

## **Bills Committee on Companies Bill**

### **Follow-up actions to be taken by the Administration for the meeting on 13 May 2011 in relation to the formulation of “responsible person” under Part 1**

#### **Purpose**

This paper sets out the Administration’s response to the following issues raised by Members at the Bills Committee meeting on 13 May 2011:-

#### **Part 1 – Preliminary**

##### *The formulation of “responsible person”*

- (I) Concerns on the limb of “fails to take all reasonable steps to prevent” breach or contravention under the new formulation of “responsible person”.
- (II) Number of cases of companies failing to file annual returns and notifying change in the address of registered office on time, and penalties for non-compliance.

#### **Administration’s response**

- (I) *Concerns on the limb of “fails to take all reasonable steps to prevent” breach or contravention under the new formulation of “responsible person”*

#### **Background**

2. Under the current Companies Ordinance (Cap 32) (CO), section 351(2) defines an “officer who is in default” as “*any officer of the company...who knowingly and wilfully authorizes or permits the default, refusal or contravention*”. Prosecution is difficult given that the evidential burden for proving “knowingly and wilfully” is very high.

3. In the Companies Bill (CB), the formulation of “responsible person” has been introduced 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*”. The formulation is based upon the definition of “officer in default” in section 1121(3) of the Companies Act 2006 of the United Kingdom.

#### Members’ concerns

4. Members expressed concerns at the meeting of 13 May 2011 that the limb of “fails to take all reasonable steps to prevent” a contravention or failure (**the relevant limb**) in the new formulation of “responsible person” would cover officers, especially those Independent Non Executive Directors who were not aware of any possible breach by the company, or directors of small and medium-sized enterprises (SMEs) who were simply negligent and whose resources and legal knowledge were usually limited.

#### Proposed revision to the formulation of “responsible person”

5. Having considered the views and concerns expressed by Members, we propose to delete the relevant limb from the formulation of “responsible person”, such that it will be revised as an officer or shadow director who “authorizes or permits, or participates in, ~~or fails to take all reasonable steps to prevent,~~ the contravention or failure”. A marked-up copy of clause 3 of the CB indicative of the proposed amendments is at **Annex A** for reference.

#### Implications of the proposed revisions

6. According to our legal advice, the removal of the relevant limb will mean that negligent omissions will not be caught. The scope of culpable acts will be narrowed such that the circumstances under which liability may be incurred by officers for the breach by the company

will be reduced and they will not be liable simply for failing to take reasonable steps to prevent a contravention by the company. The *mens rea* required under the remaining limbs, namely “authorizes or permits, or participates in”, will be actual knowledge, wilful blindness or recklessness, but not negligence.

7. As compared to the CO formulation of “officer who is in default (i.e. “*officer...who knowingly and wilfully authorizes the default, refusal or contravention*”), the prosecution threshold for the revised formulation of “responsible person” will still be lower as there is no need to prove “wilfulness”. The policy objective of enhancing corporate governance and ensuring better regulation will still be achieved.

#### Implications on other provisions of the CB

8. If the relevant limb is removed from the formulation of “responsible person”, the definition of “responsible officer” for a non-Hong Kong company under clause 762 (“*Interpretation*”) of Part 16 (“*Non-Hong Kong Companies*”) of the CB will also need to be amended accordingly. A marked-up copy of the definition of “responsible officer” under clause 762 of the CB indicative of the proposed corresponding amendments is at **Annex B** for reference.

9. There are a few provisions in the CO, re-enacted in the CB<sup>1</sup>, which already make directors responsible for “failing to take all reasonable steps to prevent” a breach. These provisions will be retained in the CB, as the offences are serious and it is considered appropriate to impose liability on a director for failing to take steps to prevent a breach by the company to ensure compliance. The CB should not be a regression from the CO in terms of corporate governance.

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<sup>1</sup> For example, clauses 375 (“*Directors must prepare financial statements*”), 380 (“*Directors must prepare directors’ report*”), 412 (“*Resigning auditor may requisition meeting*”), 430 (“*Directors may prepare financial report in summary form*”), etc.

***(II) Number of cases of companies failing to file annual returns and notifying change in the address of registered office, and penalties for non-compliance***

10. Members also asked at the meeting on 13 May 2011 about the number of companies (a) failing to file annual returns on time; and (b) failing to notify change in the address of registered office in recent years. For (a), in the past three years, the number of companies failing to file annual return on time was in the region of 90 000 to 110 000<sup>2</sup> per annum. For (b), the Companies Registry has not kept such statistics.

11. Under section 109(4) of the CO, for failure to comply with requirements for completing and filing annual returns, the company and every officer of the company who is in default shall be liable to a fine and for continued default, a daily default fine<sup>3</sup>. Under section 92(4) of the CO, for failure to notify the Companies Registrar of change in the address of registered office, the company and every officer of the company who is in default shall be liable to a fine and for continued default, a daily fine<sup>4</sup>.

**Financial Services and the Treasury Bureau  
Companies Registry  
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<sup>2</sup> In 2008, around 90 400 companies failed to file annual returns on time; in 2009, around 97 600 companies; and in 2011, around 110 000 companies.

<sup>3</sup> The level of fine set under Schedule 12 to the CO is Level 5 (\$50,000) and the daily default fine is \$700.

<sup>4</sup> The level of fine set under Schedule 12 to the CO is Level 3 (\$10,000) and the daily default fine is \$300.

**Clause 3 of the Companies Bill**

**3. Responsible person**

- (1) This section applies—
- (a) where a provision of this Ordinance provides that a responsible person of a company or non-Hong Kong company commits an offence if there is—
    - (i) a contravention of this Ordinance, or of a requirement, direction, condition or order; or
    - (ii) a failure to comply with a requirement, direction, condition or order; or
  - (b) where this Ordinance empowers a person to make subsidiary legislation that will contain such a provision.
- (2) For the purposes of the provision, a person is a responsible person of a company or non-Hong Kong company if the person—
- (a) is an officer or shadow director of the company or non-Hong Kong company; and
  - (b) authorizes or permits, or participates in, ~~or fails to take all reasonable steps to prevent,~~ the contravention or failure.
- (3) For the purposes of the provision, a person is also a responsible person of a company or non-Hong Kong company if—
- (a) the person is an officer or shadow director of a body corporate that is an officer or shadow director of the company or non-Hong Kong company;
  - (b) the body corporate authorizes or permits, or participates in, ~~or fails to take all reasonable steps to prevent,~~ the contravention or failure; and
  - (c) the person authorizes or permits, or participates in, ~~or fails to take all reasonable steps to prevent,~~ the contravention or failure.

**Clause 762 of the Companies Bill**

**762. Interpretation**

*responsible officer* (負責人員), in relation to a contravention by a non-Hong Kong company of a provision of this Ordinance, means an officer of the company who authorizes or permits, or participates in, ~~or fails to take all reasonable steps to prevent,~~ the contravention;