13th August 2010

Ms Sandy Chan
Companies Bill Team
Financial Services and the Treasury Bureau
15/F, Queensway Government Offices
66 Queensway
Hong Kong

Dear Ms Chan

Second Phase Consultation of the draft Companies Bill

The Hong Kong General Chamber of Commerce is pleased to submit the following views in response to the questions raised in the consultation paper dated May 2010 ("CP"):-

1. (a) Do you agree that the restrictions on financial assistance should be abolished for private companies?

Views are divided on this issue. Members from the banking sector believe that the existing restrictions on financial assistance protect shareholders and creditors of the target companies from dissipation of assets available to meet creditors by the various protections contained in the compliance steps necessary to comply with the provisions. Bankers believe that these benefits outweigh the consideration of the need to avoid "the trap for the unwary" referred to in the CP, and suggest that the restrictions on financial assistance should be retained and streamlined as suggested in the draft of the Bill.

The other view, from the legal and corporate perspective, is that there are strong reasons favouring abolition of the rules as argued in the CP (even on a streamlined basis similar to New Zealand), and that there are sufficient other legal protections both at common law and in statute to cover the risks involved.

Given the above, we suggest that the authorities should consider carefully whether there are sufficient consensus and support among the broader community before deciding whether to move forward on the proposal to abolish the restriction.

(b) If you answer to (a) is positive, which of the following options concerning regulation of listed and unlisted public companies would you prefer –

(i) existing rules for listed and unlisted public companies in the CO be retained (i.e. listed companies cannot give financial assistance except for certain exceptions as set out in sections 47C and 47D of the CO while unlisted public companies may give financial assistance subject to solvency test and a special resolution of the shareholders (section 47E of the CO));

(ii) the rules for both listed and unlisted public companies to be streamlined using a solvency test as set out in the draft clauses in Division 5 of Part 5; or

(iii) any other option (please elaborate),

having regard to the need to protect small investors of public companies?

The reasons for abolishing the restrictions on financial assistance for private companies also apply, in some respects, to public companies. Despite this, we are of the view that the financial assistance rules should continue to apply to public companies to safeguard the interests of small shareholders. However, we would support the rules being streamlined using a solvency test as proposed in option (b)(ii) above.

(c) If your answer to (a) is negative (i.e. you believe that private companies should still be subject to certain restrictions on financial assistance), do you have any specific comments on the draft clauses in Division 5 of Part 5? Please elaborate.

2. Do you agree that there is no need to impose a statutory requirement in the CB for all listed companies incorporated in Hong Kong and unlisted companies incorporated in Hong Kong where members holding not less than 5% of voting rights have so requested to prepare separate directors' remuneration reports?

Agreed for the reasons outlined in the CP.

3. Do you have any comments on the proposed changes to the provisions concerning the investigation of a company's affairs and enquiry into company's affairs that may be exercised by the FS described in paragraphs 4.6 to 4.13, the Explanatory Notes on Part 19 and Divisions 1 to 3 and 5 in Part 19 of the CB?

We have no particular comments on the proposed changes.

4. ***Do you have any comments on the proposed new powers for the Registrar to obtain documents, records and information as described in paragraphs 4.14 to 4.17, the Explanatory Notes on Part 19 and Divisions 1, 4 and 5 in Part 19 of the CB?***

We have no particular comments on the proposed changes.

5. ***(a) Do you think the CB should make it obligatory for a company to give reasons explaining its refusal to register a transfer of shares?***

No. In the case of private companies, the position at common law should be maintained whereby directors are not required to give reasons for their decision to accept or reject a transfer. A private company's articles of association would normally give directors power to refuse to register a transfer either in their absolute discretion or in certain circumstances, and there are often other provisions relating to transfer such as pre-emption rights in favour of the other shareholders. In cases where directors have an absolute discretion, we would not favour imposing a statutory obligation on directors to justify a refusal as this could fetter their discretion and encourage litigation. As noted in the CP, there are various remedies available to affected shareholders such as claims for breach of fiduciary duty, exercise of discretion for an improper purpose and failure to comply with the articles of association.

(b) If your answer to (a) is in the affirmative, should the company be required to provide reasons with the refusal:

(i) in the manner of the UKCA 2006 (i.e. mandatory whenever there is a refusal); or
(ii) upon request, as in the case of transmissions by operation of law under section 69(1A) of the CO?

6. ***Do you have any comments on the draft provisions in the CB Consultation Draft – Parts 1, 3 to 9, 13 and 19 to 20? If so, please elaborate.***

We have concerns over the Government's proposals to extend auditors' rights to require information contained in Part 9 of the Companies Bill which can be summarised as follows:

- the extension of the category of persons from whom auditors can require information from "*officers*" (which includes senior managers)

under the present law to all employees and former employees at the relevant time. We believe it would be far more efficient and cost effective for auditors to deal with officers including senior managers as at present rather than having statutory rights of access to all employees and former employees with the consequential exposure of such persons to potential criminal sanctions;

- the obligation of holding companies to take all reasonable steps to obtain information, explanations or assistance, if required by the auditors, from current and former officers, employees and auditors of overseas subsidiaries without delay. We question how practical this requirement is and what steps a company would have to take to comply. There may of course be legal or regulatory requirements in the overseas jurisdiction concerned which prohibit the disclosure of such information, particularly in the case of listed overseas subsidiaries;

- the creation of new criminal offences for both officers and employees, current and former, and other persons who fail to provide auditors with whatever information, explanations or assistance which the auditor thinks necessary for the performance of its duties. These new criminal offences do seem unduly harsh and could have unintended consequences. We also have concern that, given the criminal sanctions, the wording of the provisions are not sufficient clear or certain. For example, how would "*assistance*" and "*without delay*" be construed? The obligation to provide such information, explanations or assistance as to auditor "*thinks necessary*" is clearly very subjective in the context of a potential criminal offence, whereas a more objective standard of "*reasonably requires*" would be preferable.

We hope the comments are of use to you.

Sincerely,

Alex Fong
CEO