HKGCC

Hong Kong General Chamber of Commerce
香港總商會1861

香港總商會
香港金鐘道統一中心廿二樓
Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queensway, Hong Kong
Tel (852) 2529 9229
Fax (852) 2527 9843
Email chamber@chamber.org.hk
www.chamber.org.hk

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27 November 2017

Ms Ada L L Chung, *JP*
Registrar
Companies Registry
15/F, Queensway Government Offices
66 Queensway
Hong Kong

Dear Ms Chung,

**Consultation on**
**the Guideline on the Keeping of Significant Controllers Register by Companies**

The Hong Kong General Chamber of Commerce ("HKGCC") welcomes the opportunity of commenting on the Consultation on the Companies Registry's draft Guideline on the Keeping of Significant Controllers Register by Companies ("the Draft Guideline"). We are pleased to attach for your consideration our comments in response to the Draft Guideline.

We would like to emphasize, in particular, the importance of ensuring that the Guideline's purpose is limited to provide clarification and recommendations on compliance and therefore not legally binding.

We hope you will find our comments to be useful to your deliberations.

Yours sincerely,

Shirley Yuen
CEO

*Encl.*

# Hong Kong General Chamber of Commerce (HKGCC)
# Response to Companies Registry's Draft "Guideline on the Keeping of the Significant Controllers Register" ("the Draft Guideline")

1. HKGCC welcomes this opportunity to respond to the Draft Guideline. We have a number of important general points to make, before providing our specific comments on the Draft Guideline.

*General Comments*

2. The Draft Guideline pre-supposes that the Companies (Amendment) Bill 2017 will be passed by the Legislative Council (LegCo), and that it will be passed in the form in which the Government presented it to LegCo. However, whether LegCo passes a Bill presented to it by the Government, and whether it passes the Bill without amendment, are never (and should not be) foregone conclusions. The Bill is currently being studied by LegCo's Bills Committee, and it is possible that amendments- even significant ones- will be made to it, particularly in the light of submissions made to both LegCo and the Government by HKGCC and other organizations. We hope that LegCo will take on board HKGCC's submissions. Our comments in this submission are therefore based on the Bill as originally presented to LegCo, and we reserve the right to present further submissions on the Draft Guideline in the light of amendments to the Bill which LegCo may adopt.

3. It follows from the above that our comments in this response are without prejudice to the comments in our submission to the Government dated 3 March 2017 on its legislative proposals, by which HKGCC still stands.

4. The Draft Guideline proposes in paragraph 1.1.2 that it be issued under section 24 of the Companies Ordinance ("CO"). We believe that this should <u>not</u> be the case, given the largely practical and informal nature of the guidance it contains. Guidance that is issued under section 24 carries important legal implications - in particular, non-compliance with the Guideline can be relied upon in establishing a breach of the law,[1] which can in some cases constitute a criminal offence. HKGCC believes that this is inappropriate and draconian. The guidance in a new area of regulation such as this should be purely a non-binding aid to compliance, not a "stick" that can be used to establish legal liability. The reference to being issued under section 24 should therefore be removed.

*Specific Comments*

5. <u>Para 2.2: Contents of Register</u>. The requirement that the SCR "**must** contain" the particulars referred to is excessive, inappropriate, and in many cases impracticable to comply with. The Draft Guideline in itself implicitly acknowledges this. For example,

[1] Section 24(5).

Annex C Scenario 3 implicitly acknowledges that if a Hong Kong-incorporated company requests a registrable person to provide certain particulars and they are not provided, the Hong Kong company will not be legally liable. So the introductory wording of the shaded box in 2.2 should be amended along the following lines:

> "The SCR of a company should, to the extent that the following information is available after the company has taken reasonable steps to obtain the same, contain…" etc.

6. Para 2.5: Registrable Person. The Draft Guideline implicitly acknowledges that it is impracticable for a company to be expected to disclose significant controllers of listed companies. But this should not be restricted to Hong Kong-listed companies, as para 2.5.2 currently does. The same impracticability exists - perhaps even more so - for significant controllers of companies listed on stock exchanges outside Hong Kong. The wording needs to be expanded to accommodate this. Further comments on this point are set out in (7) below.

7. Para 2.5: Registrable Person. In addition to our comment at (6), it is impracticable and unreasonable for Hong Kong companies to be expected to disclose persons who are significant controllers via overseas-incorporated shareholders, as we pointed out in our submission to the Government of 3 March 2017. Where an overseas-incorporated company or non-Hong Kong citizen is a significant controller via a *direct* shareholding in the Hong Kong company this should require to be disclosed, but not where the shareholding is indirect via an overseas-based company. The latter is impracticable to disclose, in the same way that it is impracticable or Hong Kong companies to disclose any significant controller of its listed company shareholders. This needs to be added to para 2.5.

8. Para 2.7.1: Designated Representative. The word "reasonable" should be inserted before "assistance". In addition, it would be useful to give some examples of what would be considered as "reasonable assistance".

9. Para 2.7.2: Designated Representative. In the case of a group of companies, it should be possible for a designated representative to be a member, director or employee of an *associated* company (as defined by section 2 of the Companies Ordinance), not just of the company itself. So we recommend that the first bullet point in this paragraph reads: "…or an employee of the company, or of an associated company (as defined in section 2 of the Companies Ordinance (Cap 622), who is…".

10. Para 4.1: Taking Reasonable Steps. As noted in point 7 above, it should be made clear that there is no obligation or expectation to ascertain significant controllers of overseas-incorporated shareholders (whether they are direct or indirect shareholders). This should be made clear in this paragraph.

11. Paras 4.2 and 6.2.1: Giving Notices. In paragraphs 4.2.1 and 4.2.2, it does not seem necessary for a company to give notice to a person whom the company knows (as opposes to believes) is a significant controller. We therefore suggest that the introductory wording of 4.2.1 and 4.2.2 reads "If a company does not know but has reasonable cause to believe that…" etc. Paragraph 4.2.4 could be simplified by stating "A company is not required to send the notices referred to in paragraphs 4.2.1 and 4.2.2 above if it knows that the person is a significant controller of the company".

Similarly, exceptions should be added as under waiving a company's obligation to send the notices referred to in paragraph 6.2.1 if:-

i. For a registrable person, the company has already been informed of the relevant change and the relevant particulars have been provided to the company by the person or with the person's knowledge;

ii. For a registrable legal entity, the company has already been informed of the relevant change and the relevant particulars have been provided to the company.

12. Para 5.1: Required Particulars. Similar to our point on para 2.2 at (5) above, it needs to be made clear that a company is not under an absolute obligation to enter the particulars in question, but that it is only obliged to enter the particulars that it has received, having made reasonable efforts to obtain all of these particulars. Para 5.1.1 should therefore read "A company is required to use reasonable efforts to obtain, and to enter into in its SCR, the particulars of its significant controllers". For the same reason, in the introductory wording of the shaded box, the word "required" before "particulars should be deleted.

13. Para 5.2: "Confirmation". Paras 5.2.1 to 5.2.3 refer to particulars being "confirmed" by a registrable person. It is not clear what the process of confirmation involves or why it is necessary. Given that it would already be an extra burden on Hong Kong companies to comply with the need to keep a register of significant controllers, and comply with other requirements of the proposed legislation, the extra step of "confirmation" (whatever that may mean) seems unnecessary and unduly onerous**.** We recommend it be deleted.

14. Paras 4.2.1, 4.2.2, 5.2.2, 5.3.1, 6.2.1, 6.4.1 and 6.5.1: Time Limits. The time limit of 7 days to give notice (under paras 4.2.1, 4.2.2 and 6.2.1) and update the SCR (under paras 5.2.2, 5.3.1, 6.4.1 and 6.5.1) seems unduly short, and does not take into account of public holidays and other unavoidable interruptions. We recommend that it be extended to 14 days.

15. Annex B Figure 4. This should be amended to reflect our comment at point (7) above that there should be no obligation to register significant controllers of non-HK incorporated companies. In particular, Person 1 should not be a registrable person in Companies D or E.

16. Annex C. The quoted words in Scenario 1 should be amended to read: "The company does not know, after having taken reasonable steps to ascertain, whether it has any significant controller". This is consistent with the guidance in Chapter 4, as well as Scenario 2. In Scenario 3, we refer to our comments on "confirmation" at point (13) above.