Bills Committee on Companies Bill
Administration's Response to Deputations' Views

Abbreviations for deputations and LegCo paper numbers for the submissions :

	Asian Citrus Victims Alliance (LegCo Paper No. CB(1)1864/10-11(02))
ACCA HK	Association of Chartered Certified Accountants Hong Kong (LegCo Paper No. CB(1)1805/10-11(10))
BCC	The British Chamber of Commerce in Hong Kong (LegCo Paper No. CB(1)2079/10-11(02))
CHKLC	The Chamber of Hong Kong Listed Companies (LegCo Paper No. CB(1)1805/10-11(04))
CKH Ltd.	Cheung Kong (Holdings) Limited (LegCo Paper No. CB(1)1805/10-11(16))
CMA	The Institute of Certified Management Accountants Australia (Greater China) (LegCo Paper No. CB(1)1805/10-11(03))
ES	Economic Synergy (LegCo Paper No. CB(1)1864/10-11(03))
HKAB	The Hong Kong Association of Banks (LegCo Paper No. CB(1)1805/10-11(14))
HKCIEA	The Hong Kong Chinese Importers' and Exporters' Association (LegCo Paper No. CB(1)2079/10-11(04))
HKCMA	The Chinese Manufacturers' Association of Hong Kong (LegCo Paper No. CB(1)1805/10-11(09))
	College of Business, CityU (LegCo Paper No. CB(1)1805/10-11(12))
	Dr Surya Deva, CityU (LegCo Paper No. CB(1)1805/10-11(15))
HKGCC	Hong Kong General Chamber of Commerce (LegCo Paper No. CB(1)1805/10-11(17))
HKICPA	Hong Kong Institute of Certified Public Accountants (LegCo Paper No. CB(1)2679/10-11(01))
HKICS	The Hong Kong Institute of Chartered Secretaries (LegCo Paper No. CB(1)1805/10-11(11))
HKIoD	The Hong Kong Institute of Directors (LegCo Paper No. CB(1)1864/10-11(01))
HKSMEA	Hong Kong Small and Medium Enterprises Association (LegCo Paper No. CB(1)2079/10-11(03))
HKSMEGA	Hong Kong Small and Medium Enterprises General Association (LegCo Paper No. CB(1)1805/10-11(01))
	Hsin Chong Construction Group Ltd. (LegCo Paper No. CB(1)1834/10-11(01))

	Hutchison Whampoa Ltd. (LegCo Paper No. CB(1)1805/10-11(05))
IPA	The Investors Protection Association (LegCo Paper No. CB(1)1805/10-11(06))
LSHK	The Law Society of Hong Kong (LegCo Paper No. CB(1)1805/10-11(02))
REDA	The Real Estate Developers Association of Hong Kong (LegCo Paper No. CB(1)1805/10-11(13))
	Mr YEUNG Wai-sing (LegCo Paper No. CB(1)1805/10-11(08))
	公司條例草案關注組 (LegCo Paper No. CB(1)2079/10-11(01))

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General views		
HKSMEA	● Given the robust legal system in Hong Kong, there is no need to attribute criminal liability to directors in the CB.	● The current Companies Ordinance, Cap 32 (CO) already attributes criminal liability to "the company and every officer in default". ● An "officer who is in default" includes, among others, a director of the company who knowingly and wilfully authorizes or permits the default, refusal or contravention of relevant statutory provisions. Prosecution is difficult given that the evidential burden for proving "knowingly and wilfully" is very high. To strengthen the enforcement regime, the Companies Bill (CB) proposed to introduce the formulation of "responsible person" in place of "officer who is in default". "Responsible person" is defined as an officer or shadow director of the company or non-Hong Kong company who "*authorizes or permits, participates in or fails to take all reasonable steps to prevent, the contravention or failure*". ● In view of Members and some of the deputations' concern about the scope of the limb "fails to take all reasonable steps to prevent" in the formulation of "responsible person", we propose to delete this limb from the formulation so that negligent omissions will not be caught (see LegCo Paper No. CB(1)2636/10-11(01) dated 30 June 2011). We believe that the revised formulation will address the concern raised by HKSMEA and other organizations while enhancing corporate governance and ensuring better regulation.

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<u>Part 1 – Preliminary</u>		
	Clause 2 ("Interpretation")	
LSHK	● The definition of "company" is tautologous and gives rise to conceptual problems.	● The definition of "company" follows the same definition in section 2 of the CO. It means a company formed and registered under the CB or an existing company (i.e. a company formed and registered under a former Companies Ordinance). In short, it means a company incorporated in Hong Kong. ● A company incorporated outside Hong Kong can be a "non-Hong Kong company" or "registered non-Hong Kong company", depending on whether it has been registered under the CB. ● When the word "company" appears in "non-Hong Kong company", "registered non-Hong Kong company" or "company incorporated outside Hong Kong", it is clear from the context that the word "company" forms part of a compound expression and we are not talking about a "company" as defined in clause 2 of the CB. ● Since the intent is that "company" does not include a company incorporated outside Hong Kong, the use of "formed and registered" in the definition of "company" is appropriate.
LSHK	● The Government should consider inserting a general definition of the "public", or clarifying the concept in each relevant provision.	● The provisions on prospectuses in the CO, including Schedule 17 are not within the scope of the CB. The word "public" used in other provisions in the CO is not defined in the CO. In the Interpretation and General Clauses Ordinance (Cap 1), "pubic" (公眾、公眾人士) includes any class of the public and is not confined to Hong Kong. We do not consider it necessary to provide a

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		definition in Part 1 of the CB for general application.
	Clause 3 ("Responsible person")	
ES	● Reservation about the formulation of "responsible person" given the lower prosecution threshold. ● The formulation may catch officers (especially those of SMEs who usually have limited legal knowledge and professional training) for mere negligence or genuine commercial decisions that were subsequently proven wrong.	● See the response to HKSMEA above.
	Clause 4 ("Certified translation")	
LSHK	● The Registrar of Companies should have the authority to extend the list of persons with power to certify a translator's competence without involving the Secretary.	● Clause 4(3) provides for a list of persons accepted for certifying the competence of the translator of a translation made in Hong Kong whereas clause 4(5) lists out the persons accepted for certifying the competence of the translator of a translation made in a place outside Hong Kong. For clause 4(5), it is necessary to provide flexibility to the Registrar of Companies (the Registrar) under clause 4(5)(g) as it is not possible to have an exhaustive list of persons outside Hong Kong who are acceptable for such purpose. This would not be the case for translations made in Hong Kong and it would not be likely for persons not listed in clause 4(3) to be accepted for certifying the competence of a translator. Hence, the Secretary for Financial Services and the Treasury's power under clause 4(6) to amend the list in clause 4(3) already provides sufficient flexibility.

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	Clause 13 ("Provisions supplementary to section 12")	
LSHK	● The current draft of clause 13(3) should be reviewed in order to clarify that if the share is held by a body corporate when a security is enforced, such holding shall not be disregarded for the purpose of this Division.	● When the security is enforced and the shares are held beneficially by the security holder, then the shares are no longer held by way of security only, and so clause 13(3) no longer applies. It is therefore not necessary to specifically provide for the situation described in paragraph 4.3 of LSHK's submission.

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<u>Part 2 – Registrar of Companies and Companies Register</u>		
	Division 4 ("Registration of Document")	
LSHK	● Documents containing unnecessary materials should not be a ground for rejection by the Registrar and a "severance" provision should be added.	● We have refined our proposal having considered the comments received during the public consultation. Under the CB, a document will not be considered as unsatisfactory merely because it contains unnecessary information.
LSHK	● There should be a time limit for the Registrar to revert as to whether a document is acceptable for registration.	● We remain of the view that it is not necessary to include a time limit on when the Registrar needs to revert as to whether a document is acceptable for registration as the Registrar is under an obligation to exercise the statutory power within a reasonable period.
LSHK	● It should be obligatory for the Registrar to provide reasons for its decision to refuse the registration of a document.	● If the Registrar refuses to register a document, reasons will be given as a matter of administrative procedure. We believe that there is no need to provide for that specifically in the CB.
	Division 7 ("Materials in Companies Register Unavailable for Public Inspection")	
Mr YEUNG Wai-sing	● Support the proposal regarding directors' residential addresses and full identity numbers of individuals.	● Our proposal to restrict public access to the residential addresses of directors and full identity numbers of individuals seeks to strike a balance between protection of privacy and the need to identify and contact directors. We note that there was majority support for the proposal in the first phase consultation of the draft CB conducted in December 2009 to March 2010. ● The Registrar will consider all applications for withholding
HKAB	● Suggest continuation of publication of addresses of directors and their identity document numbers to provide an additional money laundering check and enhance a sense of responsibility on the part of directors.	

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HKSMEGA	● Support the proposal regarding directors' residential addresses and full identity numbers of individuals.	information made under clause 47 carefully and, if she declines to grant an application, reasons will be given as a matter of administrative procedure. We believe that there is no need to provide for that specifically in the CB. ● The new provisions for protection from disclosure of residential addresses give directors an option to provide a correspondence address instead of a residential address for public inspection at the Companies Registry's register. Clause 47(5) and the related provisions in clauses 50 and 51 are to ensure that the correspondence address provided by the director pursuant to the new provisions is effective for communication. We are of the view that the five-year period provided in clause 47(5) strikes an appropriate balance between protecting privacy of a director's residential address and maintaining an effective mechanism for public information. ● Communications sent to a director would not be regarded as remaining unanswered if the director has acknowledged receipt of the communication. ● Regarding the suggestion by LSHK that the notice under clause 50(4) should be sent to both the residential address and correspondence address of the director, it should be noted that the notice is prima facie to be sent to the director at his residential address under clause 50(4)(a) because his correspondence address has not been effective for communication (clause 50(1)). There is no need to send again to the correspondence address unless it appears to the Registrar that sending to the residential address would not be effective.
HKCIEA	● Support the proposal regarding directors' residential addresses and full identity numbers of individuals.	
HKIoD	● Support the proposal regarding directors' residential addresses and full identity numbers of individuals and suggest a fuller examination of the issues relating to public availability of personal data of company directors.	
LSHK	● Clause 47 should be redrafted so that an application, if made in accordance with the regulations, will be granted and if the Registrar declines to withhold protected information, such decision should be supported by reason. ● The five-year period in clause 47(5) seems unduly long and a shorter period of two or three years is more reasonable. ● Clause 50 should be clarified that an acknowledgement of receipt of the communication by the director without substantive reply would constitute an answer. ● Registrar should send notices to both the director's protected and correspondence address rather than either one.	

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HKAB	● Documents filed at the Companies Registry should have signatures masked before being open to inspection.	● The issue of whether signatures should be masked has to be considered in a wider context covering not only the documents available for public inspection at the Companies Registry's register but other public registers, e.g. the Land Registry's register, as well. It may not be appropriate to deal with this issue in the CB in isolation. ● The new provisions for protection from disclosure of an individual's full identity number provide a considerable degree of protection against forgery and fraud. Further, the use of e-filing and e-incorporation also helps to address the concern.

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Part 3 – Company Formation and Related Matters, and Re-registration of Company		
	Clause 104 ("Registrar may direct company to change misleading or offensive name etc.")	
LSHK	● The appellate forum for the Registrar's director to change name should be the court rather than the Administrative Appeal Board.	● The proposal to allow a company to appeal to the Administrative Appeals Board, instead of to the court, against a change-of-name direction/ notice issued by the Registrar is based on the suggestion of Members of the Bills Committee on the Company (Amendment) Bill 2010. We agree with the proposal, taking into account the cost and time involved in court proceedings.
	Clause 114 ("Section 112 not to apply to certain cases")	
HKIoD	● Exception under section 114 must not slip to become a let-off for section 98 companies to condone poor in-house management and improper internal control.	● The intention of clauses 112 to 114 is to provide better protection of the assets and funds of charitable and other non-profit companies. Outside parties will still have some measure of protection under clause 114, and will also have protection under the common law (Turquand's rule). Since there will still be situations where the company can suffer loss as a result of being bound to transactions entered into without proper authority by its directors, the company will still have incentives to discipline its errant directors. We believe that clause 114 strikes the appropriate balance for non-profit companies and should not lower standards of corporate governance.

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Part 4 – Share Capital		
	Clause 130 ("No nominal value")	
HKAB	● Supports retiring the par system but suggests that the CB should allow the company to accept an amount of paid-in surplus from an existing shareholder without issuing new shares. This is a common practice overseas.	● We have already provided for this in clause 165(2)(b).
HKIoD	● Introduction of a no-par system is supported but the system should be optional instead of mandatory. ● For companies listed but not incorporated in Hong Kong, they might have chosen or be required to have share capital with par value in their place of incorporation. ● For Hong Kong companies' associate entities in other jurisdictions, they may have or may be required to have par value shares or some other form of "stated capital". ● The Hong Kong business community and investors will have to deal with companies that may or may not have par value shares.	● Generally speaking, the CB governs the operation of companies incorporated in Hong Kong. We believe that a mandatory no-par system is simple and clear for them, while an optional no-par system would require legislating for and administering two parallel legal systems, thus bringing added costs and complexity. ● There is a trend towards abolishing par-value shares in other comparable common law jurisdictions such as Australia and Singapore which also have an active financial sector like Hong Kong. These jurisdictions have adopted a mandatory no-par system without any apparent difficulties.
	Clause 146 ("Registration of transfer or refusal of registration")	
HKIoD	● Directors should be required to give reasons where they consider that a shareholder's wish to transfer share	● This is in line with our proposal under clause 146 to require the directors to give reasons upon request where they refuse to register

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	ownership should not be honored.	a transfer of shares. ● The approach of giving reasons upon request has been adopted in the CO with respect to transmissions of shares by operation of law.
HKCMA	● It is not necessary to require a company to give reasons for refusing to register a transfer of shares. A company should have freedom to choose business partners. The proposed new requirement will increase compliance costs and result in more litigation.	● Given the majority public support for reasons to be provided[1] and to enhance transparency, we consider it desirable to proceed with the proposal.
	Clause 159 ("Publication requirements")	
LSHK	● The requirement under clause 159(5)[2] of a stock market to exhibit a notice of intention to issue a replacement share certificate received from a company on the premises on which the stock market operates is out-dated. The notice should be required to be published on a dedicated webpage of the Hong Kong Exchanges and Clearing Ltd. (HKEx)'s website.	● In the light of LSHK's views, we propose to require the recognized stock market to publish the said notice on either its website or on its premises. We have consulted the Securities and Futures Commission (SFC) and the HKEx and have obtained their agreement to the proposal.

[1] 21 out of the 36 submissions commenting on this subject in the Second Phase Consultation on the Draft CB agreed that reasons should be provided. See Financial Services and the Treasury Bureau (FSTB), *Consultation Conclusion on the Second Phase Consultation on the Draft Companies Bill* (October 2010) (Available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/ doc/ccsp_conclusion _e.pdf), paragraphs 39 and 40.

[2] Under clause 159(5), a recognized stock market must exhibit a copy of a notice of intention to issue a new certificate from a company in a conspicuous place on the premises on which the stock market operates.

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	Clause 161 ("Public notice of issue of new certificate")	
LSHK	● Under clause 159(2), a listed company intending to issue a replacement certificate is not required to publish a notice in the Gazette if the value of the shares is below $200,000. Such exemption from publishing a notice in the Gazette should also apply to the requirement to publish public notice of issue of a new certificate under clause 161(1)(a).	● We agree with the proposal and will amend clause 161(1)(a) so that a listed company that issues a new certificate must, within 14 days after the date of issue — (i) publish in the Gazette a notice in the specified form of the issue of the new certificate and cancellation of the original certificate if the company has published a notice under section 159(2)(a) and (b); and (ii) publish on the company's website a notice in the specified form of the issue of the new certificate and cancellation of the original certificate if the company has published a notice under section 159(2)(a); the notice must be made available on the company's website throughout a period of at least 7 days.
	Division 6 ("Alteration of Share Capital")	
IPA	● For listed companies, it is proposed that:- (a) successive consolidation of shares/ rights issue should be separated by a period of at least 10 to 12 months; (b) for a listed company with a market capitalization of less than $10 billion, the funds raised each time should not exceed a certain percentage of the market capitalization (e.g. 10%); and (c) the price of a rights issue share should not be lower than a certain percentage of the market price of the	● The proposals relate to limitations on the raising of capital by listed companies. We have passed the comments to the SFC and the HKEx for consideration.

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	share (e.g. the discount should be around 20% to 30%).	

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<u>Part 5 – Transactions in relation to Share Capital</u>		
	Division 2 ("Solvency Test")	
HKICPA	● The existing solvency requirement in Hong Kong, which is basically a cash flow test, should be modified by including a balance sheet solvency test, covering both current and total assets/liabilities.	● In consultation with the Standing Committee on Company Law Reform (SCCLR), we have considered and eventually decided against importing the balance sheet test into the solvency test (as a second limb) under the CB. ● Generally speaking, a balance sheet is a snapshot report of the affairs of the company as at a particular date. . The test does not reflect the assets coming into the company (such as future revenue streams which may be adequate to pay long-term liabilities) while equally fails to project any expected deterioration of revenues. ● Given the rigidity of the balance sheet test, importing it into the solvency test would give rise to undue hardship to companies. This is because the current accounting practices require annual revaluation of investment properties, which could result in large fluctuation of asset values on paper (especially when the economic climate is highly volatile). Even though such change in value of a company's long-term assets normally does not affect a company's ability to meet its liabilities when due, it might affect the result of the balance sheet test. Also, the wide scope of the definition of "liability" under the current accounting standards and the changes to the definition from time to time could cause any statutory balance sheet test to be unduly restrictive. Practically, directors must, in considering whether

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		their company can pay its debts as they fall due, have regard to the availability of assets, present and future, to meet liabilities, present and future. Thus, where there is a proper application of the cash flow test, to add the balance sheet test as a second limb to the solvency test would serve no useful purpose.
	Clause 201 ("Solvency statement")	
LSHK	● Subsection (1) should be revised (with words in ***italic*** added) as follows:- "A solvency statement in relation to a transaction is a statement that each of the directors making it has formed ~~the~~ ***a reasonable*** opinion that the company satisfies the solvency test in relation to the transaction." ● This corresponds to clause 202 under which a director is criminally liable if he does not have reasonable ground to form the opinion.	● We do not agree with the proposed amendment. ● If the opinion was not reasonable, then the directors will be liable under clause 202. If clause 201(1) is amended as suggested, then the fact that the directors did not have reasonable grounds for the opinion would also mean that the solvency statement does not comply with clause 201, which can render the transaction, such as a reduction of capital, unlawful (see clauses 210 and 211). ● It is not our intention to render the transaction unlawful and invalid only for the reason that the directors did not have reasonable grounds for their opinion.
	Clauses 219 ("Registration of return if no application to Court") and 220 ("Registration of return if application to Court")	
LSHK	● Note 1 to subsection (1) of both clauses should be amended as follows:- "The special resolution and the reduction of share capital take effect ***on the day*** when the return…is registered by the Registrar…"	● We do not agree with the proposed amendment. ● It is our intention that the special resolution should take immediate effect at the moment when the return is registered.

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	Clause 270 ("Interpretation") – definition of "financial assistance"	
LSHK	• Subsection (c)(i) of the definition should be amended as follows (with words in ***italic*** added):- "(c)(i) by way of a loan or any other agreement ***or arrangement (whether enforceable or unenforceable, and whether made on the person's own account or with any other person)*** under which any of the obligations of the person giving the assistance are to be fulfilled at a time when in accordance with the agreement ***or arrangement*** any obligation of another partly to the agreement ***or arrangement*** remains unfulfilled; or".	• We do not agree with the proposed amendment. • The current wording of subsection (c)(i) of the definition follows that of section 47B(1) of the CO and section 677(1)(c) of the UK Companies Act 2006 (UKCA 2006). • The proposed amendments are more general and may subject a wider range of scenarios to the financial assistance restrictions, which is not our intention.
LSHK	• Given that the "cash flow" solvency test is to be adopted for private companies under the streamlined white-wash procedures, subsection (d)(ii) of the definition should be modified from "*any other financial assistance given by a company if … (ii) the company has no net asset*" to "*any other financial assistance given by a company if … (ii) the net liabilities of the company are increased to a material extent by the giving of the assistance*".	• We do not agree with the proposed amendment. • If a company has no net assets, the current threshold is that the prohibition applies to any other financial assistance given by the company irrespective of whether the liabilities of the company increase or not[3]. • The proposed amendment would lower the threshold and thus might unduly weaken the current protections for shareholders and creditors as the proposed amendment would mean that financial assistance (including certain assistance that leads to a net increase in liabilities) could be given without the need for the company to satisfy the solvency test.

[3] *Palmer's Company Law*, paragraph 6.918 on section 677(1)(d)(ii) of the UKCA 2006. The UK provision is the same as section 47B(1) of the CO.

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	Subdivision 4 of Division 5 ("Authorization of Giving Financial Assistance")	
HKIoD ACCA HK (first bullet point only)	● Financial assistance restrictions should be abolished for private companies. ● Should prohibition on private companies still serve some useful purpose not addressed by other regulatory mechanisms (such as the Listing Rules and/or securities laws and regulations, etc.), the villainous conduct should be identified and outlawed.	● While many respondents in the Second Phase Consultation on the Draft CB supported the proposal to abolish the restrictions on financial assistance for private companies, others had grave concerns over outright abolition from the viewpoint of protection of minority shareholders and creditors. ● We also note that a number of respondents supported abolition subject to the introduction of the directors' duty to prevent insolvent trading which is currently under study. ● The SCCLR also considers it prudent to retain restrictions on financial assistance for private companies, pending the introduction of insolvent trading provisions[4].
HKIoD	● For listed companies, the restrictions on giving financial assistance would be better set out in the Listing Rules (and/or securities laws and regulations such as the Securities and Futures Ordinance (Cap 571) (SFO)) since a large number of companies listing on the Hong Kong market are not incorporated in Hong Kong.	● Under the CO, a listed company incorporated in Hong Kong is prohibited, with a number of specific exceptions, from giving financial assistance. There is no "white-wash" procedure available for a listed company. ● The rules on giving financial assistance are different for a listed company incorporated outside Hong Kong, depending on the law of its place of incorporation. ● If restrictions are placed in the Listing Rules or the SFO, the financial assistance restrictions will become applicable to all companies listed in Hong Kong, regardless of their place of

[4] See FSTB, *Consultation Conclusions on the Second Phase Consultation on the Draft CB* (footnote 1), paragraph 20.

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		incorporation.
HKIoD	● If some form of prohibitions on private companies shall remain, the Bills Committee can consider an alternative proposal to allow private companies to give financial assistance where there is consent from all members to the subject transaction (i.e. akin to clause 280 but with no solvency test required). ● Where there is unanimous shareholder approval, the requirement that the giving of financial assistance not to exceed 5% of shareholders funds need not be imposed.	● As financial assistance may have adverse impact on the company's ability to pay its creditors, it is prudent to keep the solvency test for the "white-wash" procedure of requiring unanimous consent from all members. ● Clauses 279 to 281 of the CB[5] provide three alternative permitted procedures for giving of financial assistances. The 5% threshold of shareholders fund (clause 279) serves as a *de minimis* exception to financial assistance where there is no unanimous shareholder consent.
	Clause 279 ("Financial assistance not exceeding 5% of shareholders funds")	
	(I) <u>Clause 279(1)(c)</u>	
LSHK	● More guidance should be given on how to quantify the "aggregate value" of the financial assistance, in the form of all monies guarantee or other forms of indemnities (e.g. indemnity against breach of warranties etc.). ● Specifically:- (a) an uncapped indemnity falls outside the "white-wash" procedure provided for under section 279;	● It should be noted that guidance on the interpretation of clause 279(1)(c) is given in clause 279(3). ● Clause 279(3) states that "*a reference in subsection 1(c) to any other financial assistance given under this section that has not been repaid includes the amount of any financial assistance given in the form of a guarantee or security for which the company remains liable at the time the financial assistance in question is*

[5] Clause 279 of the CB: "Financial assistance not exceeding 5% of shareholders funds"; clause 280: "Financial assistance with approval of all members"; and clause 281: "Financial assistance with approval of all members".

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	(b) the "amount" of a security under clause 279(1)(c) refers to the "amount" of the obligation secured, regardless of the book and/or market valuation of that security; and (c) the "amount" of a guarantee refers to the guaranteed amount, regardless of whether the guarantee is subsequently enforced, although the contingent liability arising from a guarantee given would not be reflected in the balance sheet unless the loan is not repaid.	*given.*" ● As to (a), an uncapped indemnity will exceed the 5% threshold as the company's liabilities are unlimited. The company may instead make use of the other two types of "white-wash" procedure under clause 280 ("*Financial assistance with approval of all members*") and clause 281 ("*Financial assistance by ordinary resolution*"). ● As to (b), pursuant to clause 279(3) (see above), the "amount" refers to the "amount" that has not yet been repaid, i.e. the amount for which the company remains liable. It does not refer to the value of the "security" given. ● Likewise, for (c), pursuant to clause 279(3), the "amount" refers to the "amount" for which the company remains liable, i.e. the guaranteed amount. The "amount" may or may not be disclosed in the financial statements but such disclosure or non-disclosure should not affect the calculation of the 5% threshold.
HKAB	● The phrase of "*the aggregate amount of financial assistance…that has not been repaid*" may give rise to difficulties in practice as financial assistance does not necessarily involve a payment.	● As mentioned in the above entry, guidance on the interpretation of clause 279(1)(c) is given in clause 279(3), which sets out that subsection (1)(c) includes reference to the amount of any financial assistance given in the form of a guarantee or security for which the company remains liable.
HKAB	● The wording "*…aggregate amount received by the company in respect of the issue of shares and the reserves*	● We note the concern and agree with the proposal. We will substitute the phrase with "*paid up share capital and reserves*"[6].

[6] Also see section 76(9A)(a) of the Singapore Companies Act.

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	of the company…" could be further simplified and simply expressed as the paid up share capital and reserves. Otherwise, there may be a query as to whether shares issued for a consideration other than cash or other forms of capital injection will be included.	
	(II) Clause 279(1)(d)	
LSHK	● "*The company receives fair value in connection with the giving of the financial assistance*" should be deleted given that clause 279 is meant to provide a *de minimus* exception to financial assistance. Safeguards that are already embodied in clause 279(1)(a)[7], which provides that the financial assistance has to be in the best interest of the company and that the terms of the assistance are fair and reasonable, should be sufficient.	● We agree, and will delete clause 279(1)(d) as suggested.
	(III) Clause 279(4)	
HKAB	● Under clause 279(4), within 15 days after financial assistance, the company is required to send to each member a solvency statement and a notice containing certain details of the financial assistance given. The form of notice to members under this clause should be	● The two notices respectively under clauses 279(4) and 281(1)(c) are different in nature. ● Clause 279(4) provides that the notice to be sent after giving financial assistance, while the notice under clause 281(1)(c) is to

[7] Clause 279(1)(a) provides that, "*A company may give financial assistance for the purpose of the acquisition of a share in a company or its holding company or for the purpose of reducing or discharging a liability incurred for such an acquisition if (a)(i) the company should give the assistance;* ***(ii) giving the financial assistance is in the best interests of the company; and (iii) the terms and conditions under which the assistance is to be given are fair and reasonable to the company***".

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	standardised such that it can also be used for the purpose of clause 281(1)(c) ("*Financial assistance by ordinary resolution*").	be sent before giving of financial assistance. ● As the notice under clause 279(4) is a post-transaction notice while that under clause 281(1)(c) pre-transaction, a standardised form is not warranted[8].
	Clauses 280 ("Financial assistance with approval of all members") and 281 ("Financial assistance by ordinary resolution")	
HKAB	● The solvency statement and a statement containing the text of the notice to members for financial assistance given under clauses 280 and 281 of the CB should be required to be delivered to the Companies Registry for filing, following the practice under section 47F(3) of the CO. A provision should be made in clause 280 for a special notice to be prepared for this purpose.	● We consider that the safeguards in the CB should be sufficient. We are inclined not to unduly complicate the procedures[9].
	Clause 281 ("Financial assistance by ordinary resolution")	
LSHK	● The "white-wash" procedure under this clause should require sanction of a special resolution instead of an ordinary resolution, for better protection of minority shareholders while putting in place a more liberal regulatory framework for corporate transactions.	● The current proposal in the CB seeks to strike a reasonable balance between preserving sufficient protection to minority shareholders and relaxing and streamlining restrictions on giving financial assistance for both private and public companies. ● The SCCLR agreed that the same "white-wash" procedures should apply to both private and public companies and the authorisation

[8] See FSTB, *Consultation Conclusion on the Second Phase Consultation on the Draft Companies Bill* (footnote 1), response to clause 5.81 in Appendix III.

[9] See FSTB, *Consultation Conclusion on the Second Phase Consultation on the Draft Companies Bill* (footnote 1), response to clauses 5.79 to 5.81 in Appendix III.

Deputation	Deputation's views	Administration's response
		level should be "ordinary resolution". ● The Share Repurchases Code and Listing Rules would provide additional safeguards if the financial assistance falls into a category of transactions regulated under the said Code or Rules.
LSHK	● For clause 281(2), which sets out that the relevant board materials must be sent to each member at least "*14 days before the [ordinary] resolution…is proposed*", as the date of proposing the resolution is presumably the date of the shareholders' meeting, the 14 days should be counted by reference to the date of the shareholders' meeting for the sake of clarity.	● As the resolution could be in the form of written resolution, in which case no shareholders' meeting would be necessary, the current wording is appropriate.
	Clause 282 ("Application to Court for restraining order")	
ACCA HK	● The threshold (10% voting rights) for members to apply to the court to restrain the giving of financial assistance is too high.	● We note the concern. We will amend clause 282(1) accordingly to change the threshold from 10% (of total voting right or number of members) to 5%.

Deputation	Deputation's views	Administration's response
<u>Part 6 – Distribution of Profits and Assets</u>		
	Clause 294 ("Listed company may only make certain distributions")	
LSHK	• Subsection (1) of the clause should be amended as follows (with words in ***italic*** added):- "***Subject to section 293, a*** ~~A~~ company may only make a distribution out of profits available for distribution." • This is to make it clear that a listed company has to satisfy the requirements in both clauses 293 and 294 to make a valid distribution.	• We do not agree with the proposed amendments. • Clause 293 applies to a company (i.e. listed or unlisted) while clause 294 applies to a listed company. Since "a company" includes "a listed company", it is already clear that a listed company must comply with both clauses.
	Clauses 301 ("Interim financial statements specified for purposes of section 298") and 302 ("Initial financial statements specified for purpose of section 28")	
LSHK	• Clause 301(6) should be amended as follows (with words in ***italic*** added):- "A copy of the financial statements must have been delivered to the Registrar ***for registration***…" Clause 302(7) should be amended as follows:- "A copy of the financial statements, of the auditor's report…, must have been delivered to the Registrar ***for registration***…"	• We agree and will amend the said clauses accordingly.

Deputation	Deputation's views	Administration's response
	● The Bill should clarify whether interim financial statements and initial financial statements are to be delivered to the Registrar for the purpose of registration.	

Deputation	Deputation's views	Administration's response
<u>Part 7 – Debentures</u>		
	Clause 308 ("Power to close register of debenture holders")	
LSHK	● Subsection (3) of the clause should be amended as follows:- "***Subject to subsection (4), the*** ~~The~~ period of 30 days mentioned in subsection (1)..." ● This is to clarify that the period of 30 days may be extended by a majority of debenture holders, but in any event not exceeding a further period of 30 days, i.e. no register can be closed for more than a period of 60 days in any year.	● We do not agree with the proposed amendment. ● When subsections (3) and (4) are read together, it is clear that the period of 30 days may be extended by a majority of debenture holders and that the period must not exceed 60 days in total in any year. ● Given the proximity of subsections (3) and (4), users reading one subsection can easily see the other subsection. We are inclined to avoid unnecessary cross references, pursuant to our plain language drafting policy.

Deputation	Deputation's views	Administration's response
<u>Part 8 – Registration of Charges</u>		
	Clauses 331("Interpretation") and 344 ("Notification of Registrar of payment of debt, release, etc.")	
HKAB	• Registration of charges is usually handled by solicitors who would normally prepare the certified copy of the charge as well as the form for registration. • For clarity, it is suggested that clauses 331(4)(a)(ii) and (b)(ii)(B) [10] should allow this to be done by a representative of the chargee rather than requiring the chargee to specifically authorise somebody to handle the registration. The same should also apply to clauses 344(5)(b)(ii)(A)[11].	• We do not agree with the proposal. • The provisions are clear and not onerous, as the company can easily authorise its solicitors to certify the instrument.
	Clause 333("Specified charge")	
HKAB	• Priorities between competing registered charges in the CB should be codified.	• We do not agree with the proposal. • There is no widespread demand for codification and the present

[10] Clause 331(4) of the CB reads, "*…a copy of an instrument in relation to a charge delivered for registration in a certified copy if it is certified as a true copy (a) by…(ii) a person authorized by that company or non-Hong Kong company for the purpose; or (b) by…(ii) in the case of (B) an interested person that is a body corporate, a person authorized by the interested person for the purpose, or a director or company secretary of the interested person.*"

[11] Clause 344(5) of the CB reads, "*…a copy of an instrument is a certified copy if it is certified a true copy by…(b) in the case of (ii) a mortgagee or entitled person that is a body corporate (A) a person authorized by the mortgage or entitled person for the purpose…*".

Deputation	Deputation's views	Administration's response
		rules are familiar to practitioners.
HKAB	• Clause 333(1) should be clarified so that:- (a) retention of title provisions are excluded due to the fact that these are included in a large number of standard form conditions of sale and enforcement would be difficult once goods are in the hands of a purchaser (c.f. trust receipts). (b) any reference to a bill of sale in view of its outdated nature can be removed; reference should be made to chattel mortgages and charges over plant, machinery and equipment. (c) to remove any doubt on whether a charge on share dividends and assignments of choses in action e.g. assignments of insurance contracts are registrable (e.g. as a charge over book debts).	• For (a), we do not agree with the proposal. Generally speaking, simple retention of title clauses are not registrable but some complex clauses may be charges over goods and thus registrable. We had previously considered and decided against providing a statutory definition given the difficulty and since issues concerning what types of retention of title clause would be registrable have not been a major issue in Hong Kong. The question of whether certain retention of title clauses should be registrable would be best decided by the court as per the current practice. • For (b), we have considered the possibility of removing the reference to bills of sale[12] entirely. However, the provision is still relevant where the charged assets are personal chattels, plant machinery or equipment, etc. We have also considered updating the provisions following the Australia definition[13] but the definition was considered unsuitable for Hong Kong. As the term bill of sale still appears in the UK[14] and Singapore[15] and does not seem to have caused problems in practice, it is

[12] Removing the reference to bills of sale entirely was recommended by the SCCLR and supported by the majority in the 2008 topical consultation on, amongst other subjects, registration of charges (FSTB, *Consultation Conclusions on Company Names, Directors' Duties, Corporate Directorship and Registration of Charges* (December 2008) (Available at http://www.fstb.gov.hk/fsb/co_rewrite/ eng/pub-press/doc/cdrc_conclusion_e.pdf)).

[13] Section 262(3) of the Australia Corporations Act. However, the definition was considered not suitable in the Hong Kong context as it refers to, e.g. a charge on a growing crop.

Deputation	Deputation's views	Administration's response
		retained in the CB. ● For (c), we consider that the common law position is clear that "insurance policies" and "shares" do not fall within the meaning of book debts. There is no need to restate the common law position in the legislation.
	Clause 334 ("Company must register specified charge created by it")	
HKAB	● Clause 334(7)[16] provides for a chargee to recover from the company creating the charge any fee paid for registration of a charge. This should be extended to also include any costs incurred if the chargee needs to apply for a court order to enable late registration where the company had failed to register.	● In practice, it is usually the chargee who attends to registration. There is no general demand for the said change to be made. In any event, the chargees' costs will usually be fully provided for in the charge document.
	Clauses 334(1) and (2), 335(1) and (2), 337(2), 338(3) and 339(2) and (3) (Requiring a certified copy of the charge instrument to be registrable and available for public inspection)	
HKSMEGA	● Charge documents contain private information. A specified form instead of the charge document itself should be used for registration.	● The proposal will enhance disclosure and has gained majority support in the topical public consultation conducted in 2008. ● Any commercially sensitive information may be contained in a

[14] Section 860(7) UKCA 2006.

[15] Section 131(3)(d) of the Singapore Companies Act.

[16] See similar provisions in clauses 335(8), 340(7) and 341(8) of the CB.

Deputation	Deputation's views	Administration's response
		document separate from the charge deed.
	Clauses 337 ("Company must register charge existing on property acquired") and 338 ("Registered non-Hong Kong company must register charge existing on property acquired")	
HKAB	• For completeness, clauses 337 and 338 should include parallel provisions allowing the chargee to register the charge and provisions in respect of charges contained in debentures covered in clauses 334[17] and 335[18]. • Also, an equivalent of clause 334(7) (amended as suggested above) should be included.	• The reason for allowing registration by a person interested, which will usually be the chargee, is because it is the chargee who has the most to lose by non-registration or late registration as the charge will be void against any liquidator and creditor. • However, non-registration of a charge which is already existing on a property acquired is not so void, and the consequences of non-filing or late filing are prosecution of the company and the imposition of a fine and a default fine for continued contravention. There is thus not the same need to extend the right to a person interested. • Provisions in respect of charges contained in debentures are not relevant to clauses 337 and 338 which deal with charges existing on property acquired, which are fixed charges. Clauses 334 and 335 deal with debentures created by the company. • Please see our response to the proposed amendments to clause 334(7) in the relevant entry.

[17] Clause 334 of the CB, "Company must register specified charge created by it".

[18] Clause 335of the CB, "Registered non-Hong Kong company must register specified charge created by it".

Deputation	Deputation's views	Administration's response
	Clause 339 ("Registered non-Hong Kong company must register charge existing on property on date of company's registration under Part 16")	
HKAB	● This is the provision requiring companies seeking to register as non-Hong Kong companies to register certain charges when they apply for registration as non-Hong Kong companies. However, it does not make provision for the chargee to register these charges. This should be included, as well as a provision similar to clause 334(7) amended as suggested above.	● The consequences of non-/ late registration are prosecution and a fine. The charge is not void against the liquidator or creditors. There is no need to extend the right to register to a person interested. ● Please see our response to the proposed amendments to clause 334(7) in the relevant entry.
	Clause 340 ("Company or registered non-Hong Kong company must register particulars of issue of debentures")	
HKAB	● One of the conditions requiring delivery of other particulars of debentures is that a statement of particulars of the charge has already been delivered for registration. ● Clause 340(1)(c) seems to suggest that, if (for example wrongly) no statement of particulars of charge has been delivered, there is no requirement to register other particulars. ● It seems that the obligations in respect of registering the particulars of a charge and other particulars should be concurrent and independent from each other. ● See the alternative drafting in clause 341(l)(d) which refers to a requirement to deliver particulars.	● We agree and will replace "is delivered" in this clause with "is required to be delivered".

Deputation	Deputation's views	Administration's response
	Clause 341 ("Company or registered non-Hong Kong company must register particulars of commission etc. in relation to debentures")	
HKAB	● Drafting of clause 341(1)(d) and (6) is convoluted. Confusing double cross referencing should be eliminated.	● As the requirement to deliver a statement of the particulars of a charge is set out under clauses 334(1), 335(2) or 339(2), it is necessary to refer to those provisions.
	Clause 345 ("Extension of time for registration")	
HKAB	● Applications to court for extension of the time for late registration are time-consuming and expensive but are almost always approved as a matter of routine. ● Power should be granted to the Registrar to approve late registration particularly as clause 345(3) makes it clear when the late registration can be permitted. Where such power is exercisable by the Registrar, it should be made statutory that late registration should be made without prejudice to the rights of other parties against the property acquired prior to actual registration, to reflect the current practice of the courts. ● Also, as a disincentive to late registration, an increased fee should be payable.	● During our public consultations, views on this issue were equally divided. However, there were concerns that an administrative regime may introduce uncertainty over whether some of the charges registered were effective. ● As the present system has been working well and has encouraged timely registration, it should be retained.
	Clause 346 ("Rectification of registered particulars")	
HKAB	● For similar reasons as set out in the entry under clause 345 above, rectification of registered particulars should also be	● Same reasons as set out in our response to the entry under clause

Deputation	Deputation's views	Administration's response
	sanctioned by the Registrar.	345 above.

Deputation	Deputation's views	Administration's response
<u>Part 9 – Accounts and Audit</u>		
	General issues	
HKIoD	● A company should have the option to elect "early adoption" of Part 9 for the financial year that ends after the commencement date of Part 9.	● We consider it undesirable to allow companies to decide whether to follow the requirements in Part 9 before the commencement of the CB. We will prepare guidelines to assist companies during the transition to the CB regime.
	Division 2 ("Reporting Exemption")	
HKAB	● Support the provisions allowing more companies to make simplified reporting but think that the figures in respect of the definition of a small group should be larger than those in respect of a small company. ● Guarantee companies should not have the benefit of the relaxation to preserve transparency.	● We are considering further in consultation with the Hong Kong Institute of Certified Public Accountants the qualifying criteria for private companies falling within the reporting exemption. ● As for companies limited by guarantee, given that they vary in size, it would be inappropriate to require those small guarantee companies to be subject to the HKFRSs that are primarily used for reporting by large or public companies.
HKIoD	● Support the decision not to introduce provisions requiring directors' declaration regarding financial statements.	● We note HKIoD's support for the CB provisions.
	● Support the decision not to introduce the requirement of separate directors' remuneration report.	
	Subdivision 3 of Division 4 ("Financial Statements") and Schedule 1 ("Parent Undertakings and Subsidiary Undertakings")	

Deputation	Deputation's views	Administration's response
HKICPA	● We recommend that Schedule 23 of the existing CO not be imported into the CB, i.e. that Schedule 1 of the CB be deleted and that, instead, the requirements as to the scope of consolidated financial statements be dealt with entirely within Part 9 of the CB, specifically sections 376 to 378 and with reference to the relevant financial reporting standards.	● We note the comment and would introduce suitable Committee Stage Amendments (CSAs).
	● We recommend that the requirements in the CB applicable to companies opting for the reporting exemption be made more explicit and readily identifiable for readers.	● The Companies Registry will by administrative means e.g. by external circular inform the public of the provisions on the reporting exemption.
	Clause 380 ("Directors must prepare directors' report") and Schedule 5 ("Contents of Directors Report: Business Review")	
College of Business, CityU	● Large private companies can enjoy exemption from the requirement of preparing a business review if consents from majority of shareholders are obtained. The rights of stakeholders (other than shareholders) are still not properly protected if those large private companies are controlled by concentrated ownership.	● We note that there are different views on the proposed requirement on the business review and are of the view that the current proposal strikes an appropriate balance between concerns about the additional costs to the company and the importance of enhancing corporate governance. ● Regarding the concern of HKIoD about the use of non-GAAP measures, we will work with relevant stakeholders to prepare guidelines for compliance with the business review provisions and take into account technical requirements from an accounting perspective. ● Regarding HKICPA's concern, the defence under clause 380(7) is in line with the existing defence under the CO (section 129F) and we consider that the burden of proof should not be onerous for the
Dr Surya Deva, CityU	● The scope of business review should be expanded to include a discussion about the company's policies and performances in relation to human rights and labour rights.	
HKAB	● Prefer to see the business review as an encouraged good practice rather than a mandatory requirement.	

Deputation	Deputation's views	Administration's response
REDA	● The additional disclosure requirement would appear to be superfluous and will certainly increase the reporting burden of public companies which are already governed by the Listing Rules. Recommend status quo as the new requirement is serving no useful purpose.	director. It should be noted that a safe harbour has already been introduced under clause 439.
HKIoD	● Support the modifications made to the proposal regarding business review, including the opt-outs, exemptions and the safe harbour. ● Use of non-GAAP measures in the business review can cause confusion and even be a tool to mislead.	
HKICPA	● Suggest retaining the principles in the primary legislation and placing the more detailed content items in a separate document or code where the detailed wording would be more amendable to revision. ● Suggest restricting the criminal sanctions to cases of willful or reckless conduct. The second arm of what a director needs to prove in the defence under section 380(7) should be removed. ● A safe harbour provision should be inserted.	
	Clause 396 ("Auditor's duty to report")	
公司條例草案關注組	● SMEs should be exempted from the auditing requirement.	● Auditing is fundamental in ensuring both truth and comprehensiveness in financial reporting. The importance of

Deputation	Deputation's views	Administration's response
HKSMEA	● Companies with low turnover should be exempted from the requirement to submit audit report.	reliable accounts cannot be overstated. Many stakeholders, including shareholders, investors, creditors, regulators and the tax authorities, rely on such statements. Furthermore, the auditing requirement is a fundamental element of our corporate governance regime. This is particularly so, as in Hong Kong, unlike some other common law jurisdictions like the UK, private companies are not required to file their accounts with the Registrar of Companies for public inspection. In view of these considerations, we believe that the current auditing requirement should continue to apply to both public and private companies. Nevertheless, we have relaxed the criteria for small private companies and have allowed small guarantee companies to prepare simplified financial and directors' reports with a view to reducing the compliance costs of such companies.
	Clause 399 ("Offences relating to contents of auditor's report")	
HKICPA	● Imposing a criminal sanction on a person for knowingly or recklessly omitting certain statements from the auditor's report may create a problem, where the inclusion or exclusion of those statements depends upon the exercise of professional judgment. It may not be necessary to introduce criminal sanctions given the Institute's power to discipline auditors. ● If an offence under section 399 is a summary offence, then the prosecution must be completed within six months of the date of offence. It is quite possible that the criminal investigation of such matters will take more than six months. ● It is not entirely clear from the wording of section 399(2)	● The criminal sanction is necessary for enforcement of the duty to make two very important statements. These statements are part and parcel of the auditor's opinion as to whether adequate accounting records have been kept and whether the financial statements are in agreement with the accounting records which the auditor is required to state pursuant to clause 398. ● There is no conflict between the offence provisions in the CB and the disciplinary mechanism under the Professional Accountants Ordinance (Cap. 50) (PAO). ● The offence under clause 399 is a summary offence for enforcement against non-compliance with the requirements in relation to contents of the audit report. It is a separate and distinct offence that would be enforced independently from the

Deputation	Deputation's views	Administration's response
	who could be held to have committed an offence.	misconduct proceedings pursued under the PAO, and thus should be retained. Regarding the timeframe for prosecution of summary offences, clause 888 provides that, despite section 26 of the Magistrates Ordinance, action may be brought (a) within three years after the commission of the offence and (b) within 12 months after the date on which the supporting evidence came to the Secretary for Justice's knowledge. ● Clause 399 penalises a person only if such a person "knowingly or recklessly" causes a statement to be omitted from the audit report. The provision is sufficiently clear and the threshold for conviction is very high.
	Clause 403 ("Rights in relation to information")	
ES	● Support the proposal to exclude "employees" and "ex-employees" from the categories of persons liable to give information to the auditors but are still concerned whether the proposal would increase the burden on companies and auditors. Look forward to more specific interpretation on "information or explanation reasonably required".	● We note the support on our proposal not to include "employees" and "ex-employees" of companies or their subsidiary undertakings within the categories of persons liable to give information to the auditors. We believe that the current scope is appropriate. ● With regard to the ES' concern that the auditor's right to information will impose a burden on the company and its auditor and that "information or explanation reasonably required" requires clarification, the auditor's right to information in fact facilitates compliance with the auditor's duty to report on the company's financial statements and reports. The scope of the information or explanation that the auditor may require is qualified as information or explanation "that the auditor
HKAB	● The existing provision is adequate without extending it to employees and other subsidiaries of a company. The provision enabling auditors to require a holding company to provide information regarding its non-Hong Kong subsidiaries is not necessary.	

Deputation	Deputation's views	Administration's response
REDA	● It is far more efficient and cost effective for auditors to deal with officers including senior managers rather than having the statutory rights of access to all employees and former employees. The new criminal offences seem unduly harsh and could have unintended consequences.	reasonably requires for the performance of the duties as auditor of the company". The auditor's right to information is therefore both necessary and reasonable from the auditor's and the company's points of view.
HKIoD	● Support the current scope of application of the provisions on auditors' right to information.	

Deputation	Deputation's views	Administration's response
<u>Part 10 – Directors and Company Secretaries</u>		
	General issues	
HKIoD	● The Bills Committee should consider stipulating in the CB or otherwise to require certain training for directors.	● The CB will apply to all companies and we consider it inappropriate to include in it mandatory requirements on the training for directors.
Mr YEUNG Wai-sing	● The proposal to limit the number of listed companies which an individual can assume directorship is impracticable and unreasonable.	● We have referred the comment to the HKEx for consideration.
	Clause 448 ("Requirement to have at least one director who is natural person")	
BCC	● Since Hong Kong is a territorial jurisdiction, if the person resides outside Hong Kong, they cannot be prosecuted outside Hong Kong. The requirement for private companies to have at least one natural person as director is unenforceable.	● We note that there are diverse views on the issue. The proposal strikes a balance between the need to enhance corporate governance and transparency and the legitimate commercial need for flexibility. It will also address to a large extent the anti-money laundering concern of the Financial Action Task Force. On the issue of enforcement by legal proceedings, service out of jurisdiction will be applied for whenever necessary.
HKSMEGA	● The requirement for every private company to have at least one natural person as director should be amended. Every private company with corporate director must appoint a natural person as the authorised representative of the corporate director.	

Deputation	Deputation's views	Administration's response
HKCIEA	● Companies may appoint a person not involved in the affairs of the company or a person residing outside Hong Kong as director just to comply with the statutory requirement. The proposal cannot enhance transparency but will impose additional burden on SMEs.	
HKIoD	● Corporate directorship should be abolished altogether but the position in the CB is supported as it will add some safeguard for enforcing directors' obligations and to hold company actions accountable.	
CMA	● Do not recommend a mandatory requirement on the appointment of at least one natural person as a director of a Hong Kong company as it has no help on anti-money laundering and may undermine the competitive advantage of Hong Kong.	
BCC	● It is not clear who is subject to civil remedy in case of a breach by a corporate director.	● As a corporate director is a separate legal entity, it is subject to the same civil remedies as a natural person director.
HKSMEGA	● Public companies should be required to appoint independent non-executive director and the CB should stipulate clearly the duties of such directors.	● Currently all listed companies are required under the Listing Rules to appoint independent non-executive directors and we do not consider it necessary to require public non-listed companies to do the same at this stage.
	Division 2 ("Directors Duty of Care, Skill and Diligence")	
ES	● The provision may involve operational difficulty and reduce the incentive for professionals to assume	● We consider it appropriate to clarify the standard of directors' duty of care, skill and diligence by introducing a statutory

Deputation	Deputation's views	Administration's response
	directorship in Hong Kong. Exemption should be provided to SMEs.	statement in the CB to provide appropriate guidance to directors as the common law position in Hong Kong is not entirely clear. The statutory statement proposed in the CB follows section 174 of UKCA 2006 albeit with a narrower scope (i.e. excluding fiduciary duties). This would allow us to benefit from precedent cases in the UK. ● The current formulation makes it clear that the court must take into account the functions carried out by the relevant director in relation to the company. This means that what is required of the director will depend on the functions carried out by the director, so that there will be variations not only between executive and non-executive directors, but also between different types of executive directors (and equally of non-executives) and between different types and sizes of company (see LegCo Paper no. CB(1)2577/10-11(01) dated 22 June 2011) . ● As to the concern about the subjective element in clause 456(2)(b) raising the standard expected of directors who have special knowledge, skills or experience, we note that this largely reflects the position under the common law. ● As regards HKIoD's suggestion of introducing a statutory "business judgment rule", the SCCLR had considered the proposal and was of the view that there was already similar protection under the common law, and that the existing common law position was sound. There is no need for a statutory formulation of the "business judgment rule". ● When a person ceases to be a director of a company, his duty owed to the company as a director to exercise reasonable care, skill and diligence will cease. However, any liability incurred by
HKGCC	● The standard of care, skill and diligence required to be exercised by a director of a company should be codified in the CB. However, common law principles should be preserved for the sake of clarity and that would be better for this area of the law to be left to the courts. What is proposed for Hong Kong is a wholesale replacement of common law rules. And, because statutory duties are drafted in general and broad terms, this may give rise to more uncertainties when there is no precedent from which reference may be drawn.	
Hutchison Whampoa Ltd.	● The law should be allowed to develop through evolving case-law, Imposing a subjective standard which is higher than the objective one may discourage highly qualified and experienced individuals from taking up directorships in Hong Kong listed companies. If codification is to proceed, it should not replace the existing case law in Hong Kong as it currently proposed.	
BCC	● It is not clear at which point the duty of care ceases. It is not clear how this duty of care applies to a corporate director. It is not clear who is subject to civil remedy in case of a breach by a corporate director.	
HKCMA	● Reservation about the proposal regarding directors' duty of care, skill and diligence. The current case law is effective and there is no need to change. Codification may limit	

Deputation	Deputation's views	Administration's response
	the flexibility of business operation and lead to uncertainties.	the director in connection with any breach of the duty during his term of office as a director of the company will subsist even after the cessation of his directorship.
HKAB	● In favour of the provision of this clause requiring directors to exercise skill, care and diligence. It is necessary to revise and update the non-statutory guidelines on directors' fiduciary duties to provide clearer guidance.	
HKICS	● Concerned with the prospect of two directors, one with an accounting background and the other without, sitting at the audit committee being held to different standards of skills. The provision may deter well-qualified individuals from taking up directorship. Prefer to clarify and give guidance on this complex subject by issuing non-statutory guidelines.	
REDA	● Accept that the objective test should be codified but the subjective test and other general duties should not and, for the avoidance of doubt, it should be set out clearly in the statute that such duty should be owed by a director of a company to the company only. Common law principles should be preserved and it would be better for this area of the law to be left to the courts. What has been proposed for Hong Kong is a wholesale replacement of common law rules. The statutory duties may give rise to greater uncertainties.	
HKCIEA	● The CB should demonstrative that different types of directors should have different duties. It has all along been effective to rely on case law and it is not necessary to	

Deputation	Deputation's views	Administration's response
	codify directors' duties.	
HKICPA	● The objective test seems to require an examination of the specific circumstances applying in the particular company in question. Further clarification would be helpful. It is important that the statute does not, inadvertently, go beyond the existing common law standard or create any ambiguity.	
HKIoD	● Support the objective standard but the subjective standard may be problematic when put into practice. The statutory statement should be to underpin the existing common law and equitable principles and to permit that body of case law to evolve and develop. There should be a business judgment rule to work in conjunction with the statutory statement.	
	Clause 460 ("Permitted indemnity provision")	
HKIoD	● Welcome that the CB provides for the ability of companies to provide indemnities for liabilities incurred by directors to third parties in the course of performing their duties.	● We note HKIoD's support for the CB provisions.

Deputation	Deputation's views	Administration's response
Part 11 – Fair Dealing by Directors		
	General issues	
HKIoD	● There is valid reason for the concept of "relevant private companies" to be extended to cover private companies associated with public companies, listed or unlisted as unlisted public companies could carry significant commercial significance and invoke as much issue of public accountability as listed public companies.	● During the public consultation on the draft CB, the view of a majority of the respondents was to confine "relevant private companies" only to those private companies which are subsidiaries of a public company, whether listed or non-listed to avoid casting the net too wide. Other types of private companies in a group, such as those whose holding company is a private company but which is also a majority shareholder of a listed company, can be excluded from the concept of "relevant private company". We have doubts as to whether such private companies should be subject to tighter restrictions since the public investors of the listed companies concerned generally have no interests in such private companies. Taking into account the majority view and having consulted the SCCLR, we propose to modify the concept of "relevant private company" to cover only private companies and companies limited by guarantee which are subsidiaries of a public company.
	Division 1 ("Preliminary")	
HKAB	● The definitions of "connected entity" and "family members" of a director should align with the definition of "connected person" under the Listing Rules in order to facilitate monitoring, control and compliance by listed	● The Listing Rules are different in nature and difficult to be compared. However, we have given due regard to the Listing Rules in formulating the proposals in the CB. The requirements in the CB are generally in line with the relevant requirements in

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	companies.	the Listing Rules.
	Clause 485("Persons for whom transaction or arrangement entered into")	
	● Clause 485(2) should be amended so that paragraph (a) shall be referring to the company <u>providing the benefits</u> referred to in clauses 495(1)(a) and (2)(a) and paragraph (b) is referring to the <u>company entering into the assignment</u> referred to in clauses 495(1)(b) and (2)(b). The possible distinction between the concepts of a company <u>taking part</u> in arrangements and <u>entering into an arrangement</u> are too vague.	● The phrases "taking part in arrangements" and "entering into an arrangement" must be read together with the words that follow. After taking into account of the words that follow, there should be sufficient elements to distinguish the 2 concepts in clause 485(2)(a) and (b) respectively. ● Also, the mention of "in the case of an arrangement mentioned in section 495(1)(a) or (2)(a)" and "in the case of an arrangement mentioned in section 495(1)(b) or (2)(b)" provides additional information as to the arrangement concerned.
	Clause 488 ("Relevant transaction or arrangement")	
	● In clause 488(3), reference to section 497 can be deleted as this does not refer to a relevant transaction.	● We note the comment and would introduce suitable CSAs.
	Clause 504 ("Civil consequences of contravention")	
	● The wording of clause 504(1)(c) is not wide enough to cover all innocent parties as it only applies to persons "not a party to a transaction". A lending bank will not come within this wording. Also, reference to acquiring rights for value might not cover a lending bank.	● We note the comment and would introduce suitable CSAs.

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Part 12 – Company Administration and Procedure		
	General issues	
ES	● Concerned about whether the provisions on company administration and procedure would impose additional administrative burden on SMEs.	● CB seeks to strike a balance between enhancing corporate governance and facilitating business. We believe that the relevant provisions in Part 12 should be applicable to all companies. For example, the provisions on written resolutions would facilitate all companies in their decision-making. The relevant requirements should not create significant burdens on SMEs.
	Subdivision 2 of Division 1 ("Written resolution")	
HKAB	● The provisions will render the passing of resolutions in writing much more complex and we are not aware of any abuses under the present law which need to be remedied. If the provisions are to be included, there should be a clear carve out for resolutions passed unanimously by private companies.	● The new provisions seek to set out the relevant procedures and requirements in a clear and detailed manner. They will not make the passing of resolutions more complex. Clause 551 provides that the procedures set out in the CB will not affect any provision of a company's articles authorizing the company to pass a resolution without a meeting, otherwise than in accordance with clauses 538 to 550. However, such resolution has to be agreed to by all the members of the company who are entitled to vote on the resolution.

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<u>Part 13 – Arrangement, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-Back</u>		
	Clause 664 ("Court may sanction arrangement or compromise")	
公司條例草案關注組	● Minority shareholders' interest may be undermined without the headcount test.	● We note the diverse views of the deputations and those of Members expressed at the meetings. We are giving further consideration to this issue and would revert to the Bills Committee in due course.
CKH Ltd.	● There is no justification to retain the headcount test.	
ES	● The Administration should reconsider whether the headcount test should be retained.	
HKGCC	● The retention of the headcount test disregards the overwhelming majority view expressed to abolish the same.	
Hsin Chong Construction Group Ltd.	● The abolishment of the headcount tests should be further considered.	
Hutchison Whampoa Ltd.	● The headcount test should be abolished.	
Mr YEUNG Wai-sing	● Support the proposal to retain the headcount test while providing the court with the discretion to dispense with the test.	

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HKAB	● For creditors' schemes of arrangement, the headcount test should be abolished.	
HKICS	● Support the abolition of the headcount test.	
REDA	● The headcount test should be abolished.	
HKSMEGA	● Support the retention of the headcount test while giving the court the discretion to dispense with the test for members' schemes.	
CHKLC	● Disagree with the retention of the headcount test.	
HKIoD	● Prefer to abolish the headcount test for members' scheme. The Bills Committee may want to condition the retention of the headcount test (as to listed companies) on timely introduction and implementation of a scripless market in Hong Kong.	

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<u>Part 14 – Remedies for Protection of Companies' or Members' Interests</u>		
	Clause 721 ("Member of company or of associated company may bring or intervene in proceedings")	
HKIoD	● There is no need to outright abolish the common law derivative action.	● We note HKIoD's support for the CB provisions.

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Part 15 – Dissolution by Striking off or Deregistration		
	Division 2 ("Deregistration")	
HKSMEGA	● Suggest introducing a simple deregistration procedure for companies limited by guarantee.	● The scope of the deregistration provisions in the Bill has been extended to cover applications for deregistration by companies limited by guarantee.
	Clause 740 ("Dissolved company's property vested in Government")	
LSHK	● For clause 740(4), we suggest the phrase "properly available" be amended to "available" to avoid giving an impression that there is a criteria for property being "properly available".	● A property or right vested in the Government as bona vacantia remains subject to the liabilities imposed on it by law. Under clause 740(4), if the property is "properly available" to satisfy those liabilities, the Government may satisfy those liabilities out of the property (but only to the extent to which the property is so "properly available"). In other words, if there is anything that restricts the use of the property or right to satisfy the liabilities concerned, the property or right is not considered to be properly available. The word "properly" is added to mean only the property or rights that are not subject to such restriction. The provision is modeled on section 601AE of the Australian Corporations Act.
	Clause 761 ("Effect of restoration on bona vacantia property or right")	
LSHK	● In clause 761(6), the cross-reference in the sub-section should be to section 749 instead of section 750.	The reference to clause 750 refers to the "restoration" rather than the "condition of a restoration". The reference to clause 750 is correct.

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<u>Part 16 – Non-Hong Kong Companies</u>		
	General issues	
LSHK	● The extension of the Part 16 offence provisions to "agents" of non-Hong Kong companies appears to frustrate the objective of equal treatment as it may subject the non-Hong Kong companies to potentially more onerous obligations than those of Hong Kong companies.	● Agent of non-Hong Kong company who authorizes or permits the contravention of the relevant provisions could be liable to prosecution under the CB. Such liabilities reflect the current position in section 340 of the CO. We consider that it is necessary to cover "agents" of non-Hong Kong companies for better enforcement.

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Part 18 – Communication to and by Companies		
	Clause 811 ("Period specified for purposes of sections 816(7)(a), 819(7)(a) and 821(11)(b)")	
CKH Ltd.	● The provisions should be reviewed to allow deemed receipt upon transmission (for a document which is sent electronically) and in the case of posting a document on the company's website, upon its first posting or when a notice of availability is deemed served on the recipient, whichever is the later.	● We note the comment and would consider introducing suitable CSAs to the effect that the 48 hours requirement would be subject to any provisions in the company's articles (for communication sent to members), the instrument creating the debenture (for communication sent to debenture holders) or any other agreement (for communication sent to others).
Hutchison Whampoa Ltd.	● For the deemed date of receipt for documents sent electronically, the documents should be deemed to be received upon transmission. For a document posted on a company's website, it should be deemed to be received upon its first posting, or when a notice of availability is deemed to be served on the recipient, whichever is the later.	
HKICS	● Consideration should be given to delete the 48 business-day hours for communication by making it available on a website.	

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Part 19 – Investigations and Enquiries		
	General issues	
HKCMA	● The following new proposals may result in over-regulation and uncertainty for businesses:- (a) enhancing the investigatory powers of an inspector; (b) extending the categories of companies that may be subject to investigation to companies incorporated outside Hong Kong; and (c) introducing new powers for the Registrar to obtain documents, records and information.	● For (a), the enhanced powers are necessary and incidental to the proper conduct of an investigation by the inspector, e.g. to require the preservation of records or documents and verification of answers given by statutory declaration. These powers will not change the nature of the investigations. ● For (b), in view of the enforcement problems concerning the exercise of investigatory powers in other jurisdictions, we have dropped the proposal to extend an investigation to a company which does not have a place of business in Hong Kong. Such type of investigations would be better conducted by the SFC or the Police. ● For (c), the proposed new powers would facilitate the enforcement effort of the Companies Registry and help safeguard the integrity of the public register. In view of the majority support (16 out of a total of 25 respondents) received during the public consultation on the draft CB[19], we will take forward the proposal.

[19] See FSTB, *Consultation Conclusion on the Second Phase Consultation on the Draft Companies Bill* (footnote 1), paragraphs 35 and 36.

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	Clause 864 ("Use of incriminating evidence in proceedings")	
HKAB	● Clause 861(4) and (5) should not apply to disclosure of information by authorised institutions due to their need to preserve the duty of confidentiality.	● The provisions relate to the power of the Registrar to require an authorised institution to produce records and documents. ● Clause 875(1) provides that a person who complies with a requirement imposed by the Registrar under clause 861 does not incur any civil liability by reason only of that compliance. ● Moreover, there are appropriate restraints built in clause 861, e.g. the Registrar needs to give notice in writing and certifies that certain conditions (e.g. reasons to believe an offence has been committed, the production or disclosure is necessary for the purpose of the enquiry, etc.) are satisfied before invoking the power.
	Clause 873 ("Protection of informers etc.")	
BCC	● Provisions relating to informers are new and it is questionable whether this is a desirable development and should be included in the CB.	● Clause 873 protects an informer by keeping the identity of him or her anonymous in civil, criminal or tribunal proceedings. We believe that the protection would encourage persons holding relevant information to volunteer information. ● Such a provision is not new under Hong Kong law. A similar provision is found in section 52 of the Financial Reporting Council Ordinance (Cap 588).

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Part 20 – Miscellaneous		
HKSMEGA	● Supports compounding offences to save judicial resources but cautions that the Registrar's power should be suitably limited.	● We consider that the powers of the Registrar are suitably limited. The compounding regime of the CB is confined to straightforward, minor regulatory offences committed by companies that are easily detectable by the Registrar from objective reliable evidence. Compoundable offences are set out in Schedule 7 to the CB, including failure to engrave name on its common seal, improper use of the common seal, failure to file annual returns and failure to deliver accounts. ● Some other minor regulatory offences which have yet to be created by subsidiary legislation have also been identified for inclusion in Schedule 7 in due course, including offences for failure to paint or affix the company's name, failure to disclose the company's name, etc. in its documents, and offences in relation to issuing business letters and signing contracts wherein the name of the company is not mentioned in a proper manner.[20]

[20] Additionally, similar offences committed by a registered non-Hong Kong company will also be included.

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Others		
公司條例草案關注組	● Share price manipulation seriously undermines the interest of minority shareholders.	● We have referred the comments to the SFC and HKEx for consideration.
Asian Citrus Victims Alliance	● Concerned about the Asia Citrus case.	
IPA	● The Listing Rules should be amended to combat downward price manipulation.	