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Clerk to Bills Committee on Companies Bill
Legislative Council Secretariat
Room 1010, Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

14 March 2012

Dear Sirs

Submission to Legislative Council Bills Committee on clause 664 of Companies Bill

We wish to submit our view to honourable members of the committee that it is appropriate and in the interests of Hong Kong, as a leading financial centre, to abolish the "headcount test" in respect of schemes of arrangement.

First, we consider that the retention of this rule is capable of producing an inequitable and unrepresentative outcome in meetings to approve schemes of arrangement. To take an extreme example, if a company had 1,000 people who were the underlying owners of its shares, none of whom were acting in concert with the offeror and each of whom held one board lot of shares, and of these people 998 held their shares in CCASS and voted in favour of the scheme, and two held their shares in their own names and voted against, the scheme would be defeated notwithstanding that it was approved by 99.8% of the owners and the votes cast.

Secondly, as illustrated above, the effect of holding shares through CCASS and consequently having them registered in the name of HKSCC Nominees ("HKSCCN") is effectively to deprive the underlying owners of those shares of the right to be counted under the "headcount test" given that HKSCCN only counts as one person voting for a scheme notwithstanding the number of underlying owners and shares that its vote represents – and similarly as regards HKSCCN's representation of owners and votes against the scheme. This position will not be addressed by scripless registration given that many people hold their shares through banks, brokers or custodians, hence giving rise to a similar problem.

Thirdly, a scheme of arrangement can only be approved if it is not objected to by the holders of 10% of the disinterested shares. This requirement was included in the Takeovers Code a number of years ago in order to place schemes of arrangement on a par with the level of objections that could block a privatization effected by way of a general offer and the compulsory acquisition of the shares of a dissenting minority. Having adopted such an approach it is unnecessary and unbalanced to require an additional "headcount test" for schemes of arrangement.

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Finally, a "headcount test" is simply inconsistent with good corporate governance which recognizes the principle of one share-one vote. The recognition of this principle, and the rejection of a "headcount" approach, was strikingly recognized by the introduction into the listing rules of the Hong Kong Stock Exchange in 2009 of the requirement that all shareholder votes must be conducted by way of poll and not by show of hands.

Accordingly, we believe that abolition of the "headcount test" would facilitate significantly more representative voting at shareholders meetings considering schemes of arrangement and would also promote enhanced corporate governance through the recognition of one share-one vote.

Yours faithfully

William Tam
Deputy Corporation Secretary

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