power in penalizing directors'/officers' omissions in complying with requirements under CB; while it was fair to penalize directors/officers who repeatedly failed to comply with or recklessly ignored filing obligations, it would be onerous to them to subject them to criminal liabilities for careless omission of filing obligations;</p> <p>(b) the Registrar of Companies should enhance publicity of directors'/officers' obligations regarding filing duties;</p> <p>(c) penalties for the offences listed in Annex A to the paper should be reduced, as they were only minor</p>	<p>The Administration to take action as in paragraphs 2(c) and 2(d) of the minutes</p>

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		<p>offences; and</p> <p>(d) Ms Audrey EU's suggestion regarding specifying a scheme for the exercise of the Registrar's power to compound offences was supported</p>	
012501-013350	Mr Jeffrey LAM Administration Chairman	<p>Mr Jeffrey LAM's views as follows --</p> <p>(a) a proper balance should be struck between protection of the interests of company investors and stakeholders and director's/officer's obligations; otherwise, there would be negative impact on the business environment;</p> <p>(b) the Administration should reconsider the new powers under CB and assess the pressure that such powers might create on the resources of the Companies Registry; and</p> <p>(c) the Administration should explain its consultation with the public and stakeholders on the proposed changes under CB</p> <p>The Administration's response that --</p> <p>(a) the Administration had sought views from the Standing Committee on Company Law Reform and advisory groups comprising members from different relevant business organizations, professional bodies and academics in developing the various proposals in the CO rewrite; the Administration had issued the draft CB for two rounds of public consultations afterwards; and</p> <p>(b) the Administration had received</p>	

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		<p>different views on the new formulation of "responsible person". It believed that the new formulation had balanced these views; nonetheless, in view of concerns expressed by members, the Administration would re-examine the issue</p>	
013351-013600	<p>Mr WONG Ting-kwong Administration Mr Jeffrey LAM Chairman</p>	<p>Mr WONG Ting-kwong's enquiry on the scope of the Administration's past consultations on the draft CB, in particular, whether SMEs had been included as targets of the consultation</p> <p>Mr Jeffrey LAM's remarks that the Administration's public consultation might not have covered the details and consequences of changes to SMEs, and the concerns that he had expressed were the views of SMEs</p> <p>The Administration's response that --</p> <p>(a) the Administration had reached out to a wide range of business organizations, including SMEs' associations, in past consultations;</p> <p>(b) these consultations included three topical consultations and two consultations on the draft CB;</p> <p>(c) there had been briefings on the CO rewrite organized by SMEs' associations; and</p> <p>(d) while there were not many written views from SME, SMEs did give their views on CB at seminars</p> <p>Mr WONG Ting-kwong's enquiry to the</p>	



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		<p>Chairman on whether the Hong Kong Institute of Certified Public Accountants ("HKICPA") had been consulted on the draft CB</p> <p>The Chairman's response that HKICPA and other accountants' associations had been consulted on the CO rewrite; and his views that parties who had been consulted on CB might not be aware of the effects and the impact of the changes, and the Administration should provide information on past consultations on the draft CB conducted with organizations, in particular, SME associations and their representatives</p>	<p>The Administration to take action as in paragraph 2(e) of the minutes</p>
<p><u>Empowering auditors to obtain information from a wide range of persons for the performance of their duties (clause 403)</u></p>			
013601-015007	Administration	Briefing on the follow-up to the meeting on 6 May 2011 -- supplementary information on Part 9 and Part 12 of the Bill (LC Paper No. CB(1)2132/10-11(03))	
015008-020000	Mr Jeffrey LAM SALA3 Administration	<p>Mr Jeffrey LAM's enquiries as follows --</p> <p>(a) whether the current formulation of clause 403(6) had provided sufficient protection to a company in situations where it could not obtain certain information, as requested by an auditor, from a non-Hong Kong subsidiary due to restriction imposed by non-Hong Kong legislation;</p> <p>(b) whether the Administration would consider a company's effort to acquire information from a non-Hong Kong subsidiary a reasonable step even if the acquisition was not</p>	

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		<p>successful due to restriction imposed by non-Hong Kong legislation;</p> <p>(c) whether the Registrar would accept an accountant's certification in respect of clause 403(6) that a company had made due effort but was restricted by non-Hong Kong legislation; and</p> <p>(d) if (c) was acceptable, whether this could be expressly stated in CB</p> <p>SALA3's views that --</p> <p>(a) the drafting of clause 403 had such an effect that the Registrar would consider whether the company had taken reasonable steps to obtain the required information as soon as practicable; and</p> <p>(b) the standard of "reasonable steps" would depend on the facts and circumstances of a case and the judgment would be made by the court</p> <p>The Administration's response that --</p> <p>(a) the purpose of clause 403(6) was to provide for a company's legal responsibility to obtain the information reasonably required by an auditor;</p> <p>(b) the situations mentioned by Mr LAM in (a) and (b) above should constitute a defence; and</p> <p>(c) the Administration would explore</p>	

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
		feasibility to provide such defence in CB	
020001-020033	Chairman	Date of next meeting	

Council Business Division 1  
Legislative Council Secretariat  
22 August 2012