

4 April 2011

Professor KC Chan, SBS, JP  
Secretary for Financial Services and the Treasury  
Financial Services and the Treasury Bureau  
8/F, West Wing, Central Government Offices  
Central, Hong Kong

Dear Prof Chan,

### **The Companies Ordinance**

The Hong Kong General Chamber of Commerce, after close consultation with our Legal Committee, wishes to raise our concerns over aspects of the proposed amendments to the Companies Ordinance. While we accept and believe that this law is long over-due for revision, we are uncomfortable with what we perceive to be a lack of adequate consideration for the very real concerns raised by the community over these revisions.

On the whole, we commend the government for its understanding of the very real privacy concerns related to such proposals as those put forward regarding directors' residential addresses and HKID card numbers. Issues related to electronic filing and rectification of company names (to avoid passing off or other kinds of confusion) are relatively simple and noncontroversial, and have our support.

There are two points that we think deserve closer scrutiny, most particularly the "headcount test" and codification of directors' duty of care.

The "headcount test," deviates from the "one share one vote" principle and fails to recognize the commercial reality that a very large proportion of shares in listed companies are held by nominees and custodians, the headcount test would limit a single nominee to one vote. This, we believe cannot truthfully reflect the decisions of beneficial owners using a depository, and effectively disenfranchises them. The retention of the "headcount test" disregards the overwhelming majority view expressed to abolish the same (124 submissions out of 144 submissions).

The second point pertains to codifying directors' duty of care. We accept that the standard of care, skill and diligence required to be exercised by a director of a company should be codified in the Companies Bill, but other general duties should not. We support improvements to corporate governance and clarification of the standard against which the directors will be measured under the common law. Yet, proposals in the consultation paper go well beyond this concern.

We believe common law principles should be preserved for the sake of clarity, and that would be better for this area of the law to be left to the courts, allowing it to evolve on a case-by-case basis and in response to actual situations. Much of the basis for the revisions is based on rules adopted in the UK. What is proposed for Hong Kong is a wholesale replacement of common law rules. And, because statutory duties are drafted in general and broad terms, this may give rise to more uncertainties when there is no precedent from which reference may be drawn.

The Companies Ordinance affects over 750,000 businesses in Hong Kong, and is long overdue for revision. Getting it right is important, and we would welcome the opportunity to discuss this further.

Sincerely,

Alex Fong  
CEO