Hong Kong Institute of
Certified Public Accountants
香港會計師公會

By email < co_rewrite@fstb.gov.hk > and by post

16 November 2012

Our Ref.: C/CB, M85964

Financial Services and the Treasury Bureau
15th Floor, Queensway Government Offices
66 Queensway
Hong Kong

Dear Sirs,

Public Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance (Phase 1)

The Hong Kong Institute of Certified Public Accountants has considered the above consultation paper and our comments on the draft subsidiary legislation are set out in the appendix to this letter.

If you have any questions on this submission or wish to discuss it further, please feel free to contact me at the Institute on 2287 7084.

Yours faithfully,

Hong Kong Institute of
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Appendix

Annex 1 Companies (Summary Financial Reports) Regulation

Section 3: Form and contents of a summary financial report ("SFR"): general

(a) Mutual exclusivity of section 3(2)(a) and 3(2)(b)

Section 3(2)(a) and (b) of the Regulation should be revised to clearly indicate that a company must comply with either 3(2)(a) or 3(2)(b) whichever is consistent with the basis of preparation of the financial statements under section 379 of the new Companies Ordinance ("new CO").

(b) Inclusion of income statement if presented separately

It is recommended that section 3 include an additional clause requiring that, if the financial statements include a separate income statement in addition to a statement of comprehensive income (please refer to *Hong Kong Accounting Standard (HKAS) 1 (Revised) Presentation of Financial Statements*, paragraph 81), the SFR shall also include that separate income statement.

(c) Exclusion of the notes to the financial statements

For the avoidance of doubt, it would be useful if section 3 were to clarify that notes to financial statements are not required to be included in the SFR.

Section 4: Form and contents of SFR: auditor's report and opinion

Section 4(1)(a) already requires an SFR to contain a statement, if such a statement is contained in the auditor's report, that, "in the auditor's opinion, the financial statements … have not been properly prepared in compliance with the Ordinance, and in particular, a true and fair view of the financial position and financial performance of the company has not been given". Sections 4(1)(b) and 4(1)(c) are confusing and seem to be redundant as they also require a SFR to contain a statement that a true and fair view has not been given of the financial position and financial performance of the company or of the company and its subsidiary undertakings. Other than including a statement to this effect from the auditor's report, which, as we note, is already required by section 4(1)(a), it is not clear how such a statement could be made, who would be in a position to make it and why it should be necessary.

We recommend, therefore, that sections 4(1)(b) and 4(1)(c) be deleted to avoid overlap and uncertainty. If this is done it would seem that sections 4(1) and 4(1)(a) could be combined into one and read: "If an auditor's report of a company contains a statement… a true and fair view of the financial position and financial performance of the company, or of the company and its subsidiary undertakings, has not been given, a summary financial report for that financial year must contain that statement."

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Section 5: Form and contents of SFR: other matters

(a) Section 5(1): post balance sheet events information

We are concerned that the current draft of section 5(1) of the Regulation may have the effect of expanding the scope of disclosure, whether intentionally or inadvertently, by requiring an SFR to contain all important events which have affected "the group of companies to which the company belongs". Taken literally, this would require the company to disclose events that have affected its parent/ holding company or fellow subsidiaries. Such events are commonly outside the scope of an entity's influence or knowledge.

We note that section 5(1) is almost identical to paragraph 1(c) of Schedule 5 to the new CO, which sets out the content of the business review to be included in the directors' report. If the intention of section 5(1) of the Regulation is to cover the same information as required by paragraph 1(c) of Schedule 5 to the new CO, we are of the view that, as section 3(1)(c)(i) of the Regulation requires an SFR to include the full directors' report, this already serves the purpose. We also note that Schedule 5 to the new CO clearly states that a reference to a company means the company and the subsidiary undertakings included in the annual consolidated financial statements (and not the group to which the company belongs).

It is recommended, therefore, that section 5(1) be deleted to avoid overlap and uncertainty.

Furthermore section 5(1) requires an SFR to include "the particulars of all important events that have occurred since the end of that financial year and have affected the company and (if applicable) the group of companies to which the company belongs." Schedule 5, paragraph 1(c), also refers to "particulars of important events affecting the company that have occurred since the end of that financial year". It would be helpful, in this context, if a definition of "important events" were to be provided and, in particular, an indication whether both "adjusting events" and "non-adjusting events" (please refer to *HKAS 10 Events after the Reporting Period*) are to be covered. One option would be to adopt the concept in HKAS 10, which requires disclosure of material non-adjusting events.

(b) Section 5(7): disclosure of any other information necessary to ensure consistency with the reporting documents

Section 5(7) requires that an SFR must contain "any other information necessary to ensure that the report is consistent with the reporting documents for the financial year in question". This section appears to be too broadly worded as there is no framework for an entity to judge whether information, over and above that already specified in the Regulation, which is contained in the full reporting documents, needs to be reproduced in the SFR in order for the SFR to be "consistent" with the full reporting documents. Given this lack of clarity, it is recommended that section 5(7) be removed. We consider that sufficient notice is given to readers of an SFR for the report to contain the statements required under sections 5(4) to 5(6), that the SFR is only a summary and that members, who wish to do so, may obtain a full copy of the reporting documents.

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(c) Section 5(8): definition of "specified date"

Section 5(8)(a) defines the "specified date" as "the day immediately before the expiry of a period of 6 months after the date of the annual general meeting". This is a confusing definition to follow and seems unnecessarily complex, since it applies only in sections 5(4) and 5(5), being the date by which a member may obtain, free-of-charge, a full copy of the reporting documents. Sections 5(8)(b) and (c) have similarly complex definitions.

It is suggested that the "specified date" is simplified to be, for example, within 12 months following the end of the financial year covered by those reporting documents. This would avoid the need to refer to the annual meeting date, which may vary from year to year, and to deal with the various scenarios depending on whether or not an annual general meeting is held. We consider that a 12-month period allows reasonable length of time for members to request the documents.

Section 7: Form and contents of notification

Section 7(6)(c) of the Regulation provides that sending an SFR in hard copy form by post is the default position. Since this is the case, section 7(3)(b)(i), which asks a member or potential member to indicate that s/he wishes to receive a copy of the SFR in hard copy form, appears to be redundant. We suggest that the notification should make it sufficiently clear that if a member or potential member wishes to receive a copy of the SFR in hard copy form by post, s/he does not have to take any action in response to the notification.

Annex 2 Companies (Directors' Report) Regulation

Hong Kong Institute of Certified Public Accountants 香港會計師公會

Section 4: Donations

Sections 4(1) and (2) have the effect of exempting wholly owned subsidiaries of a company incorporated in Hong Kong from making disclosures of donations, together with a definition of a "wholly owned subsidiary" by cross-reference to the relevant section in the new CO. These sections appear to introduce unnecessary complexity and to give exemptions to entities which are wholly owned subsidiaries of a company incorporated in Hong Kong. We would like to understand the reason for this exemption.

By comparison, section 2(2) of the Regulation provides how the requirements of sections 5 to 9 of the Regulation are to be interpreted in the case where a company has subsidiaries. Therefore, unless there are reasonable justifications for an exemption to be given to wholly owned subsidiaries of a company incorporated in Hong Kong, we recommend that, in order to improve clarity and consistency, the scope of section 2(2) be expanded to include section 4. As such, section 4 can be simplified to refer only to disclosures of donations in the total amount of not less than $10,000.

We should like to seek clarification as to why it is not proposed to retain the requirement to disclose the issue of debentures and arrangements for enabling directors to acquire benefits by means of the acquisition of debentures. We understand that such information continues to be of interest to, for example, insolvency practitioners.

Annex 3 Companies (Specification of Names) Order

Paragraph 3.5, chapter 3 of the consultation document, proposes that ten of the terms in the schedule to the existing Cap. 32E will not be included in the proposed Companies (Specification of Names) Order. Though there may be justification for the inclusion of individual words or terms, overall, the list to be included in the proposed Companies (Specification of Names) Order, comes across as being somewhat random, as much by what is omitted as by what is included. This suggests to us that, in principle, it would be preferable to rely on the general powers of the Registrar, under the CO, to not to allow names that could be contrary to the public interest (because, e.g., they are misleading or deceptive) or to require approval for names that give the impression that the company is connected to the government or an agency of the government.

However, if the list is to be retained, some members consider that the terms "Municipal" and "市政" should be retained in the proposed Order because they could, inappropriately, give the impression that a private entity has some relationship with the government.

Annex 4 Companies (Non-Hong Kong Companies) Regulation

No specific comments.

Annex 5 Company Records (Inspection and Provision of Copies) Regulation

Section 7: Making company records available for inspection

Section 7 requires the company to specify any one place in Hong Kong at which the records may be inspected. However, in order to provide some further protection to members and the public, the location chosen by the company for inspection should be required to be one that is reasonably accessible, e.g., capable of being easily accessed by public transport.

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Schedule: Fees payable for inspection of records

The maximum fee payable for inspection of each register is $50. However, this amount will not be sufficient to cover the administrative costs of the company to accommodate a request, such as the time cost of providing a staff to oversee the inspection, which, under the regulation, may be for two hours or more per document. It is suggested that consideration be given to raising the maximum inspection fee or providing more flexibility in relation to charging under the regulation.

Schedule: Fees payable for copies of records

The maximum fees payable are expressed in terms of the amount payable per number of words or number of entries. This seems to be an outmoded basis for calculating the fees payable, which needs to be updated given that the copies will be produced by electronic means or photocopying/ printing. It is recommended that fees for delivering copies of company records be re-expressed in terms of an amount payable per A-4 page provided.

Annex 6 Companies (Model Articles) Notice

It is noted that the memorandum of association is abolished under the new CO. For companies formed before the commencement date of the new CO, the provisions of their memorandum of association will be deemed to be articles. There are other deeming provisions in the new CO which affect the articles. For example, section 98(4) provides that a condition or an altered condition which states the amount of share capital with which the company proposes to be registered or is registered, or the division of the share capital of the company into shares of a fixed amount, to the extent it relates to share capital, is to be regarded as deleted and not to be regarded as a provision of the company's articles.

We understand that, notwithstanding these revisions to the articles under the new CO, existing companies may rely on the deeming provisions and they will not have to physically amend their articles/ adopt revised model articles, as appropriate, and file the changes or the revised articles with the Companies Registry, on the basis that this may be onerous for them. The intention is to minimise the administrative burden on existing companies. Nevertheless, we suggest that companies whose articles have been amended by the deeming provisions could at least be required to include a rider on their filed documents to the effect that there are some deemed revisions to the memorandum and articles under the new CO. This could be supplemented by, and cross-referred to, information issued by the Companies Registry. We also recommend, therefore, that the Companies Registry consider issuing explanatory materials, e.g., notices, pamphlets, etc. to educate and explain the position clearly to the public, in particular, the deemed changes to the articles of existing companies under the new CO, and to include such materials prominently on the Companies Registry's website for public information.

Annex 6A Schedule 1 Model Articles for Public Companies Limited by Shares

Hong Kong Institute of Certified Public Accountants 香港會計師公會

Article 12 compared to article 15: Directors' interests

Article 15 refers to directors being connected in any way, directly or indirectly, in a transaction, arrangement or contract and states that, where the transaction, arrangement or contract is "significant in relation to the company's business, and the director's or the entity's interest is material, the director must declare …" By contrast, article 12 simply refers to the directors being "in any way, directly or indirectly, interested in a contract, transaction or arrangement …". We recommend that, for consistency, the concept of materiality also be introduced into article 12.

Article 15: Directors' other roles

Article 15(4) refers to directors holding "any other office or place of profit under the company". Article 15(5) similarly refers to "the other office or place of profit". While the concept of "holding an office" is generally understood, the concept of holding "a place of profit under the company" is not familiar terminology. It is recommended this term be defined or replaced with a more clearly understood term.

Article 20: Record of decisions to be kept

Article 20 requires that records are kept of "every decision taken by directors" for at least 10 years. This wording in article 20 appears to impose an onerous obligation, which is too

broad in scope. It is recommended that article 20 be amended to refer to “all decisions taken in the course of any meeting of the directors”, since presumably, article 20 follows article 19 on matters in relation to a meeting of directors.

Article 26: Directors’ remuneration

Article 26 requires that the directors’ remuneration must be “determined” by the company at a general meeting. We suggest that it may be more appropriate to use the word “approved” in this context.

Article 42: Chairing general meetings

The wording of articles 42(1) and 42(2) seem somewhat inconsistent with each other. Article 42(1) states that the chairperson of the board of directors "must preside as chairperson" at the annual meeting, whilst article 42(2) allows for the possibility that the chairperson does not attend the meeting or is unwilling to act as chair. Consideration should be given to revising the wording of article 42(1) to give the chairperson the right to preside as chairperson at a general meeting of the company, rather than the obligation.

Article 89(4): Setting aside amounts before declaring dividends

The wording in article 89(4) is rather confusing as to what the directors must do and what they may do. We recommend that the wording of article 89(4) be clarified or simplified to state what the directors may do at their discretion, and any limits on that discretion, in respect of setting aside amounts into reserves.

Annex 6B Schedule 2 Model Articles for Private Companies Limited by Shares

Since written resolutions would also be commonly used by private companies, it is suggested that simplified procedures regarding written resolutions also be provided in the model articles for private companies.

Chapter 7 Companies (Accounting Standards (Prescribed Body)) Regulation

We have no specific comments on the draft regulation provided to the Institute subsequent to the meeting between representatives of the Companies Registry and the Institute.

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