香港董事學會
The Hong Kong Institute of Directors

26 February 2013

Hon Wong Ting-kwong SBS JP
Chairman
Subcommittee on Subsidiary Legislation
Made under the New Companies Ordinance
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mr Wong

CO Rewrite - Subsidiary Legislations made under the New Companies Ordinance

The Hong Kong Institute of Directors ("HKIoD") would like to present our views and comments on certain Subsidiary Legislations made under the New Companies Ordinance and tabled at the Legislative Council on 6 February 2013.

HKIoD is Hong Kong's premier body representing directors to foster the long-term success of companies through advocacy and standards-setting in corporate governance and professional development for directors. We are committed to contributing towards the formulation of public policies that are conducive to the advancement of Hong Kong's international status.

In developing the response, we have consulted our members and organised focused discussions.

Should you require further information regarding our response, please do not hesitate to contact me on tel no. 2889 9986.

With best regards

Yours sincerely
The Hong Kong Institute of Directors

Dr Carlye Tsui
Chief Executive Officer

cc: Dr Kelvin Wong, Chairman of Council, HKIoD
Mr Henry Lai, Deputy Chairman, HKIoD & Chairman, Corporate Governance Policies Committee

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Issued on: 26 February 2013

CO Rewrite
HKIoD views and comments on certain Subsidiary Legislations made under the New Companies Ordinance

The Hong Kong Institute of Directors would like to present views and comments on certain subsidiary legislations made under the New Companies Ordinance and tabled at the Legislative Council on 6 February 2013.

Companies (Words and Expression in Company Names) Order

We note the Schedule will include phrases and expressions not in the existing list: "tourism board" and "levy" (and their Chinese equivalents). We have no objection to their addition, but we ask if there are then other words and expressions that might also warrant inclusion? In this light, we may want to re-consider if the deletion of some of the words and expressions (e.g., "mass transit", "underground railway" and "municipal") is truly warranted.

Companies (Disclosure of Company Name and Liability Status) Regulation

We have no comments.

Companies (Accounting Standards (Prescribed Body)) Regulation

We have no comments.

Companies (Directors' Report) Regulation

Disclosure of directors' interests should still cover debentures

Section 3 of the regulation only requires disclosure of arrangements that will enable directors of a company to acquire benefits by means of the acquisition of shares. We understand there have been calls to retain the requirement to disclose the arrangements for enabling directors to acquire benefits by means of the acquisition of debentures. Debentures can by their terms give holders certain rights and preferences (not necessarily based on shareholdings) above other members of a company. Debentures are among the most common ways under which directors can acquire benefits. If directors are enabled to acquire certain benefits by the acquisition of debentures, this should be an important fact that members should know.

Disclosure of donations made

We note there is a drafting change that would make Section 4 of the regulation more clear in requiring disclosure in a Directors' Report donations no less than $10,000 made by the company and also its subsidiary undertakings. We have no objection. We also note that eligible private companies/groups are exempt in accordance with Division 2 of Part 9 of the New Companies Ordinance.

Eligible companies should be exempt from reporting dividend recommendations

We note there is a change from the scheme proposed in the Phase One consultation; the provision for reporting exemptions to apply to disclosure of dividend recommendations in Directors' Reports has been removed. We believe private companies/groups eligible for simplified reporting in accordance with Division 2 of Part 9 should not need to include dividend recommendations in their Directors' Reports.

Disclosure of reasons for a director's resignation

Section 8(1)(b) will require disclosure in a Directors' Report the reasons for a director's disagreement with the board which led to the director's resignation. We have no objection. We also note that eligible private companies/groups are exempt in accordance with Division 2 of Part 9 of the New Companies Ordinance.

Companies (Summary Financial Reports) Regulation

We can make SFRs and electronic copy the default position

We can agree to the mechanism in Section 7 of the regulation. However, we do believe the default position could well be for a member to receive summary financial reports and in electronic form.

Definition of "potential members" is too broad

We understand section 7 of the regulation (in conjunction with section 442 of the New Companies Ordinance) provides that a company may notify every member or potential member to give the company a notice of intent to request SFRs or full reports and to request such in electronic or hardcopy form. We can agree to the mechanism in section 7, especially as to actual members of the company.

But the wide definition of "potential members" can present many practical difficulties for companies needing or wanting to proceed under section 442 of the New Companies Ordinance. Any contract or agreement formed anywhere that somehow contemplates the delivery of a company's shares (options and forward contracts by and among third parties, for instance) will result in potential members for which the company has no easy way to know about.

Parties who are about to enter into transactions which would result in them obtaining shares of the company should want due diligence materials on the company. They will want to request information from the company direct, or through the counterparty of the transaction as appropriate. That would be normal in the realm of corporate transactions. Nonetheless, the company may not be notified (timely) of the existence of a potential member or the existence of arrangements that will result in a potential member.

With a wide definition, a potentially very large population of "potential members" could begin to have an expectation to be notified by a company under section 442, but a company will have practical difficulties to ascertain who is a "potential member".

Treatment of holding companies

For holding companies, an SFR should only need to include consolidated financial information referred to in section 3(3)(b). Company level information will be available in the full set of accounts.

SFRs to exclude notes to financial statements

We suggest exclusion of the notes in the SFR. The information will be in the full sets of accounts and members can obtain/access such information in accordance with procedure.

SFRs to include issues raised by the auditor

We note there is a change from the scheme proposed in the Phase One consultation. We believe the change simplifies matters to avoid overlap and uncertainty. We have no objection to the change. As a matter of principle, directors should inform members of issues raised by the company's auditor. Such information should appear in the SFR.

Post balance sheet events to appear in Directors' Report

We note there is a change from the scheme proposed in the Phase One consultation. There is no longer a specific provision in the regulation to require disclosure of post balance sheet events in an SFR (as in the draft regulation section 5(1)). We have no objection. We understand directors can include such information in the Business Review so long as such would not be prejudicial to the company's interests. We also note that eligible private companies/groups are exempt from including a Business Review in their Directors' Reports in accordance with Division 2 of Part 9 of the New Companies Ordinance

SFR can include other information the company considers appropriate

We note there is a change from the scheme proposed in the Phase One consultation. Section 5 of the regulation has been modified. There is no longer a specific requirement to include "any other information necessary to ensure consistency with the reporting documents", but the section does not prohibit a company from including in an SFR such information that the company considers appropriate and which is not inconsistent with the company's reporting documents. We have no objection. Directors should ensure that members have proper information and are in a position to make the necessary judgments.

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