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20 June 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 27 March and 29 May 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

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 27 March and 29 May 2013.

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Omitted: the Companies (residential Addresses and Identification Numbers) Regulation

We first note the omission of the Companies (residential Addresses and Identification Numbers) Regulation. HKIoD regrets the decision to not include the regulation among the subsidiary legislations tabled on 29 May 2013, as originally envisaged.

Companies (Revision of Financial Statements and Reports) (Amendment) Regulation 2013

This amendment regulation relates to the **Companies (Revision of Financial Statements and Reports) Regulation**, tabled at the Legislative Council on 27 March 2013. We agree with the amendment to section 20(4)(a) and the addition of the new section 20(4A). We understand the purpose of the amendments is to align the maximum period of imprisonment under section 20(4) with that under section 450(4) of the new CO, and to make clear that a court may only sentence a person to imprisonment for a willful violation of subsection 3.

We also have these comments:-

Offences relating to contents of an audit report

Section 16 of the regulation is closely based on Section 408 of the New Companies Ordinance. Issues and concerns with section 16 are therefore closely related to the issues and concerns with Section 408. The Phase Two Consultation Paper suggested “there is room for improvement with the wording of Section 408. See Paragraph 9.9. The Legislative Council Brief mentioned that the Administration is exploring with the HKICPA as to whether and how the wording of Section 408 could be improved. We believe there is good reason to consider Section 16 together with the pending review of Section 408, and to resolve the issues and concerns before the new Companies Ordinance comes into effect. We note the Administration’s undertaking to provide an External Circular on the subject matter prior to the commencement of the operation of the new Companies Ordinance.

**Companies (Disclosure of Information about Benefits of Directors)
(Amendment) Regulation 2013**

We note this amendment regulation relates to the **Companies (Disclosure of Information about Benefits of Directors) Regulation**, tabled at the Legislative Council on 27 March 2013.

We agree with the amendments.

We also have these comments:-

Rules to apply equally to shadow directors

Part 1 of the regulation provides that the rules on disclosure of benefits apply to shadow directors. We have no objection.

Part 2 - Information about directors' emoluments and retirement benefits

We note there are some drafting changes to the legislation text presented in the Phase Two consultation. We believe the changes have the effect of making clear how information about directors' emoluments and retirement benefits (in the form of cash or otherwise) should be disclosed. We have no objection to the change.

Part 3 - Information about loans, quasi-loans and other dealings

We note there are some drafting changes to the legislation text presented in the Phase Two consultation. We believe the changes have the effect of making clear the coverage of the subject disclosure requirement. We have no objection to the change. We understand the general purpose of the provisions now appear in section 15 of the Regulation is to have disclosure of aggregate amounts of subject transactions in the beginning of a year, at the end of the year and the highest amount during the year. We also understand that, by operation of section 16 of the Regulation (in conjunction with section 383, 384 and 385 of the New Companies Ordinance), certain particulars would not have to be included in the notes to financial statements so long as such particulars are entered into and kept in a register meeting certain requirements.

Part 4 - Information about material interests in transactions, arrangements or contracts

We note there are some drafting changes to the legislation text presented in the Phase Two consultation. We believe the changes have the effect of making clear what information should appear in the notes to financial statements and what would appear in Directors' Reports. We also note certain amendments have been made to the Companies (Directors' Reports) Regulation with a similar effect. We have no objection to the change. We also note that eligible private companies/groups are exempt in accordance with Division 2 of Part 9 of the New Companies Ordinance.

Information about “specified dealings” in favour of officers no longer required

We note the removal of removal of the requirement to disclose Information about “specified dealings” in favour of officers. We have no objection.

Companies (Unfair Prejudice Petitions) Proceedings Rules

We have no comments.

Companies (Model Articles) Notice

HKIoD previously commented on model articles under the new Companies Ordinance in November 2012, in response to the Phase One consultation. We restate those comments here:-

- Many existing companies have adopted standard articles of associations. Once the new CO comes into effect, the standard articles of association would remain those companies’ articles of association. NCO Sec 86.

We acknowledge that under the new CO, the memorandum of association is abolished. For existing companies, the provisions of their memorandum of association will be deemed articles. NCO sec 98. This we do not think will create too many issues.

Our concern is, owners of many companies adopting standard articles of association may not have fully understood the meaning and effect of that adoption. When the new CO comes into effect, they may inadvertently confuse themselves to believe the new model articles to be prescribed under the new CO to be their company charter. This confusion could also arise when a new company is set up or a shelf company is bought close to the date of the implementation of the new CO. Our concern here might seem far-fetched, but we would rather err on the side of caution.

HKIoD believes all company owners (and their directors) must have a good handle on their charter documents, be able to access them and should know what provisions are currently in force. FSTB and the Companies Registry, on the other hand, can consider some appropriate ways to educate and remind company owners and their directors of existing companies about the meaning and effect of adopting standard articles under the old and new CO.

We have some additional comments:-

The most important part of forming a business association is to design its constitution charter. The articles of association are a key part of that constitutional charter. Hong Kong company law traditionally gives considerable freedom to those forming a business association to make their own constitutional rules governing the companies’ internal affairs. The new Companies

Ordinance is to – and ought to – carry on this tradition to respect freedom of business association.

The model articles will have “default application”. The provisions of the model articles will apply to the extent a company’s own registered articles do not exclude or modify them. This operates as a “safety net”, and can be a convenience to some business associations.

But those coming together to form a business association should think carefully about what the model articles do not do. So long as it is not in contravention of the new Companies Ordinance, parties are free to – and ought to – design their own articles of association so they are a real reflection of what is intended to be the structure for the organization.

Model articles for private companies

The model articles for private companies may be best suited to companies with just one shareholder or when shareholder disagreement is the least likely. When several parties come together to form a business, however, HKIoD firmly believes it is to all parties’ interest to tailor design the articles of association to fit what they may have agreed in a shareholders agreement, to exact the rights, obligations and procedures that the shareholders wish to have. This can be especially important for members in minority interest.

Model articles for public companies

The different nature of public companies should require the model articles for them to be somewhat more elaborate than those for private companies. But because of the nature of public companies (larger in size, more members, etc.), it is even more important for their members to design a structure that would work for them.

Model articles for companies limited by guarantee

This set has the likelihood of being adopted by many fraternity associations and charitable organizations. Since every organization has its own priorities and approach, it is just as important for the members to treat model articles with caution.

A note on members’ reserved power

Directors may or may not be shareholders (or members) of the business association they serve. And each set contains a reserve power for the shareholders (or members) whereby they can require the directors to do (or not to do) anything that is within the power of the directors. We do not object. Members and shareholders are free to exclude this provision if they want to, if they feel that would be appropriate for their purpose.

Companies Records (Inspection and Provision of Copies) Regulation

Turn-around time to provide company records

We understand there are concerns about the “within 5 business days” turn-around time in Section 11 of the regulation being a bit short, especially for some smaller companies which may not have the manpower or resources to attend to the request for company records. We will support an extension of that turn-around time. The Administration may also consider some ways to impose or otherwise highlight the expectation of “reasonable promptness” in attending to the request of company records.

Companies (Non-Hong Kong Companies) Regulation

Directors’ personal details

Personal details of directors of non-Hong Kong companies deserve no less protection than directors of Hong Kong companies.

Particulars and documents required for application for registration

We note one change from the scheme proposed in the Phase One consultation. Section 3 of the regulation prescribes the required details for the director(s) and the company secretary, but does not now seem to prescribe the details required for a proposed authorized representative for the purposes of section 776(4)(c). The Administration could perhaps explain the rationale.

Companies (Fees) Regulation

We have no comments.

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