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# Consultation Conclusions On Proposed Companies Ordinance Amendments In Relation To Company Names, Directors' Duties, Corporate Directorships And Registration Of Charges Published

## Introduction

On 10 December 2008, the Financial Services and the Treasury Bureau (**FSTB**) published its second consultation conclusions on the rewrite of the Companies Ordinance (**CO**) covering company names, directors' duties, corporate directorships and registration of charges.

The purpose of this note is to provide a summary of the proposals which the Administration will incorporate into a draft Companies Bill to be issued for further public consultation in mid-2009.

## Company Names

### Shadow Companies

It is proposed that the Registrar should be empowered to act on a court order directing a defendant company to change its infringing name, and substitute its infringing name with its registration number if the company does not comply with the Registrar's direction to change its name.

The proposal is intended to address concerns that "shadow companies" exploit Hong Kong's name registration system to facilitate their counterfeiting activities in the Mainland. Shadow companies are companies with names which are very similar to existing and established trademarks or trade names of other companies who present themselves as owners of such trademarks or trade names when contracting with Mainland manufacturers to produce counterfeit products.

Currently, while the owner of a trademark or trade name can obtain a court order directing a shadow company to change its name in a legal action for trademark infringement or passing off, the Registrar has no authority to act on such court order.

### Hybrid Names

In the light of the mixed feedback regarding the use of the combined form of Chinese characters and the English alphabets or words (**Hybrid Name**), the Companies Registry will not allow the use of Hybrid Names. It will, however, allow phrases such as "X 光" and "卡拉OK" (X-Ray and Karaoke respectively) in company names because they have no direct Chinese equivalents and they are already used in other legislation.

## Directors' Duties

It is proposed that the directors' duty of care, skill and diligence should be codified in the Companies Bill, but that the fiduciary duties[[1]](#footnote-28) of directors should remain uncodified. Directors' statutory duty of care, skill and diligence will be along the lines of Section 174 of the UK's Companies Act 2006 which provides that:

1. a director of a company must exercise reasonable care, skill and diligence.
2. This means the care, skill and diligence that would be exercised by a reasonably diligent person with—
   1. the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
   2. the director's general knowledge, skill and experience.

The FSTB is of the opinion that the adoption of the mixed test approach – an objective test (paragraphs (1) and (2)(a)) and a subjective test (paragraph (2)(b)) will enhance corporate governance in Hong Kong.

## Corporate Directorships

It is proposed that Hong Kong should continue to allow corporate directorships for private companies subject to the condition that every company must have at least one director who is a natural person, subject to a reasonable grace period. The proposal is aimed at ensuring that there is someone who can be held accountable for the company's actions.

## Registration Of Changes

### Changes not recommended

As originally proposed, the following changes listed in Appendix V of the Consultation Paper will not be adopted in Hong Kong:

1. comprehensively codifying the law on priorities where there is more than one charge over the same property created by a company;
2. introducing an advance or provisional registration system;
3. providing legislative clarification of the kinds of retention of title clause that constitute a registrable charge;
4. registering the sale or absolute assignment of book debts (or receivables);
5. registering pledges;
6. registering trust receipts if they operate for more than a specified period of time;
7. registering insurance policies; and
8. registering fixed charges on shares (and other marketable securities).

### Charges on Aircraft and Interests therein

It is proposed that charges on aircraft and interests therein should be included in the list of registrable charges in section 80(2) of the CO.

### Debentures

Due to the support from the majority of the respondents, section 80(2)(a) of the CO which requires the registration of a charge for the purpose of securing any issue of debentures will be deleted.

### Bills of Sale

It is proposed that the current section 80(2)(c) of the CO which refers to "bills of sale" should be retained as it may still be relevant in cases where the charged assets are personal chattels, plant, machinery or equipment etc.

### Book Debts

It is proposed that the term "book debts" should be left to the courts to define.

In addition, a lien on subfreight and a charge over cash deposits will be expressly excluded from the registration requirement. In response to comments that charges over cash deposits should not be expressly excluded, the FSTB stated that a requirement to register a charge over cash deposits would be too burdensome in a financial market where financial transactions move quickly within a short period of time.

### Automatic Statutory Acceleration of Repayment

The automatic statutory acceleration of repayment in section 80(1) of the CO will be replaced with a right for the lender to demand immediate repayment of the amount secured by the charge, in the event that a company fails to register a charge within the prescribed time.

### Revised Registration Procedures

#### Registration of Instruments of Charge

Under the current registration regime, a company creating a charge is required to submit the instrument of charge together with the prescribed particulars to the Companies Registry. If satisfied that the particulars are correct, the Registrar of Companies issues a certificate of registration which is conclusive evidence that the registration requirements have been complied with. Currently, however, only the prescribed particulars (and not the instrument of charge itself) appear on the public register.

The FSTB will adopt the proposal that both the instrument of charge and prescribed particulars should be registrable and open to public inspection. The Companies Registry will no longer check the particulars of charge and will no longer issue a certificate of due registration. Instead it will only issue a certificate to establish the fact that the prescribed particulars of the charge and the instrument of charge have been delivered to the Companies Registry. The certificate will show the name of:

* the company creating the charge;
* the name of the specified form containing the prescribed particulars of the charge delivered; and
* the date on which such specified form and instrument of charge are submitted to the Companies Registry for registration.

Under the current system, registration of the particulars of charge gives constructive notice of the existence of the charge only and does not give constructive notice of the contents of the charge. If the charge instrument itself is required to be registered, it may constitute constructive notice of all the terms in the charge instrument, including negative pledge clauses, to those who may reasonably be expected to search the register, such as banks, financiers and relevant professionals.

#### Shortening of Time Limit for Registration

It is proposed that the five-week period currently allowed for registration of a charge should be shortened to 21 days. The proposal is aimed at reducing the period during which a charge is "invisible" to third parties.

#### Satisfaction of Debts Secured by a Registered Charge or Release of Property from a Registered Charge

In the case of an application under section 85 CO for the Registrar to enter a memorandum of satisfaction of a debt or debts secured by a registered charge or a memorandum of the release of property from a registered charge, it is proposed that the instrument of release or partial release executed by the chargee should be registered and open to public inspection.

#### Introduction of an Administrative Mechanism for Late Registration of Charges

It is proposed that an administrative mechanism for late registration of charges should not be introduced to replace the current requirement to apply to court for an order to allow late registration.

This note constitutes a summary only of the FSTB's Consultation Conclusions on Company Names, Directors' Duties, Corporate Directorship and Registration of Charges which can be viewed on the [FSTB's website](http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/cdrc_conclusion_e.pdf) ([see archive](cdrc_conclusion_e.pdf)).

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1. These include the duty to act in good faith in the interests of the company, the duty to exercise powers for proper purposes, the duty to refrain from fettering his own discretion, the duty to avoid conflicts of interest and the duty not to compete with the company. [↑](#footnote-ref-28)