香港特別行政區政府
財經事務及庫務局
財經事務科
公司條例草案專責小組
香港金鐘道六十六號
金鐘道政府合署十五樓

COMPANIES BILL TEAM
FINANCIAL SERVICES BRANCH
FINANCIAL SERVICES AND
THE TREASURY BUREAU
GOVERNMENT OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION
15TH FLOOR
QUEENSWAY GOVERNMENT OFFICES
66 QUEENSWAY
HONG KONG

電話 TEL.: 2528 6384
圖文傳真 FAX.: 2869 4195
本函檔號 OUR REF.: CBT/7/6C
來函檔號 YOUR REF.: LS/S/19/12-13

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By Fax

15 April 2013

Mr Timothy Tso
Assistant Legal Adviser
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
(Fax no.: 2877 5029)

Dear Mr Tso,

Subsidiary Legislation made under the new Companies Ordinance

We refer to your letters of 9 and 11 April 2013. Please find below our response for your information.

Companies (Revision of Financial Statements and Reports) Regulation (*L.N. 34 of 2013*)

Sections 3(4)(c)(ii), 5(2)(c) and 6(2)(c)

"Material revisions" is to be given its ordinary meaning and what is material depends on the facts and circumstances in each case. The term is currently used in sections 3(3)(c)(ii), 4(2)(c) and 5(2)(c) of the Companies (Revision of Accounts and Reports) Regulation (Cap.32N). The word "material" is also used in various sections of the new Companies Ordinance ("CO") e.g. sections

381(3)(a) & (b), 383(1)(e), 390(2)(a), 407(2)(b) & (3), 413(3)(b) & (c) and 448(3)(b).

You may also wish to note that in the financial reporting context, the *Conceptual Framework for Financial Reporting 2010* issued by the Hong Kong Institute of Certified Public Accountants ("HKICPA") has provided that "Information is material if omitting it or misstating it could influence decisions that users make on the basis of financial information about a specific reporting entity. In other words, materiality is an entity-specific aspect of relevance based on the nature or magnitude, or both, of the items to which the information relates in the context of an individual entity's financial report. Consequently, the Board cannot specify a uniform quantitative threshold for materiality or predetermine what could be material in a particular situation."

Section 5(5) and (6)

The principle underpinning the Regulation is that the obligations and arrangements concerning the original relevant documents shall also apply to the revised relevant documents. The penalties in sections 4, 5 and 6 are aligned with the corresponding provisions in the new CO relating to financial statements (section 379(4) & (5)), directors' report (section 388(6) & (7)) and summary financial report (section 439(3)) respectively. These are also the penalty levels currently in force under the existing CO.

Section 16

Section 16 of this Regulation is a mirror provision of Section 408 of the new CO. As indicated in the Legislative Council brief on the second batch of subsidiary legislation under the new CO, we have initiated discussion with the HKICPA on the preparatory work for implementation of section 408 of the new CO when the new CO is brought into operation, tentatively scheduled for the first quarter of 2014. In parallel, we are also exploring with the HKICPA as to whether and how the wording of the provision could be improved in the future in light of market feedback and practical operating experience.

Section 20(4)

The principle underpinning this Regulation is that the penalty for offences committed in respect of the revised documents or the auditor's report on the revised financial statements should be aligned with that imposed on the original documents or the auditor's report on the original financial statements in the new CO. On this basis, section 20(3) and (4) of this Regulation mirrors the offence and penalty prescribed in section 413(3) and (4) of the new CO.

Considering that, in respect of sentencing of imprisonment, section 450(4) of the new CO has provided that the Regulation may prescribe penalty of imprisonment of up to one year only in case an offence is committed wilfully, we propose, on this special occasion, to –

(a) amend section 20(4)(a) such that the maximum period of imprisonment will be one year (instead of two years); and
(b) introduce an additional provision after section 20(4) to stipulate that a person may be sentenced to imprisonment only if the offence under section 20(3) was committed wilfully, whether or not it is a conviction on indictment or summary conviction.

We intend to review the relevant provisions in the next legislative exercise after the commencement of the new CO with a view to aligning the penalties in relation to the similar offences imposed under the new CO and the Regulation.

Section 21(1)

This subsection mirrors section 436(1)(a) & (b) of the new CO which is based on section 436(2) of the UK Companies Act 2006. The phrase "in a manner calculated to invite members of the public generally, or any class of them, to read the statements" qualifies "otherwise made available for public inspection". It prescribes the mental state for the offence where the revised financial statements are made available for public inspection in any manner other than circulating, publishing or issuing. That mental state is not required where the revised financial statements are circulated, published or issued by the company.

Section 22(4)

This subsection is modelled on section 433(3) of the new CO, which provides that it is an offence for a company to wilfully contravene section 430(3). "Wilfully" primarily means "deliberate". The leading case is R v Sheppard [1981] AC 394 (HL), in which the majority held that a man "wilfully" fails to provide adequate medical attention for a child if he either (a) deliberately does so, knowing that there is some risk that the child's health may suffer unless he receives such attention; or (b) does so because he does not care whether the child may be in need of medical treatment or not. A company could "wilfully" contravene subsection (1) as it will have imputed to it the acts and state of mind of those of its directors and managers who represent its "directing mind and will" : Archbold 2013 Chapter 17 paragraphs 17-30 and 17-48.

Section 27(2)

Section 27(2) is an express requirement the contravention of which constitutes an offence under section 27(3). It mirrors the requirement in section 662(5) of the new CO, which applies the requirements in section 664(3)(b) and Schedule 6 section 7(b) of the new CO (in relation to certified translation of the original financial statements, the original directors' report, and the auditor's report on the original financial statements) and the offence in section 662(6). This subsection therefore seeks to maintain consistency with the aforesaid requirement in the new CO as well as to make clear the requirements and the legal consequence of contravention.

Companies (Disclosure of Information about Benefits of Directors) Regulation
(L.N. 35 of 2013)

Section 2(a)

The subsection seeks to preserve the position under the existing CO. The meaning of "undertaking" is given in section 1 of Schedule 1 to the new CO, which defines the term to mean a body corporate, a partnership or an unincorporated association. In certain provisions of this Regulation, for example section 3(4)(a), there are references to "director of any other undertaking". However, in the case where an undertaking is not a company, questions may arise as there might not be any person known as a director of that undertaking. This section is therefore necessary to deal with such circumstances by clarifying that the reference to director, in such a context, should be regarded as referring to the person holding an office corresponding to that of a director of a company. The above follows section 1(2) of Schedule 23 to the existing CO.

Section 3(1) – Definition of *retirement benefits* – paragraph (a)(i)(C)

The word "before" qualifies the time when the person's service was rendered, i.e. service before the person's retirement or death.

Section 13(1)

The definition of holding company restates the position under the existing law. By virtue of section 161B(14) of the existing CO, any loans, quasi-loans and credit transactions for a director of a company's holding company would be subject to disclosure in the company's accounts. According to section 2B of the existing CO, the aforesaid reference to "holding company" includes a parent

company (which is defined in section 1(1) of Schedule 23 to the existing CO to mean a parent undertaking that is a company). The definition in section 13(1) of this Regulation is therefore necessary for maintaining the existing scope of disclosure.

Section 16(2)

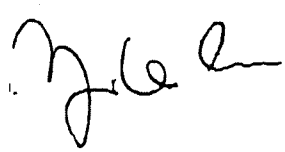
Section 16(2)(b) only requires a statement to show, in a lump sum, all the guarantees and security provided to each person named under section 15(3)(a). The use of the word "every" in section 16(2)(b) seeks to provide clearly that the guarantees and security to be included in that lump sum are the aggregate total of any guarantee or security provided for any quasi-loan or credit transaction (instead of any guarantee or security provided for the whole of the quasi-loans and credit transactions) given to the person. Accordingly, we consider that the use of the word "every" reflects our policy intent, and the proposed amendment is not necessary.

Section 18

The exemption applies only to loans, quasi-loans and guarantee entered into or security provided in connection with loans or quasi-loans by a company to an employee of the company, and by a subsidiary undertaking of the company to an employee of that subsidiary undertaking. It restates the position in section 161B(11) of the existing CO.

You are welcome to contact the undersigned at 2528 6384 should you have any further questions.

Yours sincerely,



(Arsene Yiu)
for Secretary for Financial Services
and the Treasury

c.c. DoJ (Attn : Ms Phyllis Ko,
Ms Amy Chan,
Ms Mandy Ng and
Ms Carmen Chan)

Clerk to Subcommittee (Attn.: Ms Connie Szeto)